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EXILE, AMNESTY AND INTERNATIONAL LAW

*Leila Nadya Sadat**

This Article examines recent state and international practice regarding amnesties for jus cogens crimes, particularly cases from Latin America as well as international courts and tribunals, and explores the transnational legal dialogue between courts, and to a lesser degree, legislatures, that has led to international norm creation in this area, strengthening the prohibition against amnesties considerably. At the same time, constraints upon the exercise of universal jurisdiction, whether imposed by legislatures, articulated in judicial opinions, or created by international treaty, have provided a political check to the otherwise unbounded exercise of universal jurisdiction by states and the exercise of universal international jurisdiction by the international community taken as a whole. Indeed, this Article suggests that the question of amnesties for war crimes, crimes against humanity and genocide raises profound questions about the nature and form of international criminal law—its substantive content, temporal dimensions, and constitutional status. This Article challenges the conventional wisdom that “swapping justice for peace,” is morally and practically acceptable. Instead, what longitudinal studies we have suggest that amnesty deals typically foster a culture of impunity in which violence becomes the norm, rather than the exception.

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This Article considers amnesties from a jurisdictional approach, in which domestic, transnational and international amnesties are considered in both horizontal and vertical perspective. Finally, while noting that international criminal justice is not a "one size fits all" proposition, and that carefully tailored and culturally sensitive approaches suitable to individual cases are required, this Article underscores the importance of the emerging normative and legal structure apparent in international criminal law, as well as the need for imperial powers such as the United States to submit themselves to the rule of law in order to enhance the legitimacy and effectiveness of the rules.

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INTRODUCTION

Recently, it seemed as if exile and amnesty had become fashionable again.¹ Before the U.S. invasion of Iraq, Saddam Hussein was offered the opportunity to leave Iraq to save his country.² Donald Rumsfeld, U.S. Secretary of Defense, suggested that the “senior leadership” in Iraq and their families should be afforded safe haven in some other country to avoid the prospect of war.³ Later that year, Charles Taylor, President of Liberia, was convinced to accept exile in Nigeria.⁴ Shortly thereafter, Haiti’s President Jean Bertrand Aristide

1 Historically, exile and amnesty emerged as techniques for moving a society forward through political transition, civil war or other fundamental conflict. Indeed, political exile has ancient roots. The modern term “ostracism” originated from the Greek word *ostrakon*, which was the name for the clay tablets used as ballots in votes to decide for or against banishment. This practice was initiated by Solon in Athens in 509 B.C.E. as a means of defeating political rivals who proved dangerous either politically or physically. PAUL TABORI, *THE ANATOMY OF EXILE* 1, 46 (1972). Exile in antiquity could also befall those whose actions merely displeased the ruler or emperor, and although political exiles such as Napoleon appear to be the exception, rather than the rule, more recently intellectuals, writers and artists—such as Dante, Voltaire, Hugo and Grotius—have been routinely exiled for their political and social views. *Id.* at 69–71, 84, 89–91, 111–12. Exile also appears to have been particularly appealing in monarchical political systems, where royal leaders often personally imbued both sovereign and divine authority. The example of the Stuarts, exiled from Great Britain and given residence in France by King Louis XIV at Saint Germain-en-Laye comes to mind. See, e.g., BRYAN BEVAN, *KING JAMES THE THIRD OF ENGLAND: A STUDY OF KINGSHIP IN EXILE* (1967); JAMES LEES-MILNE, *THE LAST STUARTS: BRITISH ROYALTY IN EXILE* (1983).

2 On the evening of March 17, 2003, President Bush declared “Saddam Hussein and his sons must leave Iraq within 48 hours,” or war would result. *Bush’s Speech on Iraq: “Saddam Hussein and His Sons Must Leave,”* N.Y. TIMES, Mar. 18, 2003, at A14.

3 *Lateline: US Offers Exile to Saddam Hussein* (Australian Broadcasting Corporation television broadcast Feb. 20, 2003), available at <http://www.abc.net.au/lateline/content/2003/s789392.htm>. It is not clear where Saddam would have been able to go, although one commentator suggested (tongue in cheek) St. Helena, Napoleon’s last demeure. William F. Buckley, Jr., *On the Right: A Future for Saddam*, NAT’L REV., Feb. 24, 2003, at 58. Others suggested Egypt, Saudi Arabia and Belarus. *News Hour with Jim Lehrer: Saddam in Exile?* (PBS television broadcast Jan. 20, 2003), available at http://www.pbs.org/newshour/bb/middle_east/jan-june03/saddam_1-20.html.

4 Taylor arrived in Calabar, Nigeria, with his wife, daughters and a large entourage in August 2003 and remains there as of this writing. Under the terms of his asylum, Mr. Taylor was apparently forbidden from communicating with anyone involved in political, illegal or government activities in Liberia. Anna Borzello, *Nigeria Warns Exiled Taylor*, BBC NEWS, Sept. 17, 2003, <http://news.bbc.co.uk/1/hi/world/africa/3115992.stm>. According to news reports, the U.S. government supported Taylor’s exile, believing that it would save lives, *US Denies Charles Taylor Bounty*, BBC NEWS, Nov. 13, 2003, <http://news.bbc.co.uk/1/hi/world/africa/3266075.stm>, and opposed congressional efforts to offer a \$2 million bounty for his capture, and to force Nigeria

was deposited and took up residence in South Africa.⁵

Exile can of course be tantamount to imprisonment for those obliged to endure it. Napoleon was sent by the British to St. Helena (after escaping his first offshore prison at Elba), where he lived in considerably reduced circumstances and ultimately perished, apparently poisoned by arsenic in the wallpaper of his chamber.⁶ Indeed, banishment was a significant punishment in a world without satellite television, internet access, cellular telephones or even regular mail service, and where travel to and from remote locations was infrequent (or nonexistent) and often dangerous. Modern exile, however, is considerably more pleasant. Although banished from kin and country, today's exiles often bring with them generous bank accounts and retire to live with a small retinue somewhere peaceful, and often quite attractive. Ferdinand Marcos found a haven in Hawaii;⁷ Haiti's "Baby Doc" Duvalier fled to the south of France;⁸ Ethiopia's Mengistu Haile

to extradite Taylor to the Special Court for Sierra Leone, pursuant to an indictment issued by that court, *Taylor: Fugitive, or Exile?*, CBS News, Nov. 14, 2003, <http://www.cbsnews.com/stories/2003/11/14/world/main583572.shtml>. According to news reports, Taylor's exile was also supported by U.N. envoy Jacques Klein, although the United Nations generally takes the position that amnesties for war crimes, genocide and crimes against humanity are incompatible with international law. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Promotion and Protection of Human Rights*, ¶¶ 20–24, U.N. Doc. E/CN.4/2005/L.93 (Apr. 15, 2005). Many have contended that Nigerian President Obasanjo offered the asylum as a means of deflecting attention away from potential charges against Obasanjo himself for atrocities committed against unarmed civilians by troops under his orders. *Liberia-Nigeria: Questions Raised over Taylor's Exile in Nigeria*, BIAFRANIGERIAWORLD, Aug. 23, 2003, <http://news.biafranigeriaworld.com/archive/2003/aug/23/0024.html>.

5 Gary Marx, *Haitians in a Vise of Nature, Politics: Weeks After Floods Killed at Least 1,900 in Gonaives, Relief Efforts Have Faltered in a Climate of Violence over Who Should Rule*, CHI. TRIB., Nov. 25, 2004, § 1, at 1.

6 Napoleon Bonaparte was exiled to Elba, Italy's third biggest island, following his abdication at Fontainebleau. He arrived at the island on May 4, 1814. He was allowed a personal escort of some 1000 men, a household staff, and was even permitted the title of "Emperor of Elba" with authority over its 100,000 people. He escaped from Elba on February 26, 1815, with his miniature army, and landed in France. PAUL JOHNSON, *NAPOLÉON* 145–52 (2002).

7 Bernard Gwertzman, *Marcos Appealing for Aid in Finding Haven Outside U.S.*, N.Y. TIMES, Mar. 16, 1986, § 1, at 1 (discussing Marcos's reported unhappiness with his reception in Hawaii and the U.S. government's dilemma concerning the large sums of money and jewelry aboard the planes that took the Marcos party to Hawaii).

8 In 1986, amid riots, rebellions, and rampant corruption, dictator Jean-Claude "Baby Doc" Duvalier fled Haiti for exile in France on a United States Air Force flight. No government in the world agreed to grant Duvalier permanent asylum, as the massive human rights abuses committed by his regime were well known. *'Baby Doc' Case Thrown out*, BBC NEWS, May 12, 1999 [hereinafter "*Baby Doc*" Case], <http://news.bbc.co.uk/1/hi/world/europe/341691.stm>; see also Paul Lewis, *Move by Duvalier*

Miriam sought refuge in Zimbabwe;⁹ and Uganda's Idi Amin recently died after many years living peaceably in Saudi Arabia.¹⁰

During the second half of the twentieth century, offering exile or amnesty to individuals accused of human rights atrocities collided with the erection of a new system of international criminal justice. While exile might still be an option for individuals accused of general venality—tax fraud, corruption, or embezzlement—the notion of allowing the perpetrators of human rights atrocities to go unpunished appears to have become normatively unacceptable. Fueled by the horrors of the Second World War, inspired by the relative success of the Nuremberg trials and nourished by the aspirations of democratization and the new rhetoric of international human rights that followed the establishment of the United Nations, the “impunity” paradigm came to be replaced by calls for accountability and a demand for the investigation and criminal prosecution of those who ordered or committed human rights atrocities. Indeed, requiring accountability for past crimes has been posited by both scholars and practitioners as a remedy to impunity, as well as a necessary, if not sufficient, predicate for the reestablishment of peace.¹¹ Accordingly,

to Riviera Is Seen: Press Agency Says Haitian Is Buying a Village Chateau, N.Y. TIMES, Mar. 7, 1986, at A11. Upon arriving in France, the Duvaliers took up residence in the French Riviera in an estate rented from the family of a Saudi financier. Jonathan C. Randal, *Haiti Loses Lawsuit Against Duvalier: French Court Sets Back Government Bid To Recover \$150 Million*, WASH. POST, June 24, 1987, at A22. Since 1986, there have been a few attempts to bring Duvalier to justice for the human rights abuses committed while he was in power in Haiti, as well as for the alleged corruption of his regime. He remains in France, though is believed to be sick and destitute. “Baby Doc” Case, *supra*.

9 *Ex-Ethiopia Chief Reaches Zimbabwe*, N.Y. TIMES, May 23, 1991, at A9.

10 See Ethan Bronner, Editorial, *The Obscenely Easy Exile of Idi Amin*, N.Y. TIMES, Aug. 19, 2003, at A20 (describing Amin's nearly twenty-five-year exile spent in a spacious villa with several of his children); see also Reed Brody, *Idi Amin at Death's Door: Despots Should Not Rest in Peace*, INT'L HERALD TRIB. (Paris), July 25, 2003, at 8. Amin died on August 16, 2003, in Saudi Arabia having apparently been told he would face arrest in Uganda if he returned there to die. Amin was responsible for the deaths of at least 300,000 opponents (some put the figure much higher at 500,000). *Former Ugandan Dictator Idi Amin Dies*, CNN.COM, Aug. 16, 2003, <http://www.cnn.com/2003/WORLD/africa/08/16/saudi.amin/>.

11 See Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?: A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 746 (1998); M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 203 (1998); Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 3–4 (1998); Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2546 (1991); Naomi Roht-Arriaza, *State Responsibility To Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990).

the establishment of the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the Special War Crimes Panels for East Timor was conceived of by the international community, and perhaps particularly by the United States,¹² as a means (although not *the* means) to reestablish peace and stability, foster a transition to democratic principles of government, and establish general principles of international law to deter future atrocities. The negotiation and establishment of the International Criminal Court (ICC) treaty in 1998¹³ drew heavily from this emerging practice, and seemed to offer the imprimatur of permanence to a then experimental concept.

Yet, even as the ad hoc tribunals have continued their work and the International Criminal Court has commenced its activities, many challenges to international criminal accountability remain. Some are practical in nature: the desire to trade peace for justice in order to end a conflict more quickly, even if temporarily; the overwhelming task of bringing cases against hundreds or even thousands of individuals implicated in the commission of genocide or other mass atrocities; and even the passage of time, which may cause authorities to hesitate in pursuing justice or extinguish otherwise valid cases through the application of statutes of limitations. Others question the entire international criminal justice endeavor itself,¹⁴ arguing that criminal trials may be counterproductive in fostering reconciliation, or that justice,

But see CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996); Carlos S. Nino, *The Duty To Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118, 133 (2000).

12 Although the U.S. administration currently opposes the International Criminal Court, *see, e.g.*, Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington?: U.S. Policy Towards the International Criminal Court*, 21 WIS. INT'L L.J. 557 (2003), U.S. leadership was critical to the establishment of the ICTY and ICTR, the SCSL, and even in bringing the Sudan situation to the U.N. Security Council, *see, e.g.*, Warren Hoge, *U.N. Will Refer Darfur Crimes to Court in Hague*, INT'L HERALD TRIB. (Paris), Apr. 2, 2005, at 6.

13 *See* Rome Statute of the International Criminal, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

14 One variant of this critique suggests that international law enforcement is so sporadic that it is unlikely to deter, and so plagued with "liberal" safeguards for criminal defendants that powerful international criminals are often able to thwart the international tribunals' ability to mete out justice. Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 92, 98 (2000). Another suggests that enthusiasm for the accountability paradigm results from "a perplexing fusion of exuberance and undertheorizing." Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 547 (2005).

to be effective, must be local, rather than international, in character.¹⁵ Finally, the fledgling international justice system has encountered political and ideological objections from those concerned with its constraint of state power. The U.S. objections to the International Criminal Court fall into this category, predicated as they are on the argument that international norms on accountability (particularly as embodied in the International Criminal Court Treaty) are problematic insofar as they might affect the conduct of U.S. foreign affairs, or impinge upon U.S. citizens' ability to travel abroad with impunity.¹⁶

These challenges notwithstanding, there is substantial countervailing evidence that the notion of accountability has gained considerable traction in international and domestic state practice, as this Article makes clear. The SCSL Appeals Chamber ruled, for example, in 2004 that the Lomé Accord, which granted amnesty to the perpetrators of crimes committed during the conflict in Sierra Leone, could not deprive the SCSL of jurisdiction given that the crimes within the SCSL's statute were crimes subject to universal jurisdiction.¹⁷ Similarly, the amnesties granted in Chile during Pinochet's regime and in Argentina during Argentina's "dirty war" have been recently set aside, both by courts and legislatures in those countries, as well as by courts asked to consider them abroad.¹⁸ Even governments advocating exile

15 David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473 (1999); see also José Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT'L L.* 365, 385–86 (1999) (criticizing, in particular, the primacy jurisdiction of the ICTR, and arguing that "bottom-up" solutions may be more appropriate); Evelyn Bradley, *In Search for Justice—A Truth in Reconciliation* [sic] *Commission for Rwanda*, 7 *J. INT'L L. & PRAC.* 129 (1998).

16 See, e.g., Sadat, *supra* note 12.

17 It did not, however, find the amnesty invalid per se. *Prosecutor v. Kallon & Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 87–89 (Mar. 13, 2004). This decision followed to the same effect the opinion of the ICTY in *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998), which was cited with approval by a recent U.N. report on impunity, U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Promotion and Protection of Human Rights: Impunity, Report of the Independent Expert To Update the Set of Principles To Combat Impunity*, ¶ 48, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005) (*prepared by* Diane Orentlicher) [hereinafter *Orentlicher Impunity Study*]. The SCSL reaffirmed *Kallon* and *Kamara* a few months later in *Prosecutor v. Kondewa*, Case No. SCSL-2004-14-AR72(G), Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord (May 25, 2004). In *Kondewa*, Justice Robertson authored a special opinion arguing that the amnesty had become ineffective, not because of the international nature of the crimes, but because it had been forfeited by the resurgence of the conflict. *Id.* ¶ 28 (separate opinion of Judge Robertson).

18 In March of 2001, an Argentinean judge declared Argentina's amnesty laws unconstitutional and in violation of international law, a decision confirmed in August

initially, such as the Bush administration's offer to Saddam Hussein, have subsequently sought accountability in the form of criminal trials

of 2003, when both houses of Argentina's Congress voted by a large majority to annul those laws. Debora Rey, *Argentina Approves Ending Laws on Amnesty*, WASH. POST, Aug. 22, 2003, at A16; News Release, Human Rights Watch, Argentina: Holding Rights Abusers Accountable (Aug. 14, 2003), <http://www.hrw.org/press/2003/08/argentina081403.htm>; see Amnesty Int'l, *Argentina: The Full Stop and Due Obedience Laws and International Law*, AI Index AMR 13/004/2003, Apr. 1, 2003, available at [http://web.amnesty.org/library/pdf/AMR130042003ENGLISH/\\$File/AMR1300403.pdf](http://web.amnesty.org/library/pdf/AMR130042003ENGLISH/$File/AMR1300403.pdf); Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the 'Dirty War' in International Law*, 18 EMORY INT'L L. REV. 317, 337-40 (2004). On June 15, 2005, The Supreme Court of Argentina held, by a vote of 7-1 (and one abstention), that Argentina's amnesty laws were unconstitutional because they prevented Argentina from complying with obligations with international treaties, as regards *jus cogens* norms against forced disappearances. *Supreme Court of Argentina: Case of Julio Héctor Simon*, INT'L L. BRIEF, June 28, 2005, <http://www.asil.org/ilib/2005/06/ilib050628.htm#J1> (discussing Corte Suprema de Justicia [CSJN], 14/6/2005, "*In re Simon, Julio Héctor / recurso de hecho*," No. 17.768 (Arg.), available at <http://www.clarin.com/diario/2005/06/14/um/fallopuntofinal.doc>). The Supreme Court of Argentina has also held, in a 5-3 decision, that crimes against humanity, including genocide, torture, execution and forced disappearances, are not subject to any statute of limitations due to their status as serious crimes under international law. *Supreme Court of Argentina: Judgment in the Case of Enrique Lautaro Arancibia Clavel Confirming the Non-Applicability of Statutory Limitations to Crimes Against Humanity*, INT'L L. BRIEF, Aug. 31, 2004, <http://www.asil.org/ilib/ilib0715.htm#J1> (discussing Corte Suprema de Justicia [CSJN], 24/8/2004, "*In re Clavel, Enrique Lautaro / recurso de hecho*," No. 259 (Arg.), available at <http://www.derechos.org/nizkor/arg/doc/arancibia1.html>). Similarly, courts in Chile have sidestepped Pinochet's self-granted amnesty, permitting Pinochet and others to be indicted and, in the case of some individuals, convicted of crimes committed during the Pinochet regime. See generally NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS 81 (2005); Jen Ross, *Chilean Court Slaps Down Notion of Amnesty*, GLOBE & MAIL (Toronto), Nov. 19, 2004, at A19; Raquel Aldana, Steps Closer to Justice for Past Crimes in Argentina and Chile: A Story of Judicial Boldness (Nov. 17, 2004), http://law.case.edu/war-crimes-research-portal/instant_analysis.asp?id=12. Indeed, another Chilean judge recently held that Pinochet was competent to stand trial for abuses during his tenure in office. Larry Rohter, *Chilean Judge Says Pinochet Is Fit for Trial*, N.Y. TIMES, Dec. 14, 2004, at A1. The decision was rendered by Judge Juan Guzmán Tapia on December 13, 2004, and according to press reports, rendered Pinochet mentally fit to "undergo criminal investigation in Chile in all of its stages," including depositions and "face-to-face interrogations" about his role in the perpetration of crimes against political opponents in the 1970s while head of state. *Id.* (quoting Judge Juan Guzmán Tupia, Court of Appeals of Santiago, Chile). Pinochet's lawyers immediately filed an injunction with the Santiago Court of Appeals that upheld the ruling of Judge Guzmán on December 20, 2004. Peter A. Barcroft, *The Slow Demise of Impunity in Argentina and Chile*, ASIL INSIGHT, Jan. 7 2005, <http://www.asil.org/insights/2005/01/insight050107.htm>.

or other redress.¹⁹ Most recently, the Sudanese government, many of whose members have been accused of serious crimes under international law, has not argued that accountability is a poor idea; instead, the government has argued that it should be able to bring prosecutions itself, rather than having the Darfur situation referred to the International Criminal Court.

In light of these new developments in international law and practice, this Article has four goals. First, it examines recent decisions from Argentina, Chile, Mexico, Spain, the SCSL and the International Court of Justice (ICJ) to glean new insights into the treatment of amnesties before both domestic and international courts, lending vital practical evidence and experience to the logic of the law.²⁰ Although other courts have issued opinions relevant to the present inquiry, the cluster of recent cases arising out of the Latin American experience, combined with new decisions from international courts, offer an extraordinary example of transnational legal process in which municipal and international courts have engaged in a dialogue of international norm creation.²¹ These opinions suggest that amnesties are not only increasingly unacceptable as a matter of law, but particularly as re-

19 The United States is currently supporting the trial of Saddam Hussein and other former Baath party leaders in Iraq both financially and logistically. See Leila Nadya Sadat, *New Developments Regarding the Prosecution of Saddam Hussein by the Iraqi Special Tribunal*, ASIL INSIGHT, Aug. 5, 2005, <http://www.asil.org/insights/2005/08/insights050805.html>.

20 Cf. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1963). This is in contrast to earlier work that has focused either on the legality of amnesties in the abstract, see, e.g., Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States To Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297 (2000); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L. 595 (1999); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173 (2002), or the treatment of amnesties before particular courts, see, e.g., Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481 (2003).

21 See, e.g., Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2398-402 (1991); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1089, 1124-25 (2004); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); see also Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168, 189 (Stephen Macedo ed., 2004) [hereinafter UNIVERSAL JURISDICTION].

gards top-level perpetrators, may be socially and politically unacceptable as well.²²

In connection with this discussion, Part II briefly describes as general background the by now familiar rise of the “accountability paradigm” in international law, as well as the current challenges to this model raised by the “peace vs. justice” debate, before turning to an exploration of recent state and international practice governing amnesties,²³ and some related trends regarding universal jurisdiction. We begin our inquiry with a brief recapitulation of the *Eichmann* case,²⁴ move to the *Pinochet* precedent²⁵ and the recent developments involving crimes committed during the military regimes in Argentina and Chile. Subsequently, this Part concludes with a short discussion of the Belgian retreat from the broad law on universal jurisdiction it adopted in 1993²⁶ and the recent Spanish decisions in the *Guatemala Genocide Case*.²⁷ The examples of Haiti and South Africa, often cited

22 Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656–57 (1997).

23 As a question of terminology, this Article confines itself to a discussion of general amnesties, and expressly considers certain forms of exile to be attempts at de facto “transnational” amnesties. The term “amnesties,” as used here, means legal enactments employed to exonerate particular individuals, or classes thereof, ex ante from legal responsibility for the commission of otherwise criminal acts. Derived from the Greek word *amnestia*, meaning forgetfulness, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 71 (1986), the amnesty serves to obliterate an otherwise enforceable legal norm, Fania Domb, *Treatment of War Crimes in Peace Settlements—Prosecution or Amnesty?*, 24 ISR. Y.B. ON HUM. RTS. 253, 253 (1994). Unlike pardons, which imply forgiveness of the offender and are generally particularized in nature, amnesties typically apply to groups of offenders, and neither eradicate the offense nor the moral guilt that might be associated therewith. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575–77 (1991).

24 *Israel v. Eichmann*, 36 I.L.R. 277 (Isr. S. Ct. 1962).

25 See *infra* notes 215–27 and accompanying text.

26 The 1993 Belgian Law, which covered only war crimes, was amended in 1999 to include the possibility of universal jurisdiction over genocide and crimes against humanity. Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions [Act of June 16, 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of August 12, 1949 and Their Additional Protocols I and II of June 18, 1997], *Moniteur Belge*, Aug. 5, 1993, at 17751 (Belg.), amended by and renamed to Loi du 10 février 1999 relative à la répression des violations graves de droit international humanitaire [Act of February 10, 1999 Concerning the Punishment of Grave Breaches of International Humanitarian Law] art. 1, *Moniteur Belge*, Mar. 23, 1999, at 9286 (Belg.), translated as amended in 38 I.L.M. 921 (1999) [hereinafter Amended 1993 Belgium Law].

27 Sentencia del Tribunal Supremo sobre el caso Guatemala por genocidio [Decision of the Spanish Supreme Court Concerning the Guatemala Genocide Case] STS,

in support of amnesties will be examined, as will the recent decisions from the SCSL, the ICJ, and the ICTY. This Part also briefly considers the legality of amnesties under international law, and concludes that customary international law increasingly regards amnesties for the commission of *jus cogens* crimes to be illegal, particularly for the leaders who have organized and commanded the commission of atrocities. Conversely, although states increasingly take the position that impunity for the commission of *jus cogens* crimes is legally, socially and politically unacceptable, the Belgian and recent Spanish examples suggest that they are nonetheless less inclined to exercise their own universal jurisdiction to adjudicate cases involving such crimes committed by individuals with little connection to the forum, although just as this Article was going to press, it appeared that the Spanish courts were once again pressing ahead with universal jurisdiction cases. At the same time, there is a sense that just as the International Criminal Court employs the notion of “complementarity” to properly apportion cases between the International Criminal Court and national courts, national courts are employing filtering mechanisms to distinguish appropriate from problematic exercises of universal jurisdiction. This suggests that as the normative structure is arguably being strengthened, political constraints may increasingly come to the fore in other ways.

Second, this Article challenges the conventional wisdom that “swapping justice for peace” is morally and practically acceptable. Instead, I argue that international negotiators offering exile are neither morally nor legally justified in doing so. Indeed, although it is beguiling to imagine that offering exile to Saddam Hussein would save thousands of lives,²⁸ or that the Lord’s Resistance Army of Uganda would have laid down its weapons in return for automatic immunity,²⁹

Feb. 25, 2003, (No. 327/2003) (Spain), translated in 42 I.L.M. 686 (2003). As this Article was going to press, the *Guatemala Genocide Case* was quashed by the Spanish Constitutional Court which held that “the principle of universal jurisdiction takes precedence over the existence or not of national interests.” *Spain Asserts Right To Try Genocide Crimes Committed Abroad*, AGENCE FRANCE PRESSE, Oct. 5, 2005, available in LEXIS, Agence France Presse-English File [hereinafter *Right To Try Genocide Crimes*] (discussing STC, Sept. 26, 2005 (No. 237/2005), available at <http://www.tribunalconstitucional.es/JC.htm>).

28 See *supra* note 3 and accompanying text.

29 Indeed, an amnesty was issued in Uganda four years ago for the members of the Lord’s Resistance Army, and others, and it is estimated that between ten and fourteen thousand rebels received it. *Over 14,000 Ugandan Rebels Get Amnesty*, XINHUA NEWS AGENCY, Mar. 2, 2005, available in LEXIS, World Library, Xinhua File. Nonetheless, the situation in Uganda is still so bad that the Ugandan government asked the International Criminal Court Prosecutor to open an investigation into the commis-

the evidence suggests the contrary: that warlords and political leaders capable of committing human rights atrocities are not deterred by the amnesties obtained, but emboldened. As will be discussed below, the cases of Sierra Leone, the Former Yugoslavia, and Haiti suggest that amnesties for top-level perpetrators imposed from above or negotiated at gunpoint do not lead to the establishment of peace—but at best create a temporary lull in the fighting. Indeed, amnesty deals typically foster a culture of impunity in which violence becomes the norm, rather than the exception.

Third, building upon my earlier work in this area,³⁰ I propose a resolution of many of the conceptual lacunae that have surrounded current discussions of amnesties in international law, focusing on their temporal, geographic and jurisdictional effects. In this connection, it should be noted that this Article confines itself to addressing the problem of amnesties for the commission of *jus cogens* crimes³¹—crimes covered by peremptory norms of international law³²—which

sion of atrocities there, although some have questioned the government's motivations. Although some human rights groups and other organizations have asked the International Criminal Court not to issue arrest warrants for fear of prolonging the conflict, a recent report on the situation suggests that the amnesties, particularly for child soldiers, would probably be respected by the International Criminal Court. This would not be true of the rebel leaders (or even government officials) who might still be targeted by the Court, which recently issued its first arrest warrants. *Ugandan Paper Urges Rebel Remnants To Accept Amnesty*, BBC WORLDWIDE MONITORING, Oct. 8, 2005, available in LEXIS, World Library, BBCmir File; see also CITIZENS FOR GLOBAL SOLUTIONS, IN UNCHARTED WATERS: SEEKING JUSTICE BEFORE THE ATROCITIES HAVE STOPPED—THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND THE DEMOCRATIC REPUBLIC OF THE CONGO (2004), available at http://www.globalsolutions.org/programs/law_justice/icc/resources/uncharted_waters.pdf.

30 LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 403–14 (2000); Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable*, in *UNIVERSAL JURISDICTION*, *supra* note 21, at 193.

31 I have specifically eschewed the somewhat cumbersome terminology—“Serious Crimes Under International Law,” *PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION* princ. 2 (2001) [hereinafter *PRINCETON PRINCIPLES*]—often employed to describe the subset of (international) crimes over which universal jurisdiction may presumptively be exercised by states. Because this Article addresses not only the question of amnesties in connection with the exercise of criminal jurisdiction by states, but before international tribunals as well, it is simpler and more consistent with the purport of the definition to be clear that these are *jus cogens* crimes covered by peremptory norms of international law.

32 This idea is codified in Article 53 of the Vienna Convention on the Law of Treaties, which provides that a “peremptory norm of general international law is a

may not be set aside by conflicting municipal laws. This is why the question of amnesties is problematic, especially before international courts.³³ Indeed, I argue that the legal effect of any particular grant of amnesty or exile will be determined, in part, by the forum before which the amnesty is invoked. In particular, the treatment of amnesties before international courts and tribunals is quite different than their effect before domestic or municipal courts. As I have written earlier, courts have correctly recognized (even if not explicitly) that an adjudication of international crimes before an international court involves the direct exercise of universal *international* jurisdiction, and is not the same as a domestic court's exercise of universal *inter-state* jurisdiction. This transformation was most clearly present in the quasi-revolutionary jurisdictional referral mechanisms present in the ICC Statute, which allow the Security Council to apply, in a manner unbounded by geography and state sovereignty, the substantive criminal law in the Court's Statute.³⁴ The same idea was recognized by the ICJ in the *Yerodia* case,³⁵ by the ICTY in the *Furundzija* case,³⁶ and most recently by the Special Court for Sierra Leone. All three opinions recognized the impossibility of effectively invoking an immunity created by national law before an international tribunal. However, none of the opinions satisfactorily explain why. Part I addresses this doctrinal puzzle, and argues that these opinions correctly reflect the current "constitutional" status of international criminal law norms—norms that are, and have been since at least the Nuremberg trials, norms that may prime national laws and render them inoperative under certain conditions.

Finally, having set out the evidentiary lessons from state and international practice, as well as the applicable theoretical and doctrinal foundations, I combine theory and practice (Part III) and address the status of domestic, transnational and international amnesties before national and international courts. I distinguish between "domestic"

norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

33 I must emphasize that it is problematic *only* as regards *jus cogens* crimes. Corruption, looting, tax fraud, general venality or criminality are clearly crimes not within this category.

34 The terminology is my own. See Sadat & Carden, *supra* note 30.

35 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_jjudgment_20020214.PDF.

36 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

(granted as a matter of municipal law by the territorial state) and “transnational” amnesties (generally de facto amnesty received by individuals upon the condition that they leave the territorial state and take up residence elsewhere).³⁷ In each case, the question raised is whether a particular amnesty is effective in the territorial state (where the offenses were committed), in a custodial state (where the “accused” may be found), or before an international court or tribunal. While both theory and practice dovetail nicely on the consideration of domestic and transnational amnesties before both state and international courts, the question whether the international community itself, whether by treaty or an act of the Security Council, may amnesty crimes so that even the territorial state is deprived of jurisdiction is a very difficult one, a complete treatment of which is beyond the scope of this Article, but which is briefly considered in Part III.C. This question has become of particular importance given the recent practice of the Security Council in exempting U.S. nationals, in particular, from the jurisdiction of the International Criminal Court, as well as the territorial jurisdiction of states receiving U.N. missions.

With regard to domestic amnesties, although effective in the state where granted, their effectiveness clearly diminishes with time. As regards a custodial state, I propose that courts in that jurisdiction should treat the amnesty as presumptively invalid; a presumption that can be overcome if the state granting the amnesty in question did so pursuant to a process that did not undermine the quest for accountability as a whole.³⁸ The same is true in reverse for transnational amnesties, which have no effect in the territorial state, but may at least temporarily protect an accused so long as he remains in exile. Any third state, however, would not be bound by the grant of asylum in the state of exile. Drawing from both U.S. and European practice, Part III.A.2 asks, somewhat facetiously, but entirely plausibly, whether international law needs an *Erie* doctrine, or at least some manner of systematically addressing the treatment of international law in municipal courts.

37 It may be objected that exiling a leader and his retinue is not tantamount to issuing a domestic amnesty—for in many instances, no legal action has led to the individual’s removal from his country of residence to his home in exile. While this is true, nonetheless, just as an amnesty may place the individual *juridically* outside the purview of the law, even if he continues to reside in his country of origin, exile places him *physically* outside the reach of the law. That is why, for purposes of evaluating its effect, exile granted to a leader that is accused of committing *jus cogens* offenses can be considered as a “transnational” amnesty.

38 The South African Truth and Reconciliation Commission comes to mind.

This Article concludes that the limited and recent efforts to revive the practice of exile and amnesty, particularly for high-level accused, are inconsistent with crystallizing or already existing international law norms, as opposed to evidence of a change in state practice as regards the ultimate legality of amnesties.³⁹ Even where amnesties or exile appear initially to have taken effect successfully, that effect appears to wane with time, leading to calls for prosecution years, or even decades, after the initial crimes were committed. This, in turn, suggests that whatever practical effect the initial grants of exile or amnesties may have, delayed litigation and prosecution appear to be the norm, not the exception. Perhaps even more importantly, they appear to collide with evolving social and political norms that condemn the grant of impunity for the commission of atrocities as unacceptable. It is important, however, to emphasize that the international community and states tend to differentiate between the grant of amnesties to those most responsible for the commission of atrocities, who are held most responsible, and lower level perpetrators. Creative solutions, such as those experimented with in South Africa and Rwanda may be necessary to avoid an “impunity gap” whereby senior leadership may be prosecuted and lower level perpetrators left untouched.

Finally, and perhaps controversially, this Article contends that although international criminal justice is currently tainted by a lack of evenhandedness that has a certain imperialist tinge, the unfairness is

39 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), available at http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf. Several countries have recently attempted to amnesty rebel fighters in the hope of ending a civil war or insurgency. These include Afghanistan, Algeria, Colombia, Indonesia and Iraq. The Afghan, Indonesian and Iraqi amnesties appear for the most part to be largely outside the scope of this Article, for they address a primarily political situation whereby rebel fighters (whether Iraqi insurgent, former Taliban member or Aceh rebel) may accept an amnesty offer as part of ending a civil war, as anticipated by Article 6(5) of Protocol II, discussed *infra* notes 311–16 and accompanying text. The Algerian amnesty, in contrast, has been highly controversial as it provides that the state and state agents may not be held responsible for the atrocities committed during Algeria’s civil war, and was drafted without participation by the public or other government agencies. Michael Slackman, *Algerian Leaders Prefer Amnesia to Accountability for War Deeds*, N.Y. TIMES, Sept. 26, 2005, at A1. Colombia has offered demobilized rebels a pardon, provided there are no charges pending against them, and for those accused of crimes against humanity, the Colombian “Justice and Peace Law” provides that individuals giving a voluntary account of their crimes and who disgorge illegally acquired goods may receive a lesser sentence. Human rights groups argue that this may permit paramilitaries being recycled back into the conflict, but supporters argue that if the law is rigorously administered, it will achieve both peace and justice. *Colombia: Between Peace and Justice*, ECONOMIST, July 23, 2005, at 33, 33.

largely due to the failure of Western governments to submit themselves and their leaders to the rule of law rather than the decision to pursue justice and accountability in any particular case. Moreover, the assumption that international negotiators have a moral or legal right to negotiate away the rights of victims and survivors by exchanging justice for peace is deeply problematic, particularly in light of the unacceptable nature such a tradeoff would represent if the victims were their own citizens. Thus although respect for indigenous processes through the principles of complementarity and subsidiarity is vital if the international justice system is to retain its credibility, accountability imposed in a sensitive, situation specific, and principled manner is a fundamental cornerstone of any anti-impunity campaign.

I. CRIMINAL ACCOUNTABILITY FOR THE VIOLATION OF *JUS COGENS* NORMS UNDER INTERNATIONAL LAW: DOCTRINAL FOUNDATIONS

A. *Jus Cogens Crimes Under International Law*

Many discussions of amnesties avoid the question of the legal status of the crimes in question. Yet one cannot discuss the matter without at least determining in advance which international crimes are so uniformly accepted by the international community that both the exercise of universal jurisdiction by states, as well as the exercise of universal jurisdiction by the international community as a whole, are generally accepted. Although the theory of *jus cogens* has been the subject of much dispute and scholarly commentary,⁴⁰ the near-universal acceptance of the notion of peremptory or *jus cogens* norms⁴¹ as set out in the Vienna Convention on the Law of Treaties⁴² suggests that modern international criminal law, both explicitly and implicitly, embodies within its prescriptions certain nonderogable norms of peremptory application.⁴³ Although not all international criminal law

40 See, e.g., Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens*, 6 CONN. J. INT'L L. 1 (1990); Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42 (1991).

41 See, e.g., Alain Pellet, *Internationalized Courts: Better Than Nothing . . .*, in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* 437, 444 (Cesare P.R. Romano et al. eds., 2004) (stating that all states, "even . . . France," accept the notion of peremptory norms of international law).

42 Vienna Convention, *supra* note 32.

43 In its report on what became Article 53 of the Vienna Convention, the International Law Commission gave as examples of treaties that would violate a peremptory norm of international law a treaty contemplating an unlawful use of force, a treaty contemplating an act criminal under international law, and a treaty conniving or contemplating slave trading, piracy or genocide. The Commission also mentioned as possibilities treaties violating human rights, the equality of states and the principle of self-

scholars address the question of peremptory norms (indeed, the concept does not even figure in the otherwise excellent monograph of Antonio Cassese⁴⁴), fundamental to the notion of a duty to prosecute international crimes, a duty incumbent upon all states, is the nonderogability of the norms at issue.⁴⁵ Indeed, the very reason amnesties are so deeply problematic is that they fly in the face of this fundamental tenet of international law and practice. This may be why not one jurisdiction has, to date, accepted the juridical validity of a foreign amnesty decree for the commission of human rights atrocities. As the International Criminal Tribunal for the Former Yugoslavia opined in *Prosecutor v. Furundzija*,⁴⁶ regarding the crime of torture,

While the *erga omnes* nature [of the crime] appertains to the area of international enforcement (*lato sensu*), the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.⁴⁷

Even if one agrees, however, on the status of *jus cogens* crimes in principle, determining which offenses are entitled to that status is problematic. The report issued by the Secretary-General establishing the ICTY, although avoiding the term *jus cogens*, took the view that the most serious crimes against the international community as a whole included rules of international humanitarian law that are "beyond any doubt" part of customary international law.⁴⁸ Examples include war

determination. *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. (No. 9), U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 169, 248, U.N. Doc. A/CN.4/Ser.A/1966/Add.1.

44 See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* (2003).

45 Accord M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 104 (2001); Henrard, *supra* note 20, at 645; Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 147 (A. Cassese ed., 1986); cf. Claudia Annacker, *The Legal Régime of Erga Omnes Obligations in International Law*, 46 AUSTRIAN J. PUB. & INT'L L. 131, 135 (1994).

46 Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

47 *Id.* ¶ 153. It is true that this holding is arguably dicta. See William Schabas, *Commentary on Prosecutor v. Furundzija*, in 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 753, 755 (André Klip & Göran Sluiter eds., 1999).

48 The Secretary-General's report does not use the terminology "*jus cogens*," but instead refers to "rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 34, U.N. Doc. S/25704

crimes, genocide, and crimes against humanity.⁴⁹ The draft *Chicago Principles on Post-Conflict Justice* retain the same category of offenses.⁵⁰ The *Princeton Principles* categorize these as “serious” crimes under international law, adding to the list piracy, slavery, crimes against peace, and torture.⁵¹ The International Law Commission, in its 1996 *Draft Code of Crimes Against the Peace and Security of Mankind*, included aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.⁵² Finally, the Restatement (Third) of the Foreign Relations Law of the United States, relying on several U.S. cases,⁵³ takes the position that universal jurisdiction crimes (which I would label *jus cogens* offenses, as detailed below⁵⁴) include piracy, the slave trade, attacks on or highjackings of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.⁵⁵

The Restatement’s omission of aggression and torture is perhaps problematic given the relatively widespread acceptance of these crimes (and may simply be a function of the fact that it is almost twenty years old). Conversely, its addition of terrorism as a *jus cogens*

(May 3, 1993) [hereinafter *Secretary-General’s Report*]. The Secretary-General concluded that these rules included

the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal [Nuremberg Charter] of 8 August 1945.

Id. ¶¶ 34–35 (footnotes omitted).

49 *Id.*

50 INT’L HUMAN RIGHTS LAW INST., CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE princ. 10 (forthcoming 2005), available at <http://www.yorku.ca/remedies/Papers/PCJ%20Principles.%2011.05.03.DOC>.

51 PRINCETON PRINCIPLES, *supra* note 31, princ. 2(1).

52 *Report of the International Law Commission to General Assembly*, 51 U.N. GAOR Supp. (No. 10) arts. 16–20, at 83–120, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int’l L. Comm’n 1, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2).

53 See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714–19 (9th Cir. 1992) (holding that alleged acts of official torture, which were committed in Argentina before the adoption of the Torture Convention, violated international law under which the prohibition of official torture had acquired the status of *jus cogens*); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *In re Extradition of Demjanjuk*, 603 F. Supp. 1468, 1473–79 (N.D. Ohio 1985) (holding that offenses that are *jus cogens* may be punished by any state because the offenders are the common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution).

54 See *infra* text accompanying note 65.

55 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986).

offense may be appropriate, particularly after the Security Council Resolutions issued following the attacks of September 11, 2001, particularly Resolution 1373.⁵⁶ Among other things, the Resolution, adopted pursuant to Chapter VII of the U.N. Charter,⁵⁷ provides that all states have a duty to enact legislation criminalizing certain acts of terrorism,⁵⁸ suggesting that amnesties, either de facto or de jure, for such crimes would contravene international law. Indeed, Resolution 1373 suggests that these are crimes over which the exercise of universal jurisdiction would be appropriate, and even mandatory, as a matter of customary international law.⁵⁹

Bassiouni suggests that three considerations are primary when asking whether a particular international legal rule has reached the status of a peremptory norm: the historical evolution of the crime, the number of states that have incorporated the crime into their national laws, and the number of international and national prosecutions for the crime in question and how they have been characterized.⁶⁰ Also important, in his view, are international court decisions and scholarly writings of the most distinguished publicists.⁶¹ Most commentators, including Bassiouni, appear to view *jus cogens* norms, paradoxically, as representing a floor, a set of lowest common denominator provisions truly fundamental to the international legal order, yet representing

56 S.C. Res. 1373, ¶ 1, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

57 U.N. Charter ch. VII.

58 S.C. Res. 1373, *supra* note 56, ¶ 2(e). According to the *Princeton Principles*, terrorism is not a crime of universal jurisdiction. See *PRINCETON PRINCIPLES*, *supra* note 31, princ. 2(1). However, Resolution 1373 “decides” that every state must punish and prevent terrorism, suggesting that it is the Security Council’s belief that this crime is now a crime for which universal jurisdiction exists and for which a duty to punish is present. S.C. Res. 1373, *supra* note 56, ¶¶ 1–2. Therefore, in the Security Council’s view, presumably any amnesties granted to terrorists would be illegal.

59 See Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 150 (2004). Of course, given that the Security Council presumably has no power to create international law, the question remains whether Security Council Resolution 1373 is the codification of custom or a new form of Security Council “legislation.” See generally Paul C. Szasz, Comment, *The Security Council Starts Legislating*, 96 AM. J. INT’L. L. 901 (2002).

60 M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 174 (2003).

61 *Id.* at 174–75. It is probable that Bassiouni’s list is incomplete. Although some writers question the notion of *jus cogens* entirely, as opposed to the notion of an international legal order based on state consent, Bassiouni’s perspective is perhaps too conservative, taking only those prohibitions that are without a doubt nearly universally accepted as constituting peremptory norms. Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 75 (1993) (arguing that the prohibitions “in” and “out” of the list of peremptory norms do not appear to address equally the problems of men and women).

norms of a superior hierarchical status in the international legal system. Thus, like constitutional norms, they may embody an aspirational as well as a prescriptive quality.⁶² Most authorities examining the question have concluded that the list of *jus cogens* crimes under international law includes genocide, war crimes, crimes against humanity, crimes against peace (aggression), torture, piracy and slavery and slave-related practices.⁶³ There are important indicators that terrorism, including attacks against aircraft and aircraft hijacking, is also an emerging *jus cogens* crime, both as indicated by state⁶⁴ and international practice, as discussed above. Thus, this Article includes terrorist acts in considering, in particular, the normative desirability of amnesties at the international and municipal levels.

B. *Distinguishing Universal Inter-State Jurisdiction from Universal International Jurisdiction*

Because this Article addresses the question of amnesties only as regards *jus cogens* crimes, and makes the further assumption, like the *Princeton Principles* and other authorities, that the set of *jus cogens* crimes is coterminous with the set of crimes over which states may exercise universal jurisdiction,⁶⁵ a discussion of amnesties and interna-

62 See Charlesworth & Chinkin, *supra* note 61, at 65, 75. In the future, as more explicit discussions of the constitutional order of the international community occur, the notion of peremptory norms may be more fully explored and indeed expanded to include protections for other important human rights. *Id.* at 75–76.

63 BASSIOUNI, *supra* note 60, at 172; PRINCETON PRINCIPLES, *supra* note 31, princ. 2(1). The 1997 *Joinet Report* does not list the crimes that must be prosecuted, but simply refers to them as “serious crimes under international law.” U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, ¶ 31, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) (*prepared by Louis Joinet*) [hereinafter *Joinet Report*].

64 See, e.g., *infra* Part II.B.1–2 (discussing terrorism as a *jus cogens* offense in Spanish law); see also *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

65 Obviously, there are contrary views that have been expressed about the set of “universal jurisdiction crimes.” See, for example, the separate opinion of President Guillaume in the *Yerodia* case, where he stated categorically that “international law knows only one true case of universal jurisdiction: piracy.” Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1, ¶ 12 (Feb. 14) (separate opinion of President Guillaume), available at http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_judgment_20020214_guillaume.PDF. Moreover, even in cases where universal jurisdiction is accepted *in principle* regarding certain crimes, a court may nevertheless refuse the exercise of universal jurisdiction in a particular case as a matter of comity or for lack of resources. Cf. *Guatemala Genocide Case*, STS, Feb. 25, 2003, (No. 327/2003) (Spain), translated in 42 I.L.M. 686, 702–03 (2003).

tional law necessarily entails consideration of the exercise of universal jurisdiction by states and by the international community as a whole, about which I shall say more in a moment.

States exist in a horizontal relationship to one another. Their jurisdiction to prescribe norms of criminal law is territorially bounded, except insofar as some exception permitting the extraterritorial exercise of a state's prescriptive or adjudicative jurisdiction is present. As the *Lotus* case⁶⁶ suggests, both in the views of the majority⁶⁷ as well as the dissent,⁶⁸ under the Westphalian system, the prescriptive and adjudicative jurisdiction of sovereign states is a creation of international law. Moreover, states generally have jurisdiction only over their territories, with the caveat that international law has generally recognized four exceptions to territoriality: jurisdiction based on nationality, passive personality, the protective principle, and the principle of universality. Application of universal jurisdiction is predicated largely on the notion that some crimes are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself.⁶⁹ States seeking to exercise universal jurisdiction over the perpetrator of a *jus cogens* crime are therefore employing their own legislative authority to prescribe as regards an international law norm. Deciding when and under what conditions states may exercise universal jurisdiction, even in light of an amnesty, or some other immunity imparted by municipal or international law, therefore, presents what I have referred to in earlier writings as a problem of universal "inter-state" jurisdiction.⁷⁰

The situation before an international court or tribunal, however, is quite different. The vertical relationship between international and national law, and least as regards *jus cogens* crimes, extant as a function of the basic principles of international law, is quite different from the horizontal perspective apparent in cases of universal inter-state jurisdiction. As the International Military Tribunal at Nuremberg declared, "[I]ndividuals have international duties which transcend the

66 S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), available at http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_10/30_Lotus_Arret.pdf.

67 *Id.* at 18–19.

68 *Id.* at 43–44 (dissenting opinion of Vice-President Weiss).

69 See LUC REYDAMS, UNIVERSAL JURISDICTION 38–42 (2003); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 803 (1988); see also Orentlicher, *supra* note 21, at 1059–60, 1063.

70 Sadat & Carden, *supra* note 30, at 406; Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 244 (2001).

national obligations of obedience imposed by the individual state.”⁷¹ Standing alone, of course, this statement neither created a rule or custom, nor, importantly, did it imply that international courts necessarily have primacy over national courts, although the Tribunal itself asserted that its adjudicative power was based upon the fact that the signatories to the London Charter were merely “do[ing] together what any one of them might have done singly.”⁷² Instead, what this statement suggests is that international *law* (as a matter of prescriptive content) may sometimes prime national law, and that international courts may, in appropriate circumstances, exercise adjudicative jurisdiction in questions involving international legal obligations. It was many years before the notion that international law primed national law in certain circumstances became firmly aligned with the idea that international courts should have primacy over national jurisdictions as well—at least under certain circumstances—and indeed, one of the fundamental contributions of the *Rome Statute* of the International Criminal Court was to help clarify and codify the status of international, as opposed to national, jurisdictions exercising adjudicative jurisdiction over *jus cogens* crimes.

Although some commentators have argued that international courts, whether created by the Security Council or by international treaty (or by amendment to the Charter) are courts exercising jurisdiction delegated to them by states, either directly or through the intermediary of the Charter,⁷³ this argument is probably overstated. Indeed, to accept such a proposition would stand the nature of the international legal order on its head, given that the jurisdictions of states, wrapped up as they are in the essence and definition of sovereignty, are in fact the creation of international law. At the very least, this claim appears insufficient to explain the establishment of the ICTY, ICTR, and ICC, nor does it seem consistent with their jurisdictional bases. As the Appeals Chamber of the ICTY held in *Prosecutor v. Blaskic*,⁷⁴ the grant of authority to the ICTY by the U.N. Security Council created a vertical relationship between the ICTY and states, not only as to the international law involved, but with regard to the “judicial and injunctory powers” of the ICTY.⁷⁵ The Appeals Chamber

71 International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, reprinted in 41 AM. J. INT’L L. 172, 221 (1947).

72 *Id.* at 216.

73 *E.g.*, Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS., Winter 2001, at 13, 18, 52–57.

74 Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997).

75 *Id.* ¶ 47.

noted the continued dependence of international courts upon states and the Security Council in the realm of enforcement jurisdiction, a dependency continued and perhaps even exacerbated with the establishment of the International Criminal Court and the very "soft" enforcement regime built into the ICC's Statute.⁷⁶ Moreover, as the Tribunal noted, state sovereignty is the principle organizing premise of the world's legal order. However, to the extent that national and international legal orders, each autonomous in their own right, exist in a mutually reinforcing, even symbiotic relationship, it would seem deeply problematic to argue that states alone are the ultimate repositories of the international community's prescriptive and adjudicative jurisdictional capacities. Rather, as European scholars suggested during the post-war period, the international community may assert jurisdiction over a problem if it affects a fundamental interest of the international community or *l'ordre public international*.⁷⁷

The crimes under consideration in this Article "shock the conscience of humanity."⁷⁸ The Preamble to the *Rome Statute* suggests that these crimes threaten two separate sets of core values: the value of community and the value of peace, security and public order.⁷⁹ Embodied in this conceptualization is the notion of a world or global community in which the peoples of the world are united by "common bonds" whose cultures are pieced together like the tiles in a "delicate mosaic."⁸⁰ Implicit in the metaphor of the mosaic is the notion that if tiles are removed from the picture, the image captured therein may no longer be recognizable—that humanity will become crippled, shattered and even destroyed through the elimination of its separate components. The idea of the mosaic also suggests that if some of the tiles are removed, others will be loosened, leading eventually to the degradation of the whole. For this reason, impunity for the perpetrators of the crimes in the ICC's statute is an important component not only of punishment, but of prevention.

It is perhaps bold to speak of the international legal order as having a constitutional or quasi-constitutional structure. However, it is increasingly obvious that such is the case, although it is much less clear what is included in the text of the "Global Constitution," and what principles govern the repartition of competences between na-

76 Sadat & Carden, *supra* note 30, at 415–17.

77 E.g., Georges Levasseur, *Les crimes contre l'humanité et le problème de leur prescription*, 93 J. DROIT INTERNATIONAL 259, 267 (1966) (Fr.).

78 Rome Statute, *supra* note 13, pmbl.

79 *Id.*; see also THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

80 Rome Statute, *supra* note 13, pmbl.

tional and the international legal orders.⁸¹ As Laurence Helfer recently noted, the “constitutionalization” of the European Union’s constitutive treaties by the European Court of Justice has spilled over to the general international legal order, and heavily influenced both the theory and practice of international constitutionalism generally.⁸² Certainly, the U.N. Charter is central to the fundamental structure of international law, as are basic norms such as *pacta sunt servanda*. The development of norms prohibiting the commission of *jus cogens* crimes has evolved out of a sense of urgency—the sense, as will be explored below, that the crimes under consideration represent such an extraordinary threat to human society that turning a blind eye to their prevention and punishment is a luxury that modern society can no longer afford. While some scholars critique the notion of a “global” or “international” community, it is difficult to ignore the rise of an element of universalism and internationality in current international discourse, elements that can conveniently, even if not entirely accurately, be lumped together and described as an “international community.” After all, the idea of a world community is not a new one, having been espoused at least as early by the Stoics,⁸³ and the current proliferation of international courts and tribunals with jurisdiction over a myriad of international questions—including trade, the law of the sea, territorial and boundary disputes, international investment, and international human rights—suggests a high level of transnational dialogue on myriad issues, including the problem of international criminality. As crimes against humanity, war crimes, and perhaps genocide, continue in the Sudan,⁸⁴ grotesque acts of terrorism are carried out against citizens of the United States, and conflict continues in the Middle East, Africa and parts of Asia, the international community has sought to establish legal norms condemning state violence and the commission of human rights atrocities, and to

81 See, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT’L L. 529 (1998).

82 Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 199–200 (2003). Interestingly, even opponents of some new international institutions make reference in their writings to a “global constitution,” suggesting that its presence, if not its content, is undeniable. See, e.g., Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute’s Unlawful Application to Non-State Parties*, 44 VA. J. INT’L L. 63, 64 (2003).

83 See generally Walter Schiffer, *The Legal Community of Mankind* (1954).

84 Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur delivered to the Secretary-General*, U.N. Doc. S/2005/60/Annex (Feb. 1, 2005).

create institutions and legal regimes to enforce those norms.⁸⁵ A more complete discussion of those developments follows.

II. INTERNATIONAL CRIMINAL JUSTICE AS TRANSNATIONAL LEGAL PROCESS: TWO STEPS FORWARD, ONE STEP BACK?

A. *Establishing an International System of Criminal Justice*

1. Historical Evolution

Although it would no doubt be preferable for the international community to prevent atrocities before they occur,⁸⁶ the world has neither the resources nor the will to do so consistently. Instead, just as domestic legal systems attempt to constrain violent behavior by relying upon the internalization of norms by individuals rather than the continual threat of external sanctions, the international community has sought to engage in norm building as well, with the possibility of sanctions at the domestic level conceived of as the "stick" required. This was evidenced by the adoption of international legal instruments such as the Torture Convention,⁸⁷ the Genocide Convention,⁸⁸ the Apartheid Convention,⁸⁹ and the four Geneva Conventions of 1949,⁹⁰

85 Although it was once argued that bringing war crimes prosecutions would exacerbate, rather than help resolve, ethnic conflict, and that argument continues to have some currency, it is now more commonly accepted that accountability is more likely to promote positive effects than impunity. See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 672 (1996).

86 W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 75, 75. But see Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 328 (1997) (arguing that because cataclysmic violence requires extensive planning it is both foreseeable and preventable).

87 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force on June 26, 1987) [hereinafter Torture Convention].

88 Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

89 International Convention on the Suppression and Punishment of the Crime of Apartheid, *opened for signature* Nov. 30, 1973, 1015 U.N.T.S. 243.

90 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter

that required parties to the treaties to criminalize their breach, or at least certain breaches of the treaties' provisions. These treaties notwithstanding, however, impunity for the commission of human rights atrocities was the norm, rather than the exception, for decades. In the 1970s, this began to change with the establishment of an international campaign to end impunity for the commission of human rights abuses at the hands of dictators, particularly in Latin America.⁹¹

In the 1990s, the U.N. Commission on Human Rights took up the question of impunity in a focused way, based upon an important report authored by Special *Rapporteur* Louis Joinet in 1997.⁹² In the report, Joinet identified four stages characterizing the international campaign against impunity.⁹³ The first was a grassroots campaign in the 1970s mobilizing pro-democracy movements, NGOs, and legal experts, to obtain amnesty for political prisoners in countries such as Brazil, Uruguay and Paraguay.⁹⁴ During the second stage, in the 1980s, the notion of amnesty came to be seen as a "kind of 'insurance on impunity' with the emergence, then proliferation, of 'self-amnesty' laws proclaimed by declining military dictatorships anxious to arrange their own impunity."⁹⁵ These "self-amnesties" were vigorously contested in Latin America by victims groups such as the Mothers of the Plaza de Mayo and the Latin American Federation of Associations of Relatives of Disappeared Detainees.⁹⁶ Finally, the third and fourth stages followed the fall of the Berlin Wall, an event that precipitated a

Geneva Convention II]; Convention Relative to the Treatment for Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

91 Some scholars argued that states have a duty to prosecute such offenders under customary international law, or at least to ensure their prosecution. M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 20–25 (1995); Orentlicher, *supra* note 11, at 2547–49.

92 *Joinet Report*, *supra* note 63.

93 The report defined impunity as

the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account—whether in criminal, civil, administrative, or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to to their victims.

Id. annex II, at 17.

94 *Id.* ¶ 2.

95 *Id.* ¶ 3.

96 *Id.*

new wave of democratization, and a new regard for the international norms and institutions adopted or called for in the immediate aftermath of World War II.⁹⁷ A push for justice, combined with a belief in the rule of law, was initiated by national and international actors, and a general consensus was reached that the grant of “amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court.”⁹⁸ The principles adopted in the *Joinet Report* have been highly influential in both state and international practice, and, according to the most recent U.N. expert report on impunity, submitted by Professor Diane Orentlicher, have been influential not only in the jurisprudence of the supervisory bodies for the American Convention on Human Rights,⁹⁹ but in national legal systems as well.¹⁰⁰

Both the *Joinet* and *Orentlicher* reports identify three elements essential for combating impunity: a right of the victims to know what happened to them and their countrymen, which has both an individual and a collective dimension, a right to justice (including a fair and effective remedy), and the right to reparations.¹⁰¹ Although neither identify criminal prosecutions as the *sine qua non* of the anti-impunity campaign, there is no doubt that they, as well as victims’ groups around the world,¹⁰² have identified as a cornerstone of the effort to combat impunity the traditional framework of the criminal law, i.e., the condemnation of certain behavior as *criminal*, not simply a breach

97 *Id.* ¶¶ 4–5.

98 *Id.* ¶ 5 (referring to a ruling of the Inter-American Court of Human Rights, see *infra* notes 237–42 and accompanying text; World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 91, U.N. Doc. A/CONF.157/23 (July 12, 1993)).

99 Nov. 22, 1969, 1144 U.N.T.S. 123.

100 *Orentlicher Impunity Study*, *supra* note 17, ¶ 70.

101 *Joinet Report*, *supra* note 63, ¶¶ 16–43; *Orentlicher Impunity Study*, *supra* note 17, ¶¶ 17–69.

102 The campaign against impunity has been largely driven not from the top down, as some have suggested, but from grassroots efforts by global civil society, including victims’ groups, around the world. To name just one example, the Coalition for the International Criminal Court now has more than 2000 organizational members from around the world. COAL. FOR THE INT’L CRIMINAL COURT, FACTSHEET: AN OVERVIEW OF THE ICC AND THE CICC 1 (2006), http://www.iccnw.org/documents/CICCFS_Overview_3Jan06.pdf. These organizations represent many sectors of global civil society, including victims’ rights, human rights, women’s and children’s rights, humanitarian law and religious organizations.

of treaty or customary international law obligations, requiring the imposition of individual criminal responsibility.¹⁰³

Constructing an international criminal justice system from the ground up has been an arduous endeavor, lacking the logical perfection one might wish to see in the establishment of a new legal order. Nevertheless, the international community, frustrated with the inability of civil sanctions, military reprisals, and the doctrine of State Responsibility to deter atrocities,¹⁰⁴ has increasingly moved toward a criminal model that treats the commission of atrocities as unacceptably disruptive behavior for which *individual* offenders must be tried and punished.¹⁰⁵ The impetus for the construction of an international criminal justice system has been a joint effort of governments, NGOs, victims' groups and survivors, and the system envisaged has always viewed the recourse to international law and enforcement as a last, rather than first, resort.

Modern theories of criminal justice generally justify punishment either on the basis of the benefit society can expect to receive through deterrence of other criminals or rehabilitation or incapacitation of the offender (utilitarian theory), or because the criminal "deserves" punishment for the injury he has inflicted on society (retributive justice).¹⁰⁶ Both utilitarian and retributive aspirations are found in international criminal justice, although, of course, standard criminal justice models were developed in the context of individual behavior attacking norms established by the state and not, as is so often the case in international crimes, in the context of normatively unacceptable behavior committed *by* the state. Certainly it is hoped, although not

103 This criminalization has also come largely from grassroots movements in particular countries. Thus, when Argentina's Parliament repealed two amnesty laws in August of 2003, opening the way for the prosecution of military leaders alleged to be responsible for the death and disappearance of thousands of individuals during Argentina's "dirty war," victim's rights groups clapped and chanted, "The impunity is going to end! Justice will prevail!" *Argentine Mothers Rejoice at Repeal of Amnesty Laws*, CHI. TRIB., Aug. 22, 2003, § 1, at 7.

104 Leila Nadya Sadat, *The Establishment of the International Criminal Court: From the Hague to Rome and Back Again*, 8 J. INT'L L. & PRAC. 97, 102-07 (1999).

105 See Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18, 30 (1998).

106 Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW & SOC. INQUIRY 191, 210 (1995). Retributive justice has many variants, as wonderfully explained in Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451-53 (1990) (reviewing JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1998)). For a critique of modern retributive theory, see David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992).

yet empirically demonstrable, that erecting a system of international criminal justice (including national and international prosecutions) will prevent the reoccurrence of war crimes and human rights atrocities.¹⁰⁷ The criminal justice apparatus is also designed to ensure respect for the rule of law as a value in and of itself.¹⁰⁸ In addition, there is no doubt that by employing the *criminal law*—the most coercive form of power generally available to a society to regulate social behavior—the international community (and its component states) is constructing a normative discourse expressing deep condemnation of the behavior, as well as support for its victims.

Finally, by channeling accountability and punishment through an official mechanism, society hopes to avoid individual vigilantism, and to provide an impartial forum where individuals accused of crimes during a prior regime may have their cases heard, with all the due process rights necessary to ensure that their treatment is not tantamount to a vendetta or purge.¹⁰⁹ That is, to be seen as legitimate, the offenders must receive all the benefits of due process and legality they denied their victims.¹¹⁰ Public trials occurring in courts using rules of evidence and formalized procedures are invested with a solemnity and transparency often absent from other venues. It is hoped this will provide a forum not only for the punishment of a particular defendant, but also an arena in which the victims may be heard and an “official” version of the truth recorded.¹¹¹ In the best case scenario, victims and survivors might even receive an apology from their tormentors, leading not only to the reestablishment of social order, but to individual healing. A case in point is the Bosnian Serb government, which, fol-

107 Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7, 22 (1995).

108 Indeed, “the idea that wrongs should be redressed, that reparation should be made to the injured, is among the most venerable and most central of legal principles.” Naomi Roht-Arriaza, *Punishment, Redress and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 13, 17 (Naomi Roht-Arriaza ed., 1995).

109 Purges have been another traditional response of societies in transition, and are sometimes a necessary element of a comprehensive package. They can result in human rights abuses, however, and many societies have seen a “quick, decisive purge of enthusiastic collaborators” as an alternative to criminal trials. Osiel, *supra* note 11, at 133. In post-War Europe they were common; the purge in France itself resulted in as many as 40,000 extrajudicial executions. Sadat Wexler, *supra* note 106, at 197 n.34.

110 Cohen, *supra* note 107, at 22. For a critique of this position, suggesting that many safeguards afforded to defendants in national courts should not be extrapolated to the international arena, see Farer, *supra* note 14, at 92–98.

111 For a superb treatment of many of the issues surrounding the use of criminal trials following mass atrocities, see MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997).

lowing the *Krstic*¹¹² decision in the ICTY, finally apologized to the Bosnian Muslim community for the wartime massacre at Srebrenica, during which more than 8000 Bosnian Muslim males were killed in one of the worst instances of ethnic cleansing during the war.¹¹³

The criminal law, of course, is not the only element of the campaign against impunity, as both the *Joinet* and *Orentlicher* reports underscore. An additional component is knowledge. Beginning in the 1970s, many countries in transition established truth commissions as a transitional justice mechanism that would concentrate on the overall pattern of abuses that occurred under a prior regime rather than on acts of individual criminality. Although truth commissions may be followed by amnesties,¹¹⁴ they may also, at least in theory, facilitate accountability by serving as precursors to the adoption of measures including reparations, restitution, civil remedies, lustration laws and even criminal prosecutions.¹¹⁵ In fact, the report of the National Convention on Truth and Reconciliation was critical to establishing many of the facts relied upon by Judge Garzón in the case brought against General Pinochet in Spain,¹¹⁶ and the 1997 Impunity Guidelines state that the “right to know” is an essential element in preventing impunity for the commission of serious crimes under international law.¹¹⁷ Truth commissions may “often reduc[e] tension and increas[e] na-

112 Prosecutor v. Krstic, Case No. IT-98-33, Judgment (Apr. 19, 2004).

113 For the view that remorse and apology are central to the criminal arena, and should be more explicitly taken into consideration in the criminal law, see Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 101 (2005).

114 Much of the literature posits truth commissions as alternatives to prosecutions. John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 287 (1998). But the question of whether to establish a truth commission is separate from the issue of whether any or all of the regimes' former leaders (or lower level offenders) will ultimately be prosecuted.

115 On the other hand, accountability measures and truth commissions may exist in a difficult relationship to each other, as the recent squabble between the Sierra Leone Truth and Reconciliation Commission (SLTC) and the Special Court for Sierra Leone suggests. Indeed, according to recent accounts, the SLTC has suggested that the Special Court's decision not to respect the amnesty in the Lomé Accord at least as to the accused before it, may be destabilizing to the country. Hans Nichols, *Truth Challenges Justice in Freetown*, WASH. TIMES, Jan. 6, 2005, at A15. *But see* William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L.F. 3 (2004).

116 Chandra Lekha Sriram, *Exercising Universal Jurisdiction: Contemporary Disparate Practice*, 6 INT'L J. HUM. RTS., Winter 2002, at 49, 53 (2002).

117. *See Joinet Report*, *supra* note 63, annex II, princ. 1, at 17.

tional reconciliation,¹¹⁸ or serve as a therapeutic and powerful form of restorative justice,¹¹⁹ permitting victims to narrate the account of their victimization without the cumbersome baggage and ritualized procedures of the criminal trial.¹²⁰ On the other hand, there is always the danger that the establishment of a truth commission, without more, may derail the quest for accountability if it has been established by an unrepentant government to manipulate public perceptions either at home or abroad, or simply as part of an effort to whitewash past atrocities.¹²¹

Against this background, the decision of the South African government to establish a truth and reconciliation commission was

118 Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 610 (1994); see also Peter A. Schey et al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325, 337 (1997).

119 Cohen, *supra* note 107, at 15. As Professor Cohen notes, the truth phase of social transitions “is an onslaught on all [the] forms of denial—personal and collective, the conscious coverup and the convenient forgetting, the euphemistic renaming. This process can be as painful as its common metaphors imply: digging up graves, opening wounds.” *Id.*

120 Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH v. JUSTICE 68, 71–74 (Robert I. Rotberg & Dennis Thompson eds., 2000).

121 This was the case with the first truth commission established by Idi Amin in Uganda in 1974, which was established partly as a result of international pressure. Hayner, *supra* note 118, at 608. The Commission, which was known as the “Commission of Inquiry into Disappearances of People in Uganda,” held public hearings into disappearances that occurred under the Amin government, and issued a report which President Amin refused to publish. *Id.* at 611–12. Indeed, the four commissioners who comprised the Commission were targeted by the state for reprisals, and one was ultimately executed on trumped-up murder charges. *Id.* at 612. A second, and better known, truth commission was established in Uganda in 1986, which, although more active than the first commission, was beset with financial and logistical problems. 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 513–31 (Neil J. Kritz ed., 1995). The report was issued in 1994, and has received little attention, as most copies are apparently languishing in Ugandan warehouses. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 127, 142. The same could be said, to a lesser degree, of the truth commission established in Chad in 1990. The U.N. Impunity Guidelines proposed a set of principles for the conduct of truth commissions that would set a minimum internationally acceptable standard for their operation. See *Joinet Report*, *supra* note 63, annex II. Although early experiences with truth commissions suggested that “prosecutions are very rare after a truth commission report,” Hayner, *supra* note 118, at 604, the current practice in Argentina, South Africa and Sierra Leone appears to underscore that truth commissions and prosecutions may occur either sequentially or simultaneously, see, e.g., *id.* at 614–15, 625, 632 (discussing practices in Argentina and South Africa).

viewed with interest by the international community. Unlike many earlier truth commissions, the South African Truth and Reconciliation Commission (TRC) was unique because it was established by a democratically-elected legislature that included representatives of apartheid's victims and was not simply a matter of executive (or international) fiat.¹²² There were extensive debates during this process between those who favored, at one extreme, blanket amnesties, and those who were opposed to amnesties of any kind.¹²³ The TRC¹²⁴ attempted to forge a compromise between these two extremes.¹²⁵ Of the 7112 amnesty applications that the Amnesty Committee of the Commission received, 849 were granted and 5392 were rejected.¹²⁶ Alleged perpetrators who did not come forward remain open to civil

122 On the South African experience generally, see RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 59–73 (2000); Dugard, *supra* note 114; Jeremy Sarkin, *The Trials and Tribulations of South Africa's Truth and Reconciliation Commission*, 12 S. AFR. J. HUM. RTS. 617 (1996); Schey et al., *supra* note 118; Justin M. Schwartz, *South Africa's Truth and Reconciliation Commission: A Functional Equivalent to Prosecution*, 3 DEPAUL DIG. INT'L L. 13 (1997). As part of a negotiated settlement with the leaders of the apartheid regime, the 1993 Interim Constitution for the Republic of South Africa called for amnesty to be granted "in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past." S. AFR. (Interim) CONST. 1993, postamble.

123 Dugard, *supra* note 114, at 279; Sarkin, *supra* note 122, at 620. Interestingly, prior to the political transition that finally occurred, it had been contemplated that the leaders of the apartheid regime would be tried either by an international criminal court, à la Nuremberg, or in states to which they might flee. Thus, the Apartheid Convention criminalized apartheid as a crime and provided for the trial of offenders either by States Parties to the Convention or an international tribunal. Dugard, *supra* note 114, at 290.

124 Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), available at <http://www.doj.gov.za/trc/legal/act9534.htm>.

125 Dugard, *supra* note 114, at 292. South Africa looked to Chile as a model both as to what to avoid and what mechanisms might be successful as regards a truth commission. Richard Goldstone, *Past Human Rights Violations: Truth Commissions and Amnesties or Prosecutions*, 51 N. IR. LEGAL Q. 164, 166–67 (2000). Pursuant to the Truth and Reconciliation Commission Act, amnesties may be granted only if the act, omission or offence was committed with a political objective, in the course of the conflicts of the past. Promotion of National Unity and Reconciliation Act s. 20(1)(b). Moreover, the applicant for amnesty must make full disclosure of all relevant facts. *Id.* § 20(1)(c).

126 Truth & Reconciliation Comm'n, Summary of Amnesty Decisions (Nov. 1, 2000), <http://www.doj.gov.za/trc/amntrans/index.htm>. The South African Truth and Reconciliation Commission has now concluded its work. Statistics on the amnesties granted, as well as transcripts of the proceedings, may be found at the Commission's website. *Id.*

suits and criminal prosecutions.¹²⁷ Because the process became “judicialized” due to concerns about the due process rights of those named as alleged perpetrators, the TRC’s hearings and amnesty applications came “to resemble criminal trials, with both victims or their families and the alleged perpetrators of human rights violations represented by lawyers determined to drag out the examination and cross-examination of witnesses.”¹²⁸ An examination of public discussions of the Commission’s work and the scholarly response to the amnesties granted by the Commission suggest that reactions have been mixed.¹²⁹ Nonetheless, the South African experience suggests that in some cases, carefully focused amnesty provisions, combined with the threat of prosecutions, may be both normatively and legally acceptable means to promote transitional justice.¹³⁰

2. The Steady Erosion of Realpolitik

Both amnesties and exile are typically offered up as practical, if somewhat unsatisfactory solutions to the problem of mass atrocities.¹³¹

127 The difficulty of obtaining evidence suitable for prosecutions is often cited as another factor supporting the South African solution. As others have noted, the South African Truth and Reconciliation Commission is quite different than virtually all other commissions in its effort to establish mechanisms of accountability in the face of severe political constraints. Kiss, *supra* note 120, at 76.

128 Dugard, *supra* note 114, at 298. The TRC issued its report to President Nelson Mandela on October 29, 1998. Kurt Shillinger, *South Africa Faces Up to a “Horrendous Past,”* BOSTON GLOBE, Oct. 30, 1998, at A1 (including a timeline of events).

129 The failure of former President Pieter W. Botha and many former cabinet ministers and military officers to appear was disappointing, as was the acquittal of the former Minister of Defense, Magnus Malan, and his generals for murder arising from the KwaMakutha massacre. Moreover, most of those applying for amnesty were relatively low-level perpetrators, as opposed to high government officials. Schey et al., *supra* note 118, at 328. Recent scandals involving a pardon of thirty-three prisoners by President Thabo Mbeki suggest that the ultimate success of the TRC is not yet assured. Andrew Maykuth, *Apartheid Aftermath: Presidential Pardons Ignite Political Firestorm*, SEATTLE TIMES, July 24, 2002, at A3.

130 There is some recent evidence that truth commissions, like trials, do not work well unless local conditions are taken into consideration. A recent study on the Sierra Leone Truth and Reconciliation Commission suggests that in some parts of Sierra Leone the public was very divided about the Commission, and noted that in several communities people collectively agreed not to give statements. ROSALIND SHAW, U.S. INSTITUTION OF PEACE, *RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE* 130 (2005), available at <http://www.usip.org/pubs/specialreports/sr130.pdf>. For a generally positive assessment of the SLTC and its relationship to the Special Court, see Schabas, *supra* note 115, at 3.

131 For the view that state sovereignty is the principle obstacle to the enforcement of international humanitarian law, see Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998).

Justice is traded for peace, or at least a temporary truce, in the hopes that the atrocities will stop and the society will be able to move on. Domestically, two principal justifications have been advanced for offering blanket amnesties for human rights violations committed by a regime against its citizens. First, dictators and military leaders have often demanded impunity as a condition of relinquishing power.¹³² In response, societies eager to end a conflict and fearful of repercussions from attempts to pursue accountability may shy away from criminal trials or other proceedings to hold responsible those accused of committing human rights violations in the former regime.¹³³

Second, even if a new regime is committed to prosecuting past international crimes, it may face considerable logistical obstacles in doing so. Rwanda is a case in point. During the Rwandan genocide of 1994, Rwanda's justice system was completely eviscerated.¹³⁴ Rwanda attempted to address the problem by adopting a law (under which the offenders would be punished) that effectuated a four-part triage of offenses, ranging from the most serious¹³⁵ to the least egregious (defendants who had committed crimes against property).¹³⁶ The law also provided for a "confession and guilty plea procedure" that would permit offenders in the second, third and fourth categories to obtain

132 See Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 509 (1999) (arguing that civilian rule was restored to Haiti because the members of the military regime that had been accused of massive human rights abuses received amnesty for their crimes pursuant to the Governors Island Agreement negotiated in July 1993 under international auspices). But see Irwin P. Stotzky, *Haiti: Searching for Alternatives*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 108, at 185, 189-91 (stating that the "Governors Island Agreement was a total failure. Neither Cédras [the military leader] nor François resigned. Instead, Cédras broke every part of the brokered deal and employed every kind of delay while subordinates known as attachés continued to terrorize the population," and the only way the military leaders were ousted was the threat of invasion by the United States, which ultimately sent U.S. troops to Haiti under an agreement that also required Cédras and François to leave their posts and receive amnesty for their crimes).

133 Hayner, *supra* note 118, at 609.

134 More than eighty percent of Rwanda's judges and magistrates were killed or disappeared, and the system faced extraordinary infrastructure challenges. See, e.g., Bradley, *supra* note 15, at 130.

135 Category one offenders include "organizers or planners of the genocide, persons in positions of authority . . . and 'notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves' and persons who committed 'acts of sexual torture.'" *Id.* at 134 (quoting Organic Law of August 30, 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, No. 08/96, art. 2 (Rwanda) [hereinafter Organic Law]).

136 *Id.*

significant reductions in penalties in exchange for a full confession.¹³⁷ Unfortunately, the sheer numbers of prisoners involved (estimated to be more than 100,000 at times), and the influence that the *génocidaires* continue to exert over the prison population,¹³⁸ rendered the confession and guilt procedures ineffective, and the trials that did occur under the new law were often criticized as unfair.¹³⁹ In such a case, as a practical matter, imposing individual criminal responsibility appears to be a difficult strategy.¹⁴⁰ At the same time, releasing the detainees and admitting the impossibility of the task could have led to further outbreaks of violence and degradation of the rule of law.¹⁴¹

In July 1999, Rwanda responded by creating "Gacaca Tribunals," comprised of ordinary citizens who will hear cases involving category two, three and four offenses under the Genocide Law.¹⁴² Under Gacaca, suspects are brought before nineteen-member lay tribunals sitting in the village where the crimes occurred.¹⁴³ Anyone can speak for or against those charged, and the accused may confess and seek forgiveness or deny the charges and defend themselves.¹⁴⁴ The accused is not protected by many of the rights normally available to criminal defendants, however, leading some international observers to

137 William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 538 (1996) (citing Organic Law arts. 4–16).

138 If true, it is arguable that Rwanda would be worse off if it released prisoners still under the influence of the *génocidaires*.

139 Defendants often had little or no access to legal counsel during critical periods of the investigation or trial, trials were unduly rapid and conducted in an atmosphere hostile to the defendants, and the trials often resulted in death sentences that were expeditiously carried out. MARTHA MINOW, *FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 124–25 (1998); Bradley, *supra* note 15, at 144–45.

140 Dugard suggests an alternative reason that criminal prosecutions may be thwarted following a transition to democracy: sufficient evidence may simply be unavailable to support a criminal conviction, given that the repressive regime in question may quite probably have operated under a shroud of secrecy that makes information gathering after the fact quite difficult. He suggests South Africa as a case in point. Dugard, *supra* note 114, at 286.

141 Schabas, *supra* note 137, at 547–48. Avoiding some of these difficulties is one reason the establishment of an international criminal tribunal for Rwanda appeared desirable. The Security Council resolution establishing the Tribunal expressly suggests that international cooperation will "strengthen the courts and judicial systems of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects." S.C. Res. 955, at 2, U.N. Doc. S/RES/955 (Nov. 8, 1994).

142 Leah Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 HUM. RTS. BRIEF, Spring 2001, at 15, 15, available at <http://www.wcl.american.edu/hrbrief/hrbrief083.pdf>.

143 *Id.*

144 *Id.*

express concern about the ultimate fairness of the result.¹⁴⁵ Moreover, according to at least one report, discussion is forbidden about whether the Rwandan Patriotic Front (RPF)—the now-leading political party—committed atrocities during and after the genocide,¹⁴⁶ suggesting a lack of impartiality.¹⁴⁷

Although Rwanda's pursuit of the Gacaca process¹⁴⁸ suggests the continued importance of accountability and justice to Rwandan society, at least some Rwandan observers have expressed concern that perpetrators coming forward to confess may in fact not feel that what they did was wrong: in the chilling assessment of one Rwandan, "they believe that the real crime is not what they did, but is not to *confess* what they did."¹⁴⁹ If so, there is probably little doubt that maintaining pressure on the Rwandese government and the now out of power Hutu majority is still an important component of maintaining a stable peace in Rwanda.

Yet it is not only individual states that are tempted by amnesties, but the international community as well. International negotiators eager to bring about a settlement in hopes of ending a bloody conflict, or assuring that their own state's interests are protected in any political transitions that occur abroad, will often ignore calls for justice, arguing that the "policies and practices of accommodation in the pur-

145 *Id.* at 16–17. The procedure departs considerably from the traditional Gacaca model, which was developed to handle property or marital disputes, not criminal trials or genocide. *Id.* at 17.

146 Abraham McLaughlin, *Rwanda Bucks Blind Obedience*, CHRISTIAN SCI. MONITOR, Apr. 9, 2004, at 6.

147 The ICTR has also avoided the question whether or not the RPF was engaged in the commission of atrocities. On August 28, 2003, the Security Council voted unanimously to split the job of Chief War Crimes Prosecutor Carla Del Ponte over the objections of the Chief Prosecutor herself. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003). Although it may well have been true that Del Ponte was stretched too thin, what appears to have finally brought matters to a head was that Del Ponte had been attempting to indict Tutsis for massacres committed by RPF forces during and immediately after the genocide. This angered Rwanda's President Paul Kagame, who consistently complained to the Security Council and Secretary-General Kofi Annan about Del Ponte's performance and tried to obstruct the ICTR each time it endeavored to investigate the crimes. Declan Walsh, *Turning a Blind Eye to Increasingly Dictatorial Ways of Rwanda's Leader*, IRISH TIMES, Aug. 27, 2003, at 14; see also *The Rwandan Genocide Tribunal: Did Carla Del Ponte Do too Little or too Much in Rwanda? Both*, ECONOMIST, Aug. 23, 2003, at 38.

148 Sudarsan Raghavan, *Rwanda Prepares To Use Tribunals for Genocide but Community Courts Ill-Prepared*, SAN JOSE MERCURY NEWS, June 20, 2002, at 9A.

149 Gerald Gahima, Former Procurator-General, Republic of Rwanda, Remarks at the International Conference on Accountability for Atrocities (July 16, 2004) (notes on file with author).

suit of political settlement conflict with legal accountability in the pursuit of retributive and restorative justice.”¹⁵⁰ The Dayton Accords were negotiated with Slobodan Milosevic, in spite of expert opinion and substantial evidence that implicated him in the ethnic cleansing in the former Yugoslavia.¹⁵¹ Similarly, the international community negotiated with Foday Sankoh to try to bring about a settlement in the Sierra Leone conflict.¹⁵² In both cases, the peace agreements negotiated were followed by renewed attacks against civilians as Milosevic and Sankoh resumed their bloody campaigns.¹⁵³

Haiti is often cited as a successful example of “swapping amnesty for peace.”¹⁵⁴ But its recent travails suggest that political amnesties, particularly when imposed from above, rather than democratically adopted from within, may cause a country already struggling with democracy and human rights to slip further into chaos, rather than enter a period of stability and tranquility. At the very least, there is very little evidence that the amnesty granted in the case of Haiti was of any real assistance in bringing to an end the human rights atrocities committed during the conflict in the 1990s. Of course, Haiti has been

150 M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000).

151 For a discussion of the Dayton negotiations, see GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE* 237–46 (photo. reprint 2002) (2000). As Bass notes, although it was possibly true that the Dayton Accords would not have been possible without Milosevic’s assistance, they also “would not have been necessary” in the first place. *Id.* at 246. Indeed, one expert recently suggested that the ICTY’s failure to indict Milosevic for crimes he allegedly committed in Bosnia emboldened him to commit additional crimes in Kosovo. Paul Williams, Professor of Int’l Serv., Am. Univ. Wash. Coll. of Law, Remarks at American University Washington College of Law: The International Criminal Court and American National Security (Sept. 14, 2000) (notes on file with author). In 2000, it was reported that the United States was exploring offering immunity to Milosevic in return for his relinquishing power in the Former Yugoslavia. Steven Erlanger, *An Effort To Ease Milosevic’s Exit*, INT’L HERALD TRIB. (Paris), June 19, 2000, at 1.

152 See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, U.N. Doc. S/1999/777/Annex (July 12, 1999) [hereinafter Lomé Agreement].

153 Both leaders were subsequently indicted and Milosevic was on trial before the International Criminal Tribunal for the Former Yugoslavia before his recent death. Sankoh was arraigned for murder before a national court in Freetown and would have been tried before the Special Court for Sierra Leone. *Sierra Leone: Caged but Unlikely To Hang*, ECONOMIST, Mar. 23, 2002, at 45. However, he died while awaiting trial. Somini Sengupta, *African Held for War Crimes Dies in Custody of a Tribunal*, N.Y. TIMES, July 31, 2003, at A6.

154 Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty To Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1 (1996).

“small, poor, and badly governed” for most of its 200-year history.¹⁵⁵ Yet, in 1990, it was hoped that the country had perhaps turned the corner when a populist Catholic priest named Jean-Bertrand Aristide was elected President with an overwhelming sixty-seven percent of the total vote.¹⁵⁶ Aristide ran on a platform of politically, socially, and economically empowering the country’s poor, as well as one of institutional and military reform.¹⁵⁷ Aristide’s reformist ideas, however, angered the country’s economic elite, its military, and its smugglers, and he was overthrown in a military coup in 1991.¹⁵⁸

Although the United States called for Aristide’s reinstatement, U.S. policy toward Aristide was clearly ambivalent as his populist leanings were viewed as a threat to U.S. financial and strategic interests.¹⁵⁹ Three years of military rule followed Aristide’s removal, years that were characterized by gross and systematic violations of human rights. It has been estimated that 3000 to 5000 people were murdered by right-wing death squads during this time period.¹⁶⁰ Desperate attempts to control the flow of refugees from Haiti and the rampaging of the military government ensued, culminating finally in the negotiation of the Governors Island Agreement with the regime in July 1993.¹⁶¹ The Agreement promised the return of constitutional rule in exchange for amnesty for the coup leaders.¹⁶² Unfortunately, not only did the primary beneficiaries renege on the agreement, leading ultimately to Haiti’s invasion by foreign military forces,¹⁶³ but the am-

155 ROBERT I. ROTBERG, *HAITI’S TURMOIL: POLITICS AND POLICY UNDER ARISTIDE AND CLINTON I* (2003). According to the U.N. Development Programme, Haiti is the poorest country in the Western Hemisphere. U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2004, at 142, available at http://hdr.undp.org/reports/global/2004/pdf/hdr04_complete.pdf (placing Haiti at 153rd out of 177 countries in the world, with the worst performance in Latin America).

156 MORRIS MORLEY & CHRIS MCGILLION, *“Disobedient” Generals and the Politics of Redemocratization: The Clinton Administration and Haiti*, 112 POL. SCI. Q. 363, 364 (1997).

157 *Id.*

158 ROTBERG, *supra* note 155, at 1; see also Int’l Crisis Group, *A New Chance for Haiti?*, ICG Latin America/Caribbean Report No. 10 (Nov. 18, 2004) [hereinafter *ICG Haiti Report*]; ROBERT FATTON, JR., *HAITI’S PREDATORY REPUBLIC: THE UNENDING TRANSITION TO DEMOCRACY* (2002).

159 MORLEY & MCGILLION, *supra* note 156, at 364–66.

160 *ICG Haiti Report*, *supra* note 158, at 4.

161 The Secretary-General, *The Situation of Democracy and the Human Rights in Haiti*, ¶ 5, delivered to the Security Council and the General Assembly, U.N. Doc. S/26063, A/47/975 (July 12, 1993) (reproducing text of Governors Island Agreement, July 3, 1993).

162 *Id.*

163 In July 1994, the U.N. Security Council authorized the invasion of Haiti by a U.S. led multinational force to “use all necessary means” to facilitate the military lead-

nesty that was granted appears to have helped destabilize the country, at least in the view of some experts.¹⁶⁴ Rather than use the considerable external support he received from the United States and the U.N., Aristide, who had inspired so much hope in the impoverished people of Haiti, “came to resemble the opportunist politician who has defined much of the country’s history.”¹⁶⁵

In 2000, Aristide won an overwhelming majority in elections widely viewed both by international observers and Haitians themselves as illegitimate,¹⁶⁶ and violence, corruption, protests and strikes erupted in Haiti. This resulted in an extraordinary political crisis and armed insurgency in 2004, ultimately resulting in Aristide’s resignation and departure from Haiti under mysterious circumstances.¹⁶⁷ Aristide left in a U.S. chartered plane for the Central African Republic on February 29, 2004, and now resides in exile in South Africa. Although he continues to maintain that he is still the democratically elected President of the country, the international community has rejected that assertion. Some observers have suggested that the amnesties may have sent the wrong signal to Aristide and his supporters,¹⁶⁸ and today Haiti remains impoverished, with little prospects of improvement so long as the rebels continue to dream of an armed comeback.¹⁶⁹ Ultimately, the Haitian example suggests that “swapping amnesty for peace,” while no doubt tempting to international negotiators looking for leverage, may lead to increased violence and future destabilization.

3. Amnesty, Imperialism and Deterrence: Some Normative Concerns

The critique is sometimes offered that the notion of an international criminal justice system is a Western one, insensitive to Eastern, Islamic or other non-Western sensibilities. However, modern writers on the subject correctly point to Chinese, Islamic and Hindu traditions that underscore the universal values enshrined in the prohibi-

ership’s departure from Haiti and restoration of the legitimate government. See S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

164 ICG *Haiti Report*, *supra* note 158, at 5.

165 Peter Dailey, *Haiti: The Fall of the House of Aristide*, N.Y. REV. BOOKS, Mar. 13, 2003, at 41, 47; see also Ian Martin, *Haiti: International Force of National Compromise?*, 31 J. LATIN AMER. STUD. 711, 730 (1999).

166 ICG *Haiti Report*, *supra* note 158, at 8. The ICG estimates that only five to ten percent of the population voted in the elections. *Id.*

167 *Id.* at 9–11.

168 *Id.* at 5.

169 *After the Fall*, ECONOMIST, Apr. 24, 2004, at 36, 36–37.

tion of *jus cogens* crimes that shock the conscience of humankind.¹⁷⁰ Unlike human rights law, which has a comprehensive agenda, international criminal law, at least as regards *jus cogens* crimes, limits its concern, for the most part, to “the most serious crimes of concern to the international community as a whole,”¹⁷¹ avoiding perhaps some of the difficulties human rights lawyers face when they argue universality in the face of national legal rules challenging the international standards asserted.

What is probably a fair critique, however, is that the *enforcement* of international criminal law depends upon a combination of force and political power, and is often influenced by the foreign policy agenda of powerful states. Just as rich and powerful citizens may dominate a national legal system, wealthy and powerful countries such as the United States may not only influence which cases are brought, but perhaps even more problematically, may refuse to permit the application of international criminal law to themselves and their nationals, even when insisting it should be applied to others. This is evinced by the Statute of the Iraqi Special Tribunal which permits an Iraqi Court (originally established under U.S. occupation) to exercise jurisdiction over Saddam Hussein and his associates for violations of international humanitarian law and gross violations of human rights, but deprives it of jurisdiction over U.S. soldiers or civilians accused of mistreating Iraqi detainees in Iraqi prisons such as Abu Ghraib.¹⁷² Clearly, the presence of this kind of double standard in the application of legal rules decreases the legitimacy of the entire endeavor; but it would be a mistake to confuse the *tu quoque* defense with a principle of justice. As Justice Robert Jackson argued in his opening statement at Nuremberg, those credibly accused of the commission of human rights atrocities may be “hard pressed” if called to account before the bar of justice, but they are certainly not “ill-used.”¹⁷³

Similarly, imperialism often taints the argument that one should “trade justice for peace” in order to end a conflict quickly. While it may be correct that in some highly exceptional cases, exile or amnesty

170 See, e.g., BASSIOUNI, *supra* note 60, 25–29.

171 Rome Statute, *supra* note 13, pmb1.

172 See, e.g., Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL INSIGHT, May 2004, available at <http://www.asil.org/insights/insigh134.htm>. Another example is presented by the Security Council Resolution referring the Darfur situation in the Sudan to the ICC, which although referring the nationals of Sudan, a nonparty state, to the ICC, contains language exempting persons from other nonparty states from the ICC's jurisdiction. S.C. Res. 1593, ¶ 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

173 ROBERT H. JACKSON, *THE NÜRNBERG CASE* 34 (1971).

will serve both the long and short term interests of peace, the exception easily becomes the rule, with highly corrosive effects on the rule of law, as well as international peace and security. Just as David Luban has recently exploded the fallacy of the “ticking bomb” scenario generally used to justify the practice of torture by liberal states,¹⁷⁴ we should be wary of facile assertions that failing to grant war criminals amnesty in a “naive” pursuit of justice will lead to terrible consequences, including the deaths of thousands of innocent victims.

In the context of state torture, Luban argues that relaxing the prohibition on torture leads not to the exceptional heroic effort to save hundreds of lives, but in fact serves as the predicate for the establishment of a “torture culture” in which torture becomes not the exception, but the rule.¹⁷⁵ He notes that the ticking bomb scenario, which posits that it may be sometimes necessary to torture an individual in order to defuse a ticking bomb and thereby save hundreds more, places the prohibitionist in a terrible position both rhetorically and dialectically, because he has been forced by the example to choose between his adherence to principle (opposition to torture) and saving hundreds of fellow human beings.¹⁷⁶ Yet the hypothetical does not represent the world as it really is. The “ticking bomb scenario” is predicated on three facts rarely found in the real world: first, that law enforcement agents know *in advance* of a plot capable of being thwarted; second, that they are *certain of the perpetrator’s identity*; and, finally, that torture is *likely to evoke the information needed* to thwart the plot and save the hundreds of lives being dangled in front of the prohibitionist to make him admit that in this case he would accept the practice of torture.¹⁷⁷ Because these conditions are rarely found in reality, Luban argues that admitting the morality and legality of torture in fact leads not to heroic and exceptional acts of torture by law enforcement agents saving lives, but to a mentality that permits torture to become institutionalized as a practice by governments willing to accept it.¹⁷⁸

Similarly, the theory that justice should sometimes be traded for peace seduces, although the parallels between the two constructs are not identical, of course. Take the Saddam Hussein example, invoked above. Implicit in the challenge to those who insist on bringing Saddam to justice are three assumptions: first, that the departure of Sad-

174 David J. Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005).

175 *Id.* at 1441, 1452–60.

176 *Id.* at 1440–41.

177 *Id.* at 1442.

178 *Id.* at 1445–52.

dam from Iraq would have stopped a U.S. invasion of Iraq, a proposition that seems completely unlikely (and even extraordinarily cynical) given the U.S. insistence on removing Iraq's alleged weapons of mass destruction; second, the idea that once out of the country, Saddam would cease his criminal activities and lead a quiet life, posing no danger to anyone; finally, that U.S. negotiators are morally, legally and practically justified in determining whether or not thousands of Iraqis are killed in a war launched by the United States itself.

Regarding the last point, particularly in respect of any moral claim that the United States might make in trading Iraqi justice for a U.S. peace, imagine if General Musharef of Pakistan offered Osama bin Laden amnesty in exchange for a promise that he would cease and desist his terrorist activities¹⁷⁹—would the families of those killed in the terrorist attacks of September 11 feel that General Musharef had any moral or legal right to trade their justice for peace? Even if by doing so, it could be argued that future lives would be saved once bin Laden had stopped his terrorist activities? Two different challenges, at least, might be raised to such a proposition, the first being that we would not trust Osama to honor the agreement; the second that such an agreement could embolden other would-be terrorists by setting an example of impunity. Indeed, if amnesty is generally an unacceptable proposition in cases of *jus cogens* crimes committed against U.S. nationals (although once again, it might be important to distinguish between lower level perpetrators and their leaders), it is not clear why it would be acceptable for amnesties to be granted to individuals who have “merely” victimized their own countrymen and women, unless, of course the country in question decided upon remedies uniquely suited to its particular circumstances.

The Saddam Hussein example invoked in this Article, is, of course, atypical. The more usual scenario is one in which warlords or political leaders insist upon amnesty as a condition of ceasing their criminal behavior. Yet at this juncture, only South Africa can be evoked as an example of a successful transition to democratic and peaceful rule accompanied by the grant of amnesties, and in fact, this appears to be because of the unique leadership, historical circumstances, and ultimately the particularized consideration of individual cases that accompanied the truth and reconciliation commission pro-

179 This may not be too farfetched of a hypothetical case. See, e.g., Hassan M. Fattah, *Bin Laden Warns of Attacks on the U.S.*, INT'L HERALD TRIB. (Paris), Jan. 20, 2006, at 1 (reporting that the Al Qaeda leader offered a truce which Washington rejected out of hand).

cess.¹⁸⁰ Moreover, the South African Truth and Reconciliation Commission process was accompanied by prosecutions and only uneasily accepted by many of apartheid's worst victims.¹⁸¹ In addition to the constitutional challenges brought against the amnesty laws, the families of many of those who were tortured and killed have objected to amnesty proceedings for the perpetrators of those who victimized their loved ones.¹⁸² That is not to say that truth commissions are not appropriate vehicles for transitional justice in many cases; only that for at least the most culpable perpetrators, simply acknowledging the crimes committed seems insufficient. One reason that the criminal law has been invoked in such cases is because the behavior is seen as pathological,¹⁸³ with all that implies, and the deaths and human rights abuses carried out are seen not as incidental to a particular political strategy, but as the intentional commission of terrible acts of cruelty.¹⁸⁴ Blanket amnesties, particularly when issued by leaders who have presided over the commission of atrocities to themselves and their followers, are, for the most part, simply self-serving declarations by government officials exempting themselves from the reach of the law. They represent an attempt to trump the application of rules of law, and as such constitute a threat to both the legitimacy and the fairness of the rules.¹⁸⁵ In the poignant words of one Rwandan lawyer:

We are in the process of falling into the trap that these murderers have set for us. . . . This genocide is distinguished by the fact that a maximum number of people have been implicated in the killings—there is talk of a million killers. . . . The Hutu extremists estimated that no court in the world could judge that many criminals, and they bet that they were going to get off. Are we going to say that they're right?¹⁸⁶

This leads us to the final normative challenge to international criminal justice, the question of deterrence. Some authorities have suggested that arguments supporting the establishment of a system of

180 Dugard, *supra* note 114, at 301.

181 *Id.*

182 *Id.*

183 For the view that human violence is "normal," not pathological, see PAUL SEABRIGHT, *THE COMPANY OF STRANGERS* (2004).

184 Others label them morally unjust. Kent Greenawalt, *Amnesty's Justice, in TRUTH v. JUSTICE*, *supra* note 120, at 189, 195–98.

185 See GOLDSTONE, *supra* note 122, at 122; *cf.* THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 16 (1995).

186 Laurent Bijard, *Can Justice Be Done? Massacred: 1,000,000; Tried: 0*, *WORLD PRESS REV.*, June 1996, at 6, 7 (quoting Rwandan lawyer Frédéric Mutagwera).

international criminal justice lack empirical foundation.¹⁸⁷ Yet, there is at least some anecdotal evidence that we are witnessing shifts in political and social behavior, suggesting social and possibly political norm internalization, although a full exploration of this issue is beyond the ambit of the current project. Reports of discussions at international conferences, the agenda and discussions at the meetings of grassroots NGOs, newspaper and other media reporting, popular television shows in the United States such as *Law and Order* and the *West Wing*,¹⁸⁸ continually emphasize the need for war crimes trials (such as in the case of Saddam Hussein, for example) and the importance of accountability. This shift in public perception appears to have penetrated, perhaps in a very limited manner, even internal government decision making processes.

Take, for example, the following colloquy between Shimon Peres and Avigdor Lieberman, which took place in 2002, between the members of the Israeli Cabinet discussing what policy would best address the threat of Palestinian suicide bombers:

Mr. Lieberman: "At 8 a.m. we'll bomb all the commercial centres . . . at noon we'll bomb their gas stations . . . at two we'll bomb their banks . . .'"¹⁸⁹

Mr. Peres (interrupting): "And at 6 p.m. you'll receive an invitation to the international tribunal in the Hague.'"¹⁹⁰

Although Mr. Peres was incorrect to suggest the existence of any tribunal with jurisdiction over Israel or the Occupied Territories,¹⁹¹ his response to Mr. Lieberman's proposal is intriguing, suggesting that sporadic enforcement of international humanitarian law in some situations may have some deterrent value on the conduct of hostilities

187 Because deterrence is also largely unproven in domestic legal orders, it is not clear whether this line of argumentation suggests that national, as well as international, criminal justice systems should be abandoned. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414, 416 (1999) ("Empirically, deterrence claims [in the United States] are speculative."). If they concede that empirical claims for deterrence in national legal systems are also speculative, but do not think that national criminal justice systems should be abandoned, the question is why they perceive the importance of deterrence in justifying the existence of an international system of criminal justice to be different.

188 Another recent example is the Sydney Pollack movie, *The Interpreter*.

189 Paul Peachey, *We Risk Charges of War Crimes, Peres Tells Cabinet*, THE INDEPENDENT (London), Mar. 7, 2002, at 13.

190 *Id.*

191 Israel is not a party to the International Criminal Court Statute, the Occupied Territories lack statehood and cannot ratify the International Criminal Court Treaty, and neither the ICTY nor ICTR have any jurisdiction over actions occurring outside the scope of their limited temporal and national jurisdictions.

in other fora.¹⁹² It is nonetheless probably fair to state that the international criminal justice system has not yet reached the stage at which its deterrent value may be fairly assumed. Erratic enforcement of international criminal law remains, at this point, the exception, not the rule. Yet, if it is unclear whether disclosing the truth about past abuses or punishing those responsible will deter future abuses, there is equally little proof that amnesties promote reconciliation whereas criminal trials provoke relapses.¹⁹³ The most productive course is to identify the difficulties involved in the prosecution of war crimes, and adopt creative solutions to address them.¹⁹⁴ Perhaps in cases of mass atrocities, criminal trials, particularly international criminal trials, should be required for those who bear the greatest responsibility, while other mechanisms of accountability, including the use of conditional amnesties, truth commissions, lustration laws, reparations, counseling, and other measures, may be appropriate for lower-level perpetrators.

B. *Recent Developments in State and International Practice*

1. Universal Jurisdiction and Amnesties in National Courts: *Eichmann, Pinochet and Their Progeny*

Although Israel's abduction, indictment, and conviction of Adolf Eichmann in the 1960s seems now like ancient history, its drama and legacy continue to have extraordinary contemporary relevance. Eichmann, of course, was one of the principal architects of the Nazis' "final solution," and was personally responsible for the ghettoization, deportation, and extermination of Jews in Austria, Germany, Hungary

192 Reports of interviews with Sudanese rebel leaders suggest the same effect. See, e.g., Samantha Power, *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A23 (stating that Musa Hilal, the coordinator of the Janjaweed militia in Darfur, told her that he did "not belong at the Hague").

193 Aryeh Neier, *What Should Be Done About the Guilty*, N.Y. REV. BOOKS, Feb. 1, 1990, at 32, 35.

194 A recent study examining the relationship between the Yugoslavia Tribunal and the Bosnian legal community identified some problems in the relationship between the Tribunal and Bosnian legal professionals. Concerns were noted in the following areas: "location of the ICTY; judicial appointments; criticisms by international organizations of the Bosnian legal system; a misunderstanding of the hybrid nature of ICTY judicial procedures; the inherently political nature of a United Nations-sponsored ad hoc tribunal; and the lack of communication between Bosnian and Tribunal legal professionals." The Human Rights Ctr. et al., *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT. L. 102, 144 (2000).

and the Soviet Union.¹⁹⁵ He escaped to Argentina in 1950, where he was later joined by his family, and lived a quiet life as an employee of Mercedes-Benz in Buenos Aires.¹⁹⁶ Eichmann had not made any particular effort to hide his identity, but Argentina had not attempted to find, try or extradite many of the Germans that had fled there after the war, offering them a sort of "transnational amnesty" expressed implicitly, rather than explicitly. Argentina objected to Israel's abduction of Eichmann from Buenos Aires on May 11, 1960,¹⁹⁷ but ultimately he stood trial in Israel, indicted on four groups of charges: crimes against the Jewish people; crimes against humanity; war crimes; and membership in hostile organizations.

Eichmann was convicted on all fifteen counts and sentenced to death,¹⁹⁸ and the Israeli Supreme Court affirmed the conviction on May 29, 1962.¹⁹⁹ One of the primary legal issues the court addressed on appeal was whether Israel had the authority, under international law, to try Eichmann for crimes he had committed in other states. The court found that Eichmann's trial was permitted by international law, relying upon the holding in the *Lotus* case to support its conclusion that "as yet no international accord exists on the question of the jurisdiction of a State to punish persons who are not its nationals for acts committed beyond its borders."²⁰⁰ Thus, the Israeli Supreme Court declined to find any prohibition in Israeli municipal law based upon the extraterritorial nature of the crimes. Additionally, the court found that the crimes created by the Israeli Nazi and Nazi Collaborators (Punishment) Law were crimes condemned by the law of nations, entailing individual criminal responsibility, and evincing a "peculiarly universal character . . . vest[ing] in every State the authority to try and punish anyone who participated in their commission."²⁰¹ Finally, the court concluded that these crimes are recognized as universal international crimes by reason of three particular features (features that we now recognize may have *constitutional* significance in modern interna-

195 Matthew Lippman, *The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law*, 5 HOUS. J. INT'L L. 1, 2-5 (1982). For an account of the trial and surrounding issues, see HANNAH ARENDT, *EICHMANN IN JERUSALEM* (1976).

196 Lippman, *supra* note 195, at 5.

197 *Id.* at 7-12.

198 *Israel v. Eichmann*, 36 I.L.R. 5 (Isr. DC, Jer 1961), *aff'd*, 36 I.L.R. 277 (Isr. S. Ct. 1962).

199 *Eichmann*, 36 I.L.R. 277. He was acquitted of acts committed prior to 1941, apparently based upon the Nuremberg precedent of limiting crimes against humanity to acts committed in connection with the war. *Id.*

200 *Id.* at 285.

201 *Id.* at 287.

tional law): “[They] constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations.”²⁰²

There were many critics of Eichmann’s trial, both as to its form and substance. Yet the trial ultimately goaded the West Germans into taking more seriously the prosecution of former Nazis²⁰³ and clearly influenced other national courts in asserting jurisdiction over crimes against humanity they had suffered during the Second World War.²⁰⁴ In the modern day assessment of one expert, Israel’s “relatively responsible exercise of universal jurisdiction” must be favorably received in a world where “impunity and crude vengeance are the rule.”²⁰⁵

It was not simply coincidence that induced Eichmann and many other Nazis to seek refuge in Latin America, and indeed, during the years following the Eichmann trial, Argentina and its *TransAndino* neighbor, Chile, became the situs of a wave of terrible human rights atrocities committed by government officials, military officers, and paramilitary forces, including “death squads.” It has been estimated by human rights groups that from the period following the overthrow of Salvador Allende, Chile’s elected President, by General Augusto Pinochet Ugarte in 1973, until Pinochet’s abdication and “self-amnesty” in 1990, thousands of people were killed or disappeared at the hands of Pinochet’s police, tens of thousands of Chileans fled, and thousands more were arrested.²⁰⁶ Similarly, in Argentina, the military junta that ruled the country from 1976 until 1983 caused the deaths and disappearances of thousands of civilians.²⁰⁷

The human rights abuses in Chile and Argentina, and the amnesties with which the putative perpetrators were provided have spawned lawsuits all over the globe in recent years, as victims have sought to

202 *Id.* at 291.

203 This had been a spot of contention not only with Israel, but other European nations as well, such as France.

204 See, e.g., Leila Sadat Wexler, *From Touvier to Barbie and Back Again: The Application of the Nuremberg Principles by the French Court of Cassation*, 32 COLUM. J. TRANSNAT’L L. 289 (1994) (describing the trials of Klaus Barbie and Paul Touvier for crimes against humanity committed in France during WWII).

205 Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in UNIVERSAL JURISDICTION, *supra* note 21, at 77, 90.

206 Clifford Kraus, *Chilean Military Faces Reckoning for Its Dark Past*, N.Y. TIMES, Oct. 3, 1999, § 1, at 1.

207 *Leopold Galtieri, 76, of Falkland Rout, Dies*, N.Y. TIMES, Jan. 13, 2003, at B6 (“The junta was . . . found responsible for the death and disappearance of up to 30,000 people in Argentina’s so-called Dirty War.”).

bring prosecutions—first in foreign fora—later, domestically, in Argentine and Chilean courts. The most significant foreign forum for the Argentine and Chilean cases has been Spain, for a variety of substantive and procedural reasons.²⁰⁸ Two investigating judges accepted complaints against Argentine and Chilean suspects, and the Spanish public prosecutor objected to jurisdiction. In 1998, the Spanish National Court, the *Audiencia Nacional*,²⁰⁹ held that the Spanish courts could exercise jurisdiction over genocide, torture²¹⁰ and terrorism alleged to have been committed in Chile under Spain's universal jurisdiction law, subject to a caveat (known as the "subsidiarity principle") that if a court in the territorial state had exercised its jurisdiction, then the Spanish courts would defer to that court, at least as to charges of genocide.²¹¹ The court stated:

That the Contracting Parties [to the genocide convention] have not criminalized this offense universally in each of their domestic jurisdictions does not stand in the way of a State party establishing such a category of jurisdiction for an offense that has a major impact worldwide, and that affects the international community directly, all of humanity. . . .

Terrorism is also a crime to be prosecuted internationally²¹²

The court also rejected the defendants' amnesty arguments, stating that not only could an amnesty be contrary to the principle of *jus cogens*, but that the amnesty in Chile or Argentina would have no relevance to a prosecution in Spain under a law granting universal juris-

208 See Naomi Roht-Arriaza, *Universal Jurisdiction: Steps Forward, Steps Back*, 17 LEIDEN J. INT'L L. 375, 376–77 (2004). These include the fact that the Spanish laws on extraterritoriality were well known, the fact that there were victims of Spanish nationality in both cases, and procedural advantages including the right of victims to file cases, as well as the right of "popular accusers" (reputable nongovernment groups concerned with the public interest) to file complaints, become parties and even intervene in cases at many stages of the proceedings. *Id.* at 377. This is consistent with the practice in many European countries.

209 Order of the Criminal Chamber of the Spanish Audiencia Nacional Affirming Spain's Jurisdiction To Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship, SAN, Nov. 5, 1998 (No. 173/98), translated in *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 95 (Reed Brody & Michael Ratner eds., 2000) [hereinafter *PINOCHET PAPERS*].

210 The court found it had no jurisdiction to hear the allegations of torture, but suggested they were reachable as part of the genocide claim. See *id.* at 105.

211 *Id.* at 98. The court based this on Article 6 of the Genocide Convention, which provides: "Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed . . ." Genocide Convention, *supra* note 88, art. 6.

212 *Audiencia Nacional Jurisdictional Order*, SAN, Nov. 5, 1998 (No. 173/98), at 98, 104.

diction incorporated into Spanish municipal law.²¹³ Finally, the court noted Spain's "legitimate interest in the exercise of its jurisdiction, as more than fifty Spaniards were killed or disappeared in Chile, victims of the repression denounced."²¹⁴

The Spanish decision opened the door to the prosecution of General Pinochet in Spain, but received little international attention. Instead, it was Pinochet's decision to travel to London to seek medical treatment that caused the case to become an immediate international *cause célèbre*. Unlike Eichmann, who could probably legitimately complain (to no avail, of course, *mala captus bene detentus*) about the legitimacy of his arrest, Pinochet was arrested in London (once he left the "safety" of Chile) on a request for extradition from the Spanish investigating judge, Balthazar Garzón, issued on October 16, 1998.²¹⁵ Pinochet's lawyers protested, and his case was taken up by the British courts in a series of decisions, culminating in an opinion by the House of Lords rendered in the Spring of 1999 providing that Pinochet could not benefit from his immunity as a former head of state and could be extradited to Spain to stand charges.²¹⁶

Although the Lords' opinion is highly significant, had the Chilean courts not subsequently decided to pursue General Pinochet, the opinion would have had little practical import. The Lords (six out of seven) ultimately could only agree that Pinochet could stand trial for acts charged that occurred after September 29, 1988, when the U.K. courts would have had jurisdiction over the Spanish claims. This meant that he was not extraditable on most of the charges, by one estimate causing twenty-seven out of thirty charges to fail.²¹⁷ The Lords' opinions are varied and interesting. Of particular note here is Lord Browne-Wilkinson's opinion finding (drawing heavily from the case law of the ICTY, as well as state practice) that the prohibition against torture is a *jus cogens*, peremptory norm under international law,²¹⁸ a crime that by its nature cannot be an act committed as a state function. Lord Millett went even further, finding that

[c]rimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international

213 *Id.* at 106.

214 *Id.* at 107.

215 *R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet (No. 3) (Pinochet III)* [2000] 1 A.C. 147, 190 (H.L. 1999) (appeal taken from Q.B.) (separate opinion of Lord Brown-Wilkinson).

216 *Id.* at 277.

217 *PINOCHET PAPERS*, *supra* note 209, at 37-38.

218 *Pinochet III*, [2000] 1 A.C. at 198 (separate opinion of Lord Brown-Wilkinson).

law so as to infringe a jus cogens [sic]. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.²¹⁹

Lord Goff of Chieveley disagreed, disputing both the existence of universal jurisdiction and the nonapplicability of head of state immunity.²²⁰ Finally, although Lord Phillips suggested that it was "an open question whether international law recognizes universal jurisdiction in respect of international crimes,"²²¹ citing a lack of state practice on the subject and the creation of international tribunals, he agreed with Lord Browne-Wilkinson that a torturer could not benefit from immunity that he himself granted as head of state.²²²

Perhaps the most extraordinary legacy of the British *Pinochet* case, however, was less the jurisprudence it left and the specific result, than the catalytic effect it appears to have had in Chile, Argentina, and other countries looking to prosecute former dictators.²²³ After the House of Lords issued its opinion, although extradition proceedings in the United Kingdom continued to proceed, the government of Chile renewed its request to have Pinochet sent to Chile for prosecution.²²⁴ Ultimately, the British Foreign Minister released Pinochet (after 503 days in detention in the United Kingdom),²²⁵ and he was sent back to Chile, where he was apparently welcomed at Santiago airport by top military officials. Pinochet's triumph, however, was short-lived, for he was subsequently stripped of his immunity, and more than 170 complaints are now pending against him in Chilean courts. Moreover, in November of 2004, the Supreme Court of Chile held that the amnesty law upon which he was relying could not apply to disappearances as they were ongoing (continuous) crimes.²²⁶ Finally, although until recently his attorneys had prevailed in blocking prosecutions based on the argument that Pinochet was too ill to stand trial, in December 2004, Judge Juan Guzmán declared him medically fit based

219 *Id.* at 275 (separate opinion of Lord Millett).

220 *Id.* at 206–24 (separate opinion of Lord Goff of Chieveley).

221 *Id.* at 288 (separate opinion of Lord Phillips of Worth Matravers).

222 *Id.* at 290.

223 Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 315 (2001).

224 For a penetrating discussion of Chile's voyage towards democracy and human rights, see ROHT-ARRIAZA, *supra* note 18, at 67–96.

225 *A Chronology of the Pinochet Affair*, AGENCE FRANCE PRESSE, July 9, 2001, available in LEXIS, Agence France Presse-English File.

226 Barcroft, *supra* note 18 (discussing Corte Suprema, Nov. 17, 2004 (Chile), available at <http://www.derechos.org/nizkor/chile/doc/krassnoff.html>).

apparently upon a lucid interview he had given to a media outlet in the United States.²²⁷

Like Chile, Argentina suffered in the 1970s and 80s from a repressive military rule that resulted in thousands disappeared and dead.²²⁸ Argentina's generals were able to act with impunity, not only during their years in power but subsequently, due to a 1983 amnesty law that was followed by two other amnesty enactments known as "Full Stop" and "Due Obedience" laws.²²⁹ Although space does not permit a full treatment of the important developments in Argentina, several courts have recently declared these laws unconstitutional,²³⁰ as well as inconsistent with international law. In the most recent of these decisions, the Argentine Supreme Court held that a life sentence given to the murderers of General Carlos Prats, a Chilean who had been killed in Buenos Aires in 1974 as part of Operation Condor, could be up-

227 Rohter, *supra* note 18.

228 Amnesty Int'l, *supra* note 18, at 2-3.

229 The Full Stop law adopted in 1986 prevented the hearing of cases filed with the courts concerning abuses of human rights that may have occurred during the military regime, by providing that the time period for bringing the action expired sixty days following the enactment of the law. Ley de Punto Final [Full Stop Law], Law No. 23492, Dec. 29, 1986, B.O. (Arg.), *translated in* Amnesty Int'l, *supra* note 18, at 6 n.6. The Due Obedience law provided "commanding officers, subordinate officers, non-commissioned officers and members of the rank and file of the Armed Forces, security forces, police force and prison force" with a presumption that they had acted under the coercion of orders, and were therefore not punishable for abuses committed during the same period. Ley de Obediencia Debida [Due Obedience Law], Law No. 23521, June 8, 1987, B.O. (Arg.), *translated in* Amnesty Int'l, *supra* note 18, at 6 n.6.

230 The first case finding the laws null and void was issued by Judge Gabriel Cavallo on March 6, 2001. See Amnesty, Int'l, *Argentina: Amicus Curiae Brief on the Incompatibility with International Law of the Full Stop and Due Obedience Laws* para. 3, AI Index 13/012/2001, June 2001, *available at* [http://web.amnesty.org/library/pdf/AMR130122001ENGLISH/\\$File/AMR1301201.pdf](http://web.amnesty.org/library/pdf/AMR130122001ENGLISH/$File/AMR1301201.pdf) (discussing Juzgado Nacional en lo Criminal y Correccional Federal No. 4 [Fourth National Court for Criminal and Correctional Matters], 6/3/2001, "Julio Simón, Juan Del Cerro"). His ruling was important because although the laws had been repealed in 1998, the repeal was interpreted as being nonretroactive, meaning that the cases of human rights violations committed during the years of military rule could not be pursued. *Id.* para. 4. This case was preceded, however, by an important ruling in 1999 which determined that the statute of limitations could not be applied in a forced disappearance case, given that the fate of the victim remained unknown. Additionally, the court held that international law applied to the case, given that enforced disappearance is a crime against humanity. *Id.* para. 20 (discussing Cámara Federal [Federal Chamber], 9/1999, "Rafael Videla, Emilio Massera").

held.²³¹ The court found that the U.N. Convention on the Non-Applicability of Statutes of Limitations could apply to the killing, even though it had only recently been formally incorporated into the Argentine Constitution.²³² The court reasoned that the Convention simply expressed a principle already in existence as a matter of customary international law at the time that the actions were committed.²³³

In a similar case, Mexico's Supreme Court recently held that Ricardo Miguel Cavallo, an Argentinean former Navy Lieutenant, could be extradited to Spain to face charges of genocide and terrorism for crimes he committed during the "dirty war" period.²³⁴ While some commentators have suggested that the decision of the Supreme Court does not appear to have been based upon the doctrine of universal jurisdiction *per se*,²³⁵ and indeed the court refused extradition on counts of torture based upon the application of Mexico's statute of limitations for those crimes, the decision is nonetheless important. In particular, with regard to the amnesty relied upon by the accused in Mexico, the Supreme Court approved the lower court's ruling that the amnesty provided by Argentina's Full Stop and Due Obedience laws amnesty had no application before a Mexican Court. The court held:

The fact that a State decided not to exercise jurisdiction in order to prosecute crimes subject to international jurisdiction did not prevent any other State of an international agreement to exercise its own jurisdiction. This is so because international treaties that are applicable to the present case recognized the jurisdiction of any State party to those treaties, namely, jurisdiction to prosecute them, judge them and punish them in conformity with their domestic law and the treaties themselves, with the purpose of preventing impunity. . . . Argentinean laws could not be binding on another State nor would they have the legal effect of depriving it from exercising jurisdiction, not only by virtue of its internal legislation, but also on the basis of international treaties to which it is a party.²³⁶

231 Barcroft, *supra* note 18 (discussing Corte Suprema de Justicia [CSJN], 24/9/2004, "Arancibia Clavel, Enrique Lautaro s / recurso de hecho," (No. 259) (Arg.), available at <http://www.derechos.org/nizkor/arg/doc/arancibia.html>).

232 *Id.* The Convention had been incorporated into the Argentine Constitution in 2003 by Argentine Law No. 25-778. *See id.*

233 *Id.*

234 Ricardo Miguel Cavallo, *Procede el Amparo en Revision* [Decision on the Extradition of Ricardo Miguel Cavallo], Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Junio de 2003, Tesis P./J. 140/2002 (Mex.), *excerpts translated in* 42 I.L.M. 888 (2003).

235 Luis Benavides, *Introductory Note to Supreme Court of Mexico: Decision on the Extradition of Ricardo Miguel Cavallo*, 42 I.L.M. 884, 886 (2003).

236 *Decision on the Extradition of Ricardo Miguel Cavallo*, 42 I.L.M. at 908-09.

In its reasoning, the court relied upon the decision of the Inter-American Court of Human Rights in the case of *Barrios Altos*²³⁷ of March 14, 2001, as well as the 1997 Impunity Guidelines referred to earlier.²³⁸ Unquestionably, the case law of the Inter-American Court of Human Rights had its own catalytic effect upon courts in Latin America. For example, in the *Barrios Altos* case, the government of Peru was brought before the Inter-American Court of Human Rights regarding a massacre of fifteen people (another four were seriously injured) that occurred in Lima, Peru, on November 3, 1991.²³⁹ The attack was perpetrated by a government "death squadron," and before the courts could properly investigate, the Congress of Peru adopted Amnesty Law No. 26479 which exonerated members of the army, police force and also civilians who had violated human rights from 1980 to 1995.²⁴⁰ The law was promulgated by Peru's President on June 15, 1995, and the investigation regarding the *Barrios Altos* case was quashed.²⁴¹

In a landmark opinion, the Inter-American Court held:

[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.²⁴²

Although the court's opinion does not address the question of amnesties for international crimes, per se, cases like *Barrios Altos* have certainly influenced domestic courts faced with amnesties in cases like *Cavallo*.

The state practice emerging from the Latin American experience, as considered by Chile, Argentina, Spain, Mexico and the United Kingdom,²⁴³ suggests not only that domestic self-amnesties

237 *Barrios Altos Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14).

238 See *supra* note 117 and accompanying text.

239 *Barrios Altos Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at 2.

240 *Id.* at 3-4.

241 *Id.* at 4.

242 *Id.* at 14.

243 Proceedings were also brought against Pinochet in France, Belgium, Switzerland, Germany, Ecuador, and the Netherlands. Some of them were mooted by Pinochet's return to Chile (the Swiss case), and others were dismissed based upon practical considerations (the Netherlands). In the German and Ecuadoran cases, the jurisdictional link was based on the nationality of the victim. Only the Belgian case appears to have proceeded as a true case of universal jurisdiction, the investigating

may have a limited shelf-life in the country of origin, but, also appear to have no staying power when considered outside the country where granted.²⁴⁴ That principle seems to be accepted by international human rights bodies and international courts, as we shall see in a moment, and indeed the jurisprudence of international courts has influenced national courts in an extraordinary example of transnational judicial dialogue in which courts in the international and domestic legal orders have looked to each other for guidance in a rich and mutually reinforcing relationship. Indeed, courts have together been able to strengthen the fight against impunity more than any one court alone probably could.²⁴⁵ Interestingly, however, although the principle that domestic amnesties for international crimes have no extraterritorial effect appears clearly to have been strengthened in recent decisions, the same cannot be said of the reach of universal jurisdiction itself, as the following sections make clear.

magistrate finding that the "prohibition of crimes against humanity [of which Pinochet was accused] [being] part of customary international law and *jus cogens*." Sriram, *supra* note 116, at 55-57.

244 Another interesting example is provided by the constitutional debate that occurred in France as a result of France's decision to ratify the Rome Statute of the International Criminal Court. The Treaty was submitted to France's constitutional court for an opinion as to the compatibility of the International Criminal Court Statute with France's Constitution. While several issues arose from the reference and the *Conseil Constitutionnel's* reply, of interest in this case is that the *Conseil* found that ratification of the Rome Statute would necessarily require constitutional revision, because, although the Treaty respected French national sovereignty in general, certain specific provisions, such as presidential immunity granted by the Constitution and the application of amnesty laws as a function of French national sovereignty, were not compatible with obligations France would be assuming by ratifying the Rome Statute. See Beale Rudolf, *Statute of the International Criminal Court, Decision No. 98-408DC, 1999 J.O. 1317*, 94 AM. J. INT'L L. 391, 391-94 (2000) (discussing CC decision no. 98-408 DC, Jan. 22, 1999, J.O. 1317, available at <http://www.conseil-constitutionnel.fr/decision/1998/98408/98408dc.htm>).

The solution adopted was the amendment of France's Constitution, which was effectuated by the French Parliament by an overwhelming majority in July, 1999. *Id.* at 394. During the debates in the National Assembly, the Senate, and before both bodies sitting as a Congress, most speakers suggested that although ratification of the Statute would impinge, at least modestly on French sovereignty, in the case of serious crimes under international law, this was a small price to pay, and that, in any event, amnesties for crimes against humanity, genocide or war crimes were incompatible with the rule of law.

245 See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 370-72 (1997); Koh, *supra* note 22, at 2656-58; Waters, *supra* note 21, at 506-08.

2. The Relationship Between Amnesty and Universal Jurisdiction: The Spanish and Belgian (Temporary?) Retreats

Following the adoption of the Rome Statute for the International Criminal Court in July of 1998 and the House of Lords opinion in the *Pinochet* case in March 1999, there was optimism from human rights activists that the principle of universal jurisdiction—whether universal *inter-state* jurisdiction, or universal *international* jurisdiction exercised by the International Criminal Court or other international tribunals—would be used to rein in so-called “traveling tyrants.” Yet recent developments at both the international and domestic level suggest that any optimism should probably be tempered, at least as regards jurisdiction over *jus cogens* crimes exercised by states, and perhaps even as regards the exercise of jurisdiction by the international community as a whole. This section discusses some of the doctrinal evolution that has occurred at the national level; the international case law is discussed in Part II.B.3, below.

The country perhaps most admired (or reviled) in regard to its laws on universal jurisdiction is Belgium. In 1993, Belgium adopted a law providing its courts with universal jurisdiction over war crimes.²⁴⁶ The law was amended in 1999 to extend Belgium’s jurisdiction over crimes against humanity.²⁴⁷ Although many, particularly European, states were asserting jurisdiction over foreigners accused of committing human rights abuses abroad at the time,²⁴⁸ Belgium was nearly alone in basing the assertion of jurisdiction solely on the concept of universal jurisdiction,²⁴⁹ although even many of the cases filed in the Belgian courts were filed by foreigners residing there. Nonetheless, Belgium became a magnet for cases concerning grievances around the world: Rwandese citizens alleging themselves to be victims of Rwanda’s 1994 genocide; a group of Chadian former detainees alleging their abuse at the hands of Chad’s former President, Hissène Habré; a group of Congolese citizens resident in Belgium accusing Abdulaye Yerodia Ndombasi of grave breaches of the Geneva Conventions and crimes against humanity; a complaint against Israel’s Prime Minister, Ariel Sharon, alleging his responsibility for the massacre at Sabra and Shatila in 1982; and a group of Iraqis filed two separate complaints against U.S. President George H.W. Bush, Vice President Dick Cheney, then Secretary of State Colin Powell, General Norman Schwarzkopf, and General Tommy Franks arising out of both the 1991

246 Amended 1993 Belgium Law, *supra* note 26, arts. 1, 7.

247 *Id.*

248 Sriram, *supra* note 116, at 66–67.

249 *Id.*

and 2003 U.S. invasions of Iraq.²⁵⁰ Although only one judgment was actually rendered on the basis of the 1993 law, as amended, more than forty claims were brought thereunder.²⁵¹

Belgium succumbed to the tremendous international pressure to revisit its exercise of “pure” universal jurisdiction, which it did, amending its 1993 law in 2003 in two important respects. First, it included a provision essentially responding to the ICJ’s opinion in the *Yerodia* case, discussed below, to the effect that Belgium had violated the international immunity of Yerodia by issuing an international arrest warrant against him while he was a sitting foreign minister for the Democratic Republic of the Congo.²⁵² Under the new amendments, Belgium will respect the “limits established under international law” when evaluating the immunity of an accused otherwise liable to prosecution.²⁵³ Second, Belgium has limited the application of “pure” cases of universal jurisdiction, by providing that only a federal prosecutor may determine whether to bring a case under the Belgian law, and only if one of four situations exists: the violation was not committed on Belgian territory; the alleged offender is not in Belgium; the alleged offender is not located within Belgian territory; and the victim is not Belgium or has not resided in Belgium for at least three years.²⁵⁴ Even in such cases, the Federal Prosecutor must bring the case (not victims groups, as was possible under the 1993 law, as amended), unless an additional “filtering” provision requires or suggests he should desist. Universal jurisdiction remains an option, even if the accused is

250 Stefaan Smis & Kim Van der Borght, *Introductory Note to Belgium’s Amendment to the Law of June 16, 1993 (As Amended by the Law of February 10, 1999), Concerning the Punishment of Grave Breaches of Humanitarian Law*, 42 I.L.M. 740, 743 (2003); Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach*, WASH. POST, Sept. 30, 2003, at A1; Human Rights Watch, *Belgium: Anti-Atrocity Law Limited*, Apr. 5, 2003, <http://hrw.org/english/docs/2003/04/05/belgiu5488.htm>.

251 Smis & Van der Borght, *supra* note 250, at 742.

252 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1, ¶ 70 (Feb. 14), available at http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_jjudgment_20020214.PDF.

253 Loi du 23 avril 2003 modifiant la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire et l’article 144^{ter} du Code judiciaire [Belgium’s Amendment to the Law of June 15, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law, Law of April 23, 2003] art. 4, *Moniteur Belge*, May 7, 2003, at 24,846 (Belg.), translated in 42 I.L.M. 749 (2003).

254 *Id.* art. 7, § 1, 42 I.L.M. at 755. The English translation in I.L.M. has two important errors that I have corrected. First, the four conditions are conjunctive, not disjunctive; the English translation omits an “and” that is found in the French. Second, the French is clear that *only* the Federal Prosecutor may bring the case in the situation envisaged in Article 7, section 1.

not found in and has no connection to Belgium directly, but the Belgian courts are instructed to refrain from exercising universal jurisdiction *in absentia* if “more appropriate mechanisms to obtain justice for the victims exist.”²⁵⁵ Although some commentators have expressed disappointment in the Belgian amendments, suggesting that they will result in a “high degree of ill-defined discretion left to officials susceptible to political pressures” (rather than judges),²⁵⁶ others have suggested that the amendments properly incorporate Belgium into a “comprehensive international system” for the prosecution of international crimes.²⁵⁷

We now return to the Spanish courts, which, particularly following the *Pinochet* affair, became a magnet for the filing of cases based upon universal jurisdiction. One such case was filed on December 2, 1999, by Nobel Laureate Rigoberta Menchú Tum against several Guatemalan heads of state, accusing them of terrorism, genocide, torture and other crimes against Spanish citizens, Guatemalans, and citizens from third states.²⁵⁸ An investigating judge initiated an investigation, and the Prosecutor appealed. The appeals court dismissed the complaints, relying upon the earlier decision in the *Pinochet* case to the effect that, under the theory of “subsidiarity,” the Spanish courts would not exercise their jurisdiction unless the territorial state courts were “inactive.”²⁵⁹ The case was appealed to the Spanish *Tribunal Supremo* (Spain’s Supreme Court), which limited, in an 8-7 decision, the jurisdiction of the Spanish courts to the crimes of torture committed against Spanish citizens.²⁶⁰ As to the allegations of genocide, torture and terrorism concerning the Guatemalan population at large, the case was dismissed.

255 Smis & Van der Borght, *supra* note 250, at 744.

256 *E.g.*, Roht-Arriaza, *supra* note 208, at 387–88.

257 *E.g.*, Smis & Van der Borght, *supra* note 250, at 744.

258 Guatemala Genocide Case, STS, Feb. 25, 2003 (No. 327/2003) (Spain), translated in 42 I.L.M. 686 (2003). According to the Supreme Court, the complaint covered the period 1978–1990, during Guatemala’s civil war, and included references to the killing of Spanish citizens during an attack on the Spanish Embassy in 1980, as well as the assassinations of Spanish Catholic priests. *Id.* at 689. For an excellent description of accountability efforts in Guatemala, see generally Susan Kemp, *The Inter-Relationship Between the Guatemalan Commission for Historical Clarification and the Search for Justice in National Courts*, 15 CRIM. L.F. 67 (2004).

259 Order of the Criminal Chamber of the Spanish Audiencia Nacional Affirming Spain’s Jurisdiction To Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship, SAN, Nov. 5, 1998 (No. 173/98), translated in THE PINOCHET PAPERS, *supra* note 209, at 98; see also *supra* notes 211–12 and accompanying text.

260 *Guatemala Genocide Case*, 42 I.L.M. at 702.

The court's ruling is interesting both on the question of jurisdiction and the "subsidiarity principle" evoked by the state.²⁶¹ As to the latter, the difficulty of the complainants, according to the court, was that the claims presented to the Spanish courts had not actually been presented to the courts of Guatemala and dismissed. The complainants attempted to show that Guatemala's judicial system did not guarantee compliance with the law, and even assisted in carrying out violence towards Guatemalans, generally contributing to a situation of utter impunity within the country.²⁶² They cited documents showing a lack of activity on the part of Guatemala's authorities on the question of specific instances of disappearances; the reports of human rights groups and the Inter-American Human Rights Commission; the report of Guatemala's "Historical Clarification Commission" and the "Recovery of Historical Memory"—all in vain.²⁶³ The Supreme Court found that none of these documents established the "evidentiary facts" as to the lack of activity on the part of Guatemala's judicial system required to make the case admissible in Spain.²⁶⁴

The court agreed that genocide was a crime over which universal jurisdiction could properly be exercised, in principle.²⁶⁵ The court did not appear to find, however, that acts of terrorism and torture had the same status. Arguably departing from the broad holding of the Spanish *Audencia Nacional* in the *Pinochet* case, the majority opined "there is significant support in doctrine for the idea that no state may unilaterally establish order through criminal law, against everyone and the entire world, without there being some point of connection which legitimizes the extraterritorial extension of its jurisdiction."²⁶⁶

The dissent disagreed profoundly with the court's opinion as to the universality of the crimes charged. Finding that neither the Spanish legislature nor the Genocide Convention itself required the application of the principle of subsidiarity, the dissent found that "universal jurisdiction over crimes of genocide as crimes of international law is not governed by a principle of subsidiarity, but rather by a

261 See *supra* notes 209–12 and accompanying text.

262 See *Guatemala Genocide Case*, 42 I.L.M. at 694.

263 See *id.*

264 *Id.* This finding was roundly criticized by the dissent as unnecessarily restrictive and contrary to law. *Id.* at 706–07 (dissenting opinion).

265 *Id.* at 695 (majority opinion).

266 *Id.* at 698. The court then surveyed the other crimes alleged, examining the Torture Convention and several antiterrorism treaties. It found that "universal jurisdiction is not expressly provided for in any of these treaties." *Id.* at 700–01.

principle of concurrent jurisdiction, given that its precise purpose is to prevent impunity.”²⁶⁷ The dissenting opinion concludes:

The exercise of universal jurisdiction, by eradicating impunity for the most grave crimes against humanity, contributes to peace and to the humanization of our civilization. It is true that it does not bring life back to the victims, nor can it achieve the goal of prosecuting all of those who are responsible. It helps to secure a more safe and just world, and helps strengthen international law, in place of violence, as [] the usual means of resolving conflicts.²⁶⁸

In another example of “transjudicial dialogue,” the dissent refers not only to Spanish cases, but to the decisions of the ICJ,²⁶⁹ the German Constitutional Court,²⁷⁰ the Supreme Court of Belgium,²⁷¹ the Supreme Court of France,²⁷² and the U.K. House of Lords.²⁷³ The dissent also found that the majority had erred in interpreting the legislature’s grant of jurisdiction to the courts, arguing that the legislature had incorporated into Spanish law “the principle of universal jurisdiction, in function of the grave nature of these violations against the essential interests of the international community, accepting the principle if *ius cogens*.”²⁷⁴ Finally, although critiquing the nexus requirement between the acts charged and Spanish sovereignty, the dissent argued that even if a nexus were required, it was present.²⁷⁵ The opinion emphasized that the Spanish government and Spanish citizens in Guatemala had suffered attacks as a result of their efforts to protect Guatemala’s Mayan population. Finally, it underscored the

267 *Id.* at 705 (dissenting opinion).

268 *Id.* at 712.

269 *Id.* at 709 (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 91 (July 11)).

270 *Id.* (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 2 BVR 1290/99 (F.R.G.), available at http://www.bundesverfassungsgericht.de/entscheidungen/text/rk20001212_2bvr129099 (confirming the constitutionality of the sentencing by German courts for acts of genocide committed by Serbs in Bosnia against Bosnian victims, in circumstances not directly affecting German interests)).

271 *Id.* (citing Cour de Cassation [Supreme Court], Feb. 12, 2003 (No. P.02.1139.F/1) (Belg.), translated in 42 I.L.M. 596 (2003)).

272 *Id.* (citing Cour de Cassation, Chambre Criminelle [Cass. crim.] [highest court of ordinary criminal jurisdiction], Dec. 20, 1985 (Fr.), translated in 78 I.L.R. 125 (1988)).

273 *Id.* (citing v. Bow St. Metro. Stipendiary Magistrate, *ex parte Pinochet* (No. 3) (*Pinochet III*) [2000] 1 A.C. 147 (H.L. 1999) (appeal taken from Q.B.)). The dissent, like the majority, is somewhat selective in its choice of authority, citing only the opinions in the *Pinochet* case, for example, that supported its conclusion!

274 *Id.*

275 *Id.* at 711.

“cultural, historical, social, linguistic, legal” and other links uniting Guatemala and its indigenous population to Spain, noting that Spain shared the same cultural community as Guatemala, and could not be considered as “foreign” to the fate of the Mayan people.²⁷⁶ One point not taken up with particularity in the dissent, but worth noting, is that the complainants were probably entirely correct in their assessment of Guatemala’s legal system. In a recent decision by the Inter-American Court of Human Rights, the court cited with approval expert testimony to the effect that in Guatemala “‘justice is slow, inefficient, it is corrupt, fearful,’ and partial, particularly when those with any political power are prosecuted.”²⁷⁷ Moreover, the court found that as a result of corruption and fear, “99.9% of cases of human rights violations go unpunished”—impunity appears to be the rule, not the exception.²⁷⁸ More recently, *The New York Times* reported that Guatemala’s highest court dismissed a “landmark war-crimes trial against [16] soldiers accused of the mass killing of hundreds of . . . unarmed civilians in the village of Dos Erres in 1982,” ruling that the soldiers were exempt from prosecution.²⁷⁹ Perhaps because of this, just as this Article was going to press, the Spanish Constitutional Court quashed the opinion of the Spanish Supreme Court, holding that “the principle of universal jurisdiction takes precedence over the existence or not of national interests.”²⁸⁰

3. Recent International Decisions and Practice

In addition to the practice of the U.N. Human Rights Committee, as well as regional human rights courts, particularly in the Americas, four international legal decisions were recently handed down on the question of amnesties and the related problem of immunities for *jus cogens* crimes. In the first, *Prosecutor v. Furundzija*,²⁸¹ the ICTY held that not only was the prohibition on torture *jus cogens*, but that any amnesty therefore would be inconsistent with international law.²⁸² The discussion of amnesties was not necessary to the resolution of the case, as the problem of amnesties was not raised during the proceedings; however, the Trial Chamber cited with approval a Comment from the Human Rights Committee that “[a]mnesties are generally

276 *Id.*

277 *Bamaca Velasquez Case*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 70, at 229 (Nov. 25) (quoting expert testimony of Helen Mack).

278 *Id.*

279 *Guatemala: Court Voids War Crimes Trial*, N.Y. TIMES, Feb. 5, 2005, at A8.

280 *See Right To Try Genocide Crimes Committed Abroad*, *supra* note 27.

281 Case No. IT-95-17/I-T, Judgment (Dec. 10, 1998).

282 *Id.* ¶¶ 153, 156.

incompatible with the duty of States to investigate [torture].”²⁸³ Moreover, the Trial Chamber noted that even in the light of an amnesty, a prosecution could be instituted either before a foreign court, an international tribunal, or in their own country under a subsequent regime.²⁸⁴

Although *Furundzija* only addressed the issue of amnesty in passing, the question was squarely presented last year to the Special Court for Sierra Leone. The SCSL was established on January 16, 2002, by agreement entered into between the United Nations and the Government of Sierra Leone.²⁸⁵ The jurisdiction *ratione materiae* of the SCSL included, inter alia, crimes against humanity and war crimes. In an opinion on the question of amnesties for international crimes, dated March 14, 2004, the Special Court considered the appeals of two defendants who argued the amnesty granted under the Lomé Peace Agreement precluded their trial before the SCSL.²⁸⁶

The defendants argued that, notwithstanding the international nature of the crimes, the SCSL was bound to respect the amnesty granted by the Lomé Agreement because the Agreement was an international treaty, having been signed by six states and a number of international organizations, including the RUF.²⁸⁷ The SCSL disagreed, holding that

[t]he role of the UN as a mediator of peace, the presence of a peace-keeping force which generally is by consent of the State and

283 *Id.* ¶ 155 n.172 (citing Compilation of General Recommendations Adopted by Human Rights Treaty Bodies, at 30, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994)).

284 *Id.* ¶ 155.

285 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, U.N. Doc. S/2002/246/Annex (Mar. 8, 2002). The negotiations were undertaken pursuant to Security Council Resolution 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

286 *Prosecutor v. Kallon & Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 1 (Mar. 13, 2004). This provision was negotiated between the Government of Sierra Leone and the Revolutionary United Front (RUF) on July 7, 1999. Although a representative of the Secretary-General of the United Nations and outside governments signed as “Moral Guarantors” of the agreement, only two factions of Sierra Leonians were parties thereto: President Kabbah, who signed on behalf of the Sierra Leone government, and Corporal Sankoh on behalf of the RUF. It was ratified by the Parliament of Sierra Leone on July 15, 1999. After the RUF reneged on the agreement, the President of Sierra Leone wrote to the Security Council requesting the establishment of a “court . . . to administer international justice and humanitarian law.” Letter from the Permanent Representative, Sierra Leone, to the President of the Security Council, United Nations (Aug. 9, 2000), at 3, U.N. Doc. S/2000/786/Annex (Aug. 10, 2000).

287 *Kallon & Kamara*, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), ¶¶ 22, 30.

the mediation efforts of the Secretary-General cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party.²⁸⁸

Instead, the court found that the agreement could not be characterized as an international instrument.²⁸⁹ Conversely, it held that Article 10 of the Special Court's Statute, forbidding the Special Court from taking into consideration "an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of [international] crimes [within the Special Court's jurisdiction] shall not be a bar to prosecution," did apply.²⁹⁰ Therefore, any amnesty granted to the accused had no effect. In the words of the Special Court:

Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.²⁹¹

The Special Court concluded that the crimes within its jurisdiction—crimes against humanity and war crimes committed in internal armed conflict—are the subject of universal jurisdiction under international law.²⁹² Going beyond many of the national court decisions referred to above, which found that states were entitled to exercise jurisdiction over such crimes, the Special Court suggested that the prosecution of such crimes was perhaps required, given that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."²⁹³

The third decision is the ICJ's opinion in the *Yerodia* case.²⁹⁴ The separate and dissenting opinions filed in that case offer an interesting perspective on the question of universal jurisdiction and universal jurisdiction crimes under international law. The court held that Yer-

288 *Id.* ¶ 39.

289 *Id.* ¶ 49.

290 *Id.* ¶¶ 53, 64 (quoting Statute of the Special Court for Sierra Leone art. 10 (2000)).

291 *Id.* ¶ 67.

292 *Id.* ¶ 69.

293 *Id.* ¶ 71. Somewhat inconsistently, the court suggested that domestic amnesties for such crimes were lawful. *Id.*

294 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF.

odia was immune from Belgium's criminal jurisdiction by virtue of his status as a sitting foreign minister of the Democratic Republic of the Congo.²⁹⁵ However, perhaps to meet the critique that its decision could promote impunity for international crimes, the court stated that several fora would nonetheless be available for his prosecution—that is, his immunity before the courts of Belgium was not tantamount to *impunity* for the commission of crimes under international law.²⁹⁶ In particular, an accused could be tried before the courts of his own state, in a foreign state if either his state waived its immunity or after his tenure in office ceased,²⁹⁷ and finally, “an incumbent or former foreign minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction.”²⁹⁸ The ICJ referred specifically in this paragraph to the International Criminal Court, and the ad hoc Tribunals for Rwanda and the Former Yugoslavia, but did not foreclose other international courts from relying upon this holding in support of their own jurisdiction.²⁹⁹ This holding has proven to be more than theoretical, for on May 31, 2004, the Special Court faced the question of immunity for a sitting head of state, namely Charles Taylor.³⁰⁰ In a fascinating opinion, the Special Court opined that because it was an international, not a domestic court, the immunity invoked by Taylor could not apply.³⁰¹ The Special Court, while admitting that it was not “immediately evident” why national and international courts could differ as to their treatment of immunities under international law,³⁰² suggested that: *first*, the principle of the sovereignty of states was inapplicable, given the court's status as an international organ; and *second*, as a matter of policy, “states have considered the collective judgment of the international community to provide a vital safeguard against the potential destabilizing effect of unilateral judgment in this area.”³⁰³ Of course,

295 *Id.* ¶ 58.

296 *Id.* ¶ 60.

297 Here, however, the court has created significant confusion as to what acts may be chargeable, stating that he may be charged with acts subsequent to his period of office “as well as in respect of acts committed during that period of office in a private capacity.” *Id.* ¶ 61.

298 *Id.*

299 *Id.*

300 *See supra* note 4 and accompanying text.

301 *Prosecutor v. Taylor*, Case No. SCSL-2003-01-1, Decision on Immunity from Jurisdiction, ¶ 51 (May 31, 2004), available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-059.pdf>.

302 *Id.*

303 *Id.* (quoting Amicus Brief of Professor Diane Orentlicher at 15, *Taylor*, Case No. SCSL-2003-01-1).

as alluded to above, there is another explanation of the difference between the jurisdiction of national and international courts in this area, *which is that they are not exercising the same form of universal jurisdiction at all.*³⁰⁴

C. *The Legality of Amnesties Under International Law*

Principle 7(1) of the *Princeton Principles on Universal Jurisdiction* provides that “[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law,”³⁰⁵ suggesting the undesirability, but perhaps not a *per se* prohibition, on all domestic amnesties for *jus cogens* crimes under international law. The view taken by the drafters of the *Principles* in 2001 has been strengthened by recent state and international practice, and indeed, research to date has not uncovered any recent case in which a foreign or international court has respected a state amnesty with respect to a *jus cogens* crime. Nonetheless, even if courts are unwilling to consider amnesties for *jus cogens* crimes as having any extra-territorial effect (or any effect before international courts), they are still hesitant to declare them unlawful *per se*. For example, the amnesty opinion of the SCSL held (perhaps as dictum), that although the Lomé amnesty was inapplicable before it, there was “not yet any general obligation for States to refrain from amnesty laws on these [*jus cogens*] crimes. Consequently, if a State passes any such law, it does not breach a customary rule.”³⁰⁶

This hesitancy is perhaps because the law in this area has been slow to evolve and is in disarray. As to war crimes, most authorities distinguish between amnesties that might be given for crimes committed in international and noninternational armed conflict.³⁰⁷ The grave breaches regime of the four Geneva Conventions of 1949 mandate the exercise of universal jurisdiction over those crimes.³⁰⁸ While

304 See *supra* Part II.B.

305 PRINCETON PRINCIPLES, *supra* note 31, princ. 7(1).

306 Prosecutor v. Kallon & Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 71 (Mar. 13, 2004).

307 Although amnesty clauses for war crimes committed in international armed conflict were generally incorporated in peace agreements prior to World War I, they were vigorously rejected thereafter. Domb, *supra* note 23, at 256–57.

308 Geneva Convention I, *supra* note 90; Geneva Convention II, *supra* note 90; Geneva Convention III, *supra* note 90; Geneva Convention IV, *supra* note 90. This obligation was expanded upon in the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.; see also Michael Bothe,

it is certainly possible that only the substantive provisions of the Conventions and not their procedural provisions have risen to the level of custom, most commentators have accepted that, at least with respect to war crimes committed in international armed conflict that fall within the grave breaches regime, a fair (but not watertight) case can be made not only for the existence of a customary international law duty to prosecute or extradite the offender, but, as a corollary,³⁰⁹ for a rule prohibiting blanket amnesties.³¹⁰

As regards noninternational armed conflicts, at least some take the view that general amnesties are not only permitted, but are encouraged by existing law.³¹¹ This view relies upon Article 6(5) of Protocol II relating to the Protection of Victims of Non-International Armed Conflict, which provides: "At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."³¹²

This provision was cited by the South African Constitutional Court as supporting the validity, under international law, of the amnesties granted by the South African Truth and Reconciliation Commission.³¹³ The decision may be criticized for being insuffi-

War-Crimes in Non-International Armed Conflicts, 24 *ISR. Y.B. ON HUM. RTS.* 241 (1994); Domb, *supra* note 23, at 261.

309 There are two related, yet distinct, issues raised by the question of amnesties. First, whether states have a duty to punish and prosecute (or extradite) those who commit crimes falling under universal jurisdiction. Second, even if no such duty to punish exists, whether international law recognizes the legality of amnesties for such offenses. The two questions are often conflated, but they are distinct. One can answer the first question in the negative, for example, but still recognize that the absence of an affirmative obligation to prosecute does not permit states *carte blanche* in their reaction to the commission of mass atrocities. On the other hand, an affirmative duty to prosecute or extradite would appear to rule out the legality of amnesties.

310 Scholars are divided on this question. Professor Meron argues that every state has a duty to try or extradite those guilty of grave breaches, and has "the right, although probably not the duty, to prosecute [other] serious violations of the Geneva Conventions." Meron, *supra* note 105, at 23. On the other hand, states have generally not complied with this obligation, thereby undermining its claim as custom. BASSIOUNI & WISE, *supra* note 91, at 44-46; Cassese, *supra* note 11, at 5.

311 See Domb, *supra* note 23, at 266-67.

312 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(5), June 8, 1977, 1125 *U.N.T.S.* 609, 614 [hereinafter Protocol II]. One author takes the position that this language was intended to apply to those combating the State, not those acting as its agents. Schey et al., *supra* note 118, at 340.

313 *Azanian Peoples Org. (AZAPO) v. The President of the Republic* 1996 (8) BCLR 1015 (CC) at 1033 (S. Afr.).

ciently attentive to the international legal issues in question, in particular, for failing to analyze the crimes committed as crimes against humanity (of which apartheid is clearly one), and neglecting to establish whether there exists any customary international law duty to punish offenders of a prior regime for such crimes.³¹⁴ Moreover, both the ICTY and the SCSL have made it clear that crimes committed in internal armed conflict cannot benefit from amnesties, at least before those jurisdictions, and even more importantly, perhaps, the ICRC takes the position that Article 6(5) may not be “invoked in favour of impunity of war criminals, since it only applied to prosecution for the sole participation in hostilities.”³¹⁵ Thus while soldiers may benefit from a general amnesty for combatants, the ICRC takes the position that they may not receive immunity for the commission of atrocities during a conflict.³¹⁶

With respect to crimes against humanity and genocide, some commentators have vigorously accepted the existence of a duty to investigate and punish human rights violations committed under a prior regime.³¹⁷ Certainly, the Genocide Convention and the Torture Convention suggest that a duty is assumed by States Parties to those conventions to pursue and punish (or extradite, in the case of the Torture Convention) those who violate the Conventions’ prohibitions.³¹⁸ However, even those treaties are unclear as to the precise modalities of such punishment. They would thus appear to leave a certain degree of discretion to national legal systems in their implementation.

314 Dugard, *supra* note 114, at 302. This criticism is consistent with the notion that there may be an international legal obligation to punish at least the worst offenders after a civil war as a necessary corollary of the need to protect human rights. Bothe, *supra* note 308, at 248 (arguing that principles of State Responsibility may require prosecution). Nonetheless, while the distinction between international and noninternational armed conflict may be disappearing, it has not done so yet.

315 2 INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL LAW 4043 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

316 *Id.*

317 Orentlicher, *supra* note 11, at 2546–48.

318 Article 1 of the Genocide Convention, provides that “genocide . . . is a crime under international law which they undertake to prevent and to punish.” Genocide Convention, *supra* note 88, art. 1. The Convention is not based on a principle of universal jurisdiction, but of territorial jurisdiction; that is, pursuant to Article 6 of the Convention, those charged with genocide or similar acts “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by [an] international penal tribunal.” *Id.* art. 6. Similarly, Article 4 of the Torture Convention requires States Parties to “ensure that all acts of torture are offences under [their] criminal law” and Article 7 requires them to either extradite or prosecute alleged torturers. Torture Convention, *supra* note 87, arts. 4, 7.

As to a generalized customary international law rule requiring punishment, the evidence of state practice is less forceful. At the same time, although the human rights instruments that guarantee a right to bodily integrity and freedom from torture and other abuses do not typically, by their terms, require states to investigate and prosecute abuses of rights,³¹⁹ regional human rights courts and international human rights monitoring bodies have been unanimous in imposing an affirmative obligation on states to investigate human rights abuses.³²⁰ Additionally, in 2001, the Inter-American Court rendered its first judgment on the merits of an amnesty, finding Peru's amnesty laws incompatible with international law.³²¹

These decisions are highly significant, particularly when viewed in light of emerging state practice. Without more, they perhaps do not establish that a duty to investigate and prosecute is imposed upon states as a matter of international law. However, they do suggest that a

319 Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation To Investigate, Prosecute and Provide Redress*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 108, at 24, 28.

320 The leading case is *Velásquez Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29). *Velásquez* has been followed by the Inter-American Commission on Human Rights to find that Chile's amnesty laws violated the right to judicial protection in the Convention, as well as the State's duty to "prevent, investigate and punish" any violations of the rights found in the Convention. *Hermosilla v. Chile*, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 73 (1996); *see also* *Espinoza v. Chile*, Case 11.725, Inter-Am. C.H.R., Report No. 133/99, OEA/Ser.L./V/II.106, doc. 6 rev. ¶¶ 102–07. The European Court of Human Rights has, similarly, suggested that states may have affirmative obligations to prevent and remedy breaches of the Convention in certain circumstances suggesting in one case that criminal prosecution could be required as part of that obligation. *X & Y v. Netherlands*, App. No. 8978/80, 8 Eur. Ct. H.R. Rep. 235, 241 (1985) (holding that the Netherlands was required to adopt criminal law provisions to remedy sexual abuse of a mentally handicapped individual living in a home for mentally handicapped children because "the protection afforded by the civil law in [this] case is . . . insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions."); *see also* *Selçuk & Asker v. Turkey*, App. Nos. 23184/94, 23185/94, 26 Eur. Ct. H.R. Rep. 477, 519–20 (1998). The Human Rights Committee has reached a similar conclusion, finding that criminal prosecutions may sometimes be required. *Orentlicher Impunity Study*, *supra* note 17, ¶ 37 n.48 (cases cited). Finally, the African Commission on Human and Peoples' Rights has concluded that governments have not only negative obligations, but affirmative duties to protect their citizens. *SERAC & CESR v. Nigeria*, Comm. 155/96, 15th Annual Activity Report annex V, ¶ 57 (2001–2002), *available at* http://www.achpr.org/english/_doc_target/documentation.html?./activity_reports/activity15_en.pdf.

321 *Barrios Altos Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75, at 14 (Mar. 14); *see also* *Orentlicher Impunity Study*, *supra* note 17, ¶ 29.

prohibition against the grant of blanket amnesties for the commission of *jus cogens* crimes may now have crystallized as a matter of general customary international law.³²² Although some countries have granted amnesties to the perpetrators of atrocities under a prior regime, amnesties that in some instances have been sustained by higher courts,³²³ this practice appears to be changing, certainly in countries where democratic institutions have come to replace dictatorships or military regimes, as the examples of Chile and Argentina seem to suggest. Indeed, it may be that amnesties are acceptable within a society only so long as they are needed to provide stability, after which time their beneficiaries need to "repay" the liberty they received under duress.

The International Criminal Court Statute is explicit on certain challenges to accountability such as superior orders,³²⁴ head of state immunity,³²⁵ and statute of limitations,³²⁶ but is silent both as to any duty to prosecute and with regard to amnesties.³²⁷ Although the issue was raised during the Rome Conference at which the Statute was adopted, no clear consensus developed among the delegates as to how the question should be resolved. This too suggests that customary international law had not crystallized on this point, at least not in 1998. According to the Chairman of the Committee of the Whole of the Diplomatic Conference, the question was purposely left open by the drafters: while the Statute does not condone the use of amnesties by its terms, presumably the Prosecutor has the power to accept them if doing so would be "in the interests of justice."³²⁸

Finally, in regard to the international practice of the United Nations, although prior to the establishment of the International Criminal Court in 1998, international negotiators participated in amnesty deals, consistent with recent jurisprudence on the subject, the United Nations now takes the position that a grant of amnesty in the case of a

322 GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY* 248-53 (2000); Orentlicher, *supra* note 11, at 2568-81.

323 See, e.g., *Hermosilla*, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L./V/II.95, doc. 7 rev. ¶ 73 (describing decision of Supreme Court of Chile in 1990 to uphold a self amnesty).

324 Rome Statute, *supra* note 13, art. 33.

325 *Id.* art. 27.

326 *Id.* art. 29.

327 For a good discussion of some of the issues raised by the Statute, see Scharf, *supra* note 132, at 523-25.

328 Rome Statute, *supra* note 13, art. 53(2)(c). The delegates were largely unable to achieve consensus on the issues of pardons, commutations and amnesties. See John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 41 (Roy S. Lee ed., 1999).

jus cogens crime is inconsistent with international law. As stated by the U.N. Secretary-General in his 2000 report on the establishment of the SCSL:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.³²⁹

III. THE EFFECT OF AMNESTIES FOR *JUS COGENS* CRIMES

A. *The Effect of Domestic Amnesties for Jus Cogens Crimes*

1. Before National Courts

As the ICJ noted in the *Yerodia* case³³⁰ (and the Special Court for Sierra Leone noted as well), a domestic amnesty is valid in the state where granted, unless that state decides otherwise (through a regime change or otherwise). However, the situation before a court in a third state is quite different. Having concluded that the accountability paradigm is normatively desirable (even if not legally required), we are squarely faced with its operation through the mechanism of universal jurisdiction exercised either by states or the international community as a whole. States seeking to exercise universal jurisdiction over perpetrators do so pursuant to internal legislation adapted to that end. If faced with claims of a defendant's immunity, granted by domestic amnesty provisions, how should the state in question (the forum state) respond?

With respect to amnesties or immunities granted by municipal law, the first question to be answered is what law applies. Public international law has not yet developed a system of conflicts of laws to address this question, because it is largely operating under the *Lotus* paradigm: every state being an independent sovereign, every state may apply its law to a problem unless there is some rule prohibiting it from doing so.³³¹ Moreover, many states refuse to enforce foreign public

329 The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000); see also The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, ¶¶ 6, 7, 18, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

330 2002 I.C.J. 1 (Feb. 14).

331 S.S. "Lotus" (Fr. v. Tur.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), available at http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_10/30_Lotus_Arret.pdf.

law, and would consider criminal proceedings as well as amnesty laws “public,” applying what one writer has dubbed the “‘public law taboo.’”³³² Yet to the extent that national courts are using universal jurisdiction as the basis for the trial of perpetrators that otherwise have no connection to the forum (as in the *Pinochet* case, for example), they are already applying, through the medium of international law, an exception to the rule that penal jurisdiction is generally territorial in character. Thus, the national court exercising universal jurisdiction has a dual role: to apply and interpret national law, and to effectively sit as a court of the international community, applying international legal norms. Thus in considering what effect a national amnesty should have before a foreign court, it is appropriate to consider whether the applicable law should be the law of the forum state, the law of the state granting the defendant immunity, the law of the state of the defendant’s nationality, the law of the state upon whose territory the crimes were committed (the territorial state), or international law to resolve the question.³³³

While a full treatment of this subject is beyond the scope of this Article, I will nonetheless suggest some general parameters that may be of use. To begin with; surely, it would be paradoxical for the forum state to use the law of the state granting immunity as the measure of its own exercise of universal jurisdiction. First, as most of these crimes are committed in internal conflicts by regimes in power, the state granting immunity will typically be the state of the defendant’s nationality as well as the territorial state. Assuming the defendant is charged with a violation of clear norms of international law, there can be no issue relating to *nullum crimen, nullum pœna sine lege*—no punishment without law—if an amnesty granted after the crime’s commission is ultimately ineffective if the defendant travels abroad.³³⁴ Moreover,

332 William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161, 161 (2002) (quoting Andreas Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 322–26 (1979) (Neth.)).

333 The *Princeton Principles* have a provision on conflicts of jurisdiction, proffering a set of criteria upon which states might base a decision to prosecute a particular case, or not, in the case of a demand for extradition of the accused. PRINCETON PRINCIPLES, *supra* note 31, princ. 8.

334 This may be less true, however, in the case of conditional amnesties, where the defendant has voluntarily come forward and placed him or herself in jeopardy of prosecution by confessing the crime. In this case, the better rule may be that the forum state should examine the particular proceeding to see if the principle of *ne bis in idem* should attach and immunize the particular defendant from subsequent prosecutions. Again, the issue arises whether the forum uses its own rules or an international rule of *ne bis in idem*. The practical response of most fora will most likely be to

many immunities are granted by regimes to themselves just before they step down, or are extracted from a successor regime with threats of rebellion and violence. The former situation is a classic example of law that is blatantly self-interested and probably illegitimate. The second situation, while involving amnesties granted by a presumably legitimate government, could appear to be an illegal contract, void *ab initio*, if the beneficiary seeks to enforce it, as against public policy and extracted by duress.³³⁵ As noted earlier, the SCSL and the Supreme Court of Mexico both came to the conclusion that a domestic amnesty granted as regards a *jus cogens* crime cannot affect the jurisdiction of a third state.

Assuming then that it is not a state other than the forum whose law should govern the question whether the amnesty or other immunity is valid, the choices remaining are the law of the forum and international law. I discuss the last possibility first. The international law criminalizing gross abuses of human rights has developed considerably since the Second World War. As noted earlier, the explicit thesis of this Article is that the substantive norms, whether initially established by treaty or by custom, are well established norms of customary international law, and indeed, *jus cogens* norms that are nonderogable in nature.³³⁶ This position appears to be confirmed by most recent state court decisions, and was reaffirmed during the Rome Diplomatic Conference to establish the International Criminal Court, where most governments were comfortable codifying these norms and applying them universally in the event the Security Council referred a particular case to the Court. A state investigating a non-national for one of these crimes pursuant to an exercise of universal jurisdiction, is thus applying, through the medium of its national law, international law. What is not clear is whether the state is bound, in the absence of a specific treaty obligation, to apply international rules *related to* the substantive norm. The most that can be said is that there is at least some evidence that a state is required to do so, at least as to certain rules.

First, as outlined in Part I.A, the Charter and judgment of the International Military Tribunal at Nuremberg clearly affirmed the primacy of international law over national law, at least insofar as crimes against peace, war crimes and crimes against humanity were con-

use some combination of the two, due to the fact that the international law on the subject is not well codified, and the need to balance the competing interests involved.

335 As between the state of nationality and the territorial state, if the two were to differ, it would seem logical to look first to the territorial state, the application of the criminal law generally being territorial in nature.

336 See *supra* text accompanying note 31; see also Bassiouni, *supra* note 150, at 411.

cerned. The Charter essentially abolished the defense of superior orders, and was explicit in rejecting municipal law as a defense to an international crime. The Nuremberg principles were adopted in a resolution by the United Nations General Assembly in 1946,³³⁷ and have not been seriously questioned since. It would seem odd for international law to prime national law, only for national law to extinguish the legal obligation imposed either through the application of a statute of limitations, amnesty or some other form of domestic immunity. Although there was some doubt as to whether a rule concerning the statute of limitations existed in customary international law,³³⁸ that doubt would seem to be laid to rest after the widespread adoption of the Rome Statute which provides that the crimes therein are subject to no period of limitations.³³⁹ Moreover, recently some jurisdictions have been adopting provisions abolishing the statute of limitations as regards at least certain *jus cogens* crimes.³⁴⁰ Similarly, the issue of superior orders is clearly addressed in the Rome Statute, and its widespread adoption by states will presumably create a clear legal rule on this question. Thus, although the manner in which international law is applied by states is generally a question of national law, given that these particular rules of international law appear to be inextricably intertwined with the application of a *jus cogens* norm of fundamental importance, the better rule would be that national legal systems are bound, as a matter of international law, to apply interna-

337 G.A. Res. 96 (I), U.N. Doc. A/61/Add.1 (Dec. 11, 1946).

338 There are two treaties on the subject, but they have not been widely adopted. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 75. The convention came into force on November 11, 1970, and according to the United Nation's website, currently has only nine signatories and forty-nine parties. United Nations, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty8.asp> (last visited Dec. 20, 2005). Shortly thereafter, the Council of Europe adopted a similar Convention. European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, *opened for signature* Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540. The European Convention was only ratified by two states and never entered into force. Interestingly, both conventions were largely a response to German statutes of limitation that would have caused Nazi crimes to prescribe, and prevented prosecution. This result, which was apparently perceived as desirable in Germany, was viewed as unacceptable by many other countries. See Sadat Wexler, *supra* note 204, 318–21.

339 Rome Statute, *supra* note 13, art. 29 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

340 *Orentlicher Impunity Study*, *supra* note 17, ¶¶ 47–48.

tional, and not national, rules regarding superior orders and statutes of limitation.³⁴¹

Head of state immunity presents a slightly different problem, as the House of Lords recognized in the *Pinochet* case, for if international law abolishes head of state immunity as regards the *international* prosecution of current, as well as former, heads of state, national prosecutions of current leaders (unlike their predecessors) might unduly strain the international legal system, which is still premised largely on the sovereign equality of states. The ICJ took this view in its recent decision in the *Yerodia* case,³⁴² as discussed earlier, and the decision on the immunity of Charles Taylor of the Special Court for Sierra Leone appears compatible with these views.

I turn now to the last issue, the difficult question of amnesty, either de facto or de jure.³⁴³ If we reject the law of the state granting the amnesty as a source of law to apply (for the reasons given above or through a simple refusal to accord the amnesty any extraterritorial effect), we must assume the relevant law to be the national law of the forum state.³⁴⁴ Of course, it is quite likely, however, that the forum state may not have any law on the question, for its legislature probably has not considered the problem. Thus, the remainder of this section proposes some policy considerations that a court in the forum state might use in evaluating a foreign amnesty, keeping in mind that it will need to balance the international community's interest in pursuing justice against concerns of comity and the importance of respecting the difficult choices a particular jurisdiction has made as to how it will treat the perpetrators of past atrocities.

Courts in the forum state should keep in mind that amnesties are disfavored, perhaps even illegal, in international law, particularly as

341 This appears to be the view taken by the Special Court for Sierra Leone, as discussed earlier. How national courts accomplish this is of course a question of domestic constitutional law.

342 Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 1, ¶ 60 (Feb. 14), available at http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF.

343 Pardons and conditional amnesties may be distinguishable, for both involve the use of judicial or quasi-judicial proceedings and involve particularized consideration of a defendant's guilt or innocence in a particular case. Assuming the proceedings are not a sham, even where amnesties are generally prohibited, pardons and conditional amnesties may be acceptable, or even required by the legality principle, if the defendant has been "put in jeopardy" of criminal proceedings.

344 "Pure" cases of universal jurisdiction appear to be quite rare. Rather, there generally appears to be some connection between the defendant and the forum state, in most instances, again suggesting the appropriateness of the forum applying its law to the question.

regards those who bear the most responsibility for the commission of a particular atrocity. Moreover, to permit national amnesties to extinguish obligations imposed by international law would seem contrary to the foundational principles of international criminal law, and stand in opposition to the clear weight of authority and much of the state and international practice emerging in this field. This should create a presumption that the forum should refuse the amnesty. This presumption would be rebuttable, however, in specific cases. First, even the International Criminal Court Statute does not prohibit amnesties per se. Instead, as noted earlier, it leaves open the possibility that some amnesties might serve the interest of justice. Assuming the decision is made in good faith, national fora presumably have the same margin of appreciation. Their courts may already be overburdened, the defendant may have already been placed "in jeopardy" of criminal prosecution elsewhere, or comity may require that the forum state abstain from prosecution in a specific case, particularly with respect to conditional amnesties that have resulted from a carefully negotiated and potentially fragile agreement entered into as part of a transition to democracy. Of course, a state may use other filtering mechanisms in evaluating the viability of a particular exercise of universal jurisdiction, such as the "subsidiarity principle" suggested by the Spanish courts, or the exercise of prosecutorial discretion, as Belgium's law provides.³⁴⁵ In the United States, U.S. conflicts principles or the doctrine of comity may be employed to determine when and under what circumstances a U.S. court should entertain a prosecution of a foreign national if that individual invokes a foreign amnesty.³⁴⁶ Indeed, assuming the decision of the forum state is made without the influence of political pressure, and pursuant to sound jurisprudential reasoning, a case-by-case approach to the problem of amnesties serves the interest of justice more than a per se rule.

Before concluding this section, it is worth noting that the conundrum posited by the application of international law by national legal

³⁴⁵ Of course, the exercise of prosecutorial discretion raises its own set of problems. Cf. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003). Indeed, a Danish public prosecutor was recently criticized for bowing to political pressure by refusing to arrest a visiting Russian general, Anatoly Kulikov, accused of alleged war crimes in Chechnya, given that Chechen Deputy Prime Minister Akhmed Zakayev had been arrested in 2002 following a Russian request to hold him on charges of terrorism. *Denmark Rejects Call To Arrest Visiting Russian General*, AGENCE FRANCE PRESSE, Mar. 22, 2005, available in LEXIS, Agence France Presse-English File.

³⁴⁶ Cf. *Hartford Fire Ins. v. California*, 509 U.S. 764, 797-98 (1993); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 612 (9th Cir. 1976).

systems is not new. All legal systems involving multiple and overlapping courts must address this problem, and it is a particularly interesting feature of both horizontal and vertical transjudicial process. As an example, consider the doctrine elaborated by the United States Supreme Court to govern the application of state law by federal courts. In the case of *Erie Railroad Co. v. Tompkins*,³⁴⁷ the Court held, as is well known, that federal courts sitting in diversity were required to apply state law to decide the case before them.³⁴⁸ The Court was later faced with the question, similar to our problem here, of what the state law governing a case included. That is, if New York law was to be applied to govern the tort liability of a particular defendant, should New York's statute of limitations apply to the case, or was the federal court free to apply its own law to the problem? In a series of sometimes vexing decisions, the Supreme Court suggested that many factors would govern whether state or federal law would apply, in particular relying upon whether the application of one or the other would be outcome determinative,³⁴⁹ or bound up in the rights and obligations created by the state law to be applied.³⁵⁰ Thus, if the state law question was "substantive," state law applied. If it was simply procedural, federal law applied. The Court has often suggested that the purpose of the *Erie* doctrine, aside from its constitutional underpinnings, was to avoid "forum shopping" and the "inequitable administration of the laws."³⁵¹ *Erie* and its progeny have plagued first-year law students ever since its elaboration, but there is no doubt that federal and quasi-federal systems in which many courts may potentially hear a case need to systematize the situation and balance the competing interests involved if the legal rules sought to be enforced are not to be undermined by inconsistent and widely varying application.

The European Court of Justice has developed similar doctrines governing the application of European law by national courts. (This is *Erie* in reverse.) Faced with the disparate application of EU law by national courts, the ECJ has, through a set of complex and sophisticated cases, developed doctrines that require national courts to apply EU law, but allow them a certain degree of discretion in how they do so. A central point in the ECJ's jurisprudence, however, which *Erie* underscores, is that a national court's application of procedural rules to an EU cause of action may not discriminate against the application

347 304 U.S. 64 (1938).

348 *Id.* at 78.

349 *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

350 *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535 (1958).

351 *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

of Community law, or completely vitiate the substantive right, nor render the right impossible to exercise in practice.³⁵²

The relationship between EU courts and national courts, and between federal and state courts in the United States are of course quite different than the diffuse and relatively informal links that characterize the relationship of national courts to each other, to other international tribunals such as the ICTY and ICTR, and to the ICC and the ICJ. The treaties establishing the European Communities and the European Union form a nascent constitution constraining the member states, the communities and the EU in a much more formal and legal relationship than exists in the international arena. Similarly the balance between the federal and state courts in the United States is governed by a written constitution. Nevertheless, as the international legal system matures, and takes on its own constitutional form, it may be instructive to consider case law elaborated in two well developed two-tier legal systems as a guide to doctrines that might ultimately be useful to international criminal law.

2. Before International Courts and Tribunals

The international jurisprudence on the subject appears uniform on this point: domestic amnesties, whatever their legality *ab initio* cannot immunize an accused faced with prosecution before an international court. It is interesting to note that the courts so opining have yet to provide much in the way of a *ratio decidendi* for their holdings;³⁵³ however, it is this author's contention that national amnesties have no play before international courts for at least two reasons. First, as the Special Court for Sierra Leone hinted in its opinion, the problem of frictions between sovereigns in a horizontal relationship of full equality simply does not exist in the international context. Second, given the primacy and hierarchical status of the norms as *jus cogens*, it has been true since the Nuremberg trials that international courts exercising (international) universal jurisdiction have not been bound by municipal law that would serve as an obstacle to prosecution. That is, the holdings of the ICJ and the SCSL, as well as the many national court decisions and commentaries to the same effect, rest on an understanding of the international legal order as autonomous from and existing in a vertical relationship to (at least for these purposes) sovereign states. Thus, the status of amnesties for *jus cogens* crimes,

352 PAUL CRAIG & GRÁINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS 214–15 (2d ed. 1998).

353 More may be coming soon from the International Court of Justice in the case of *Congo v. France*.

while seemingly banal, raise fundamental questions concerning the structure and function of the global constitutional order.

B. The Effect of Transnational Amnesties (Exile) for Jus Cogens Crimes

The question posed by this section is a simple one: what is the legal status of an individual accused of a *jus cogens* crime, who has sought and been given refuge in a third state? This is not so much a question of international law but of common sense: the short answer appears to be that the individual may benefit from the grant of asylum within the state of refuge under the constitutional system in place there, but presumably could not travel with his immune status, for it would cease to have any effect outside the territory of the state of refuge. (Returning to the Idi Amin example raised at the beginning of this Article, it will be recalled that the Ugandan government stated that he would be arrested if he returned from his exile in Saudi Arabia.) Given that criminal laws are generally laws of territorial application, surely it cannot be that granting immunity to Charles Taylor in Nigeria, for example, or to Idi Amin in Saudi Arabia, affects the prescriptive jurisdiction of the territorial state. Thus, the effect of a transnational amnesty (exile) in the territorial state (or presumably any third state as well), would appear to be null. Similarly, as is the case with domestic amnesties before international courts, presumably any grant of exile has no legal effect before an international court (as the SCSL held by implication in the Charles Taylor case).

C. The Effect of International Amnesties for Jus Cogens Crimes

The question arises whether individual responsibility for the commission of international crimes can be abrogated by treaty or even by the Security Council itself. As regards the effect of an "amnesty treaty" in national courts, some interesting questions arise. Although there is some contention on this point, it is currently the practice of the United Nations to reject amnesty for crimes against humanity and genocide (and presumably serious violations of international humanitarian law, as well).³⁵⁴ We have, of course, already seen that amnesty is disfavored in state practice and by international courts. Moreover, most international criminal law treaties, particularly the Rome Statute, the Genocide Convention, the Torture Convention, the Grave Breaches provisions of the Geneva Conventions, and many antiterrorism treaties arguably prohibit amnesties by their requirement that offenders must be punished. Thus, presumably this problem will not

354 Robinson, *supra* note 20, at 483.

surface extensively. However, if immunity is granted pursuant to a Treaty to which the forum state is not a party, it is difficult to see why it should or would apply. Indeed, implicit in the amnesty opinion of the SCSL, is a holding that the agreement is binding upon the parties—just not upon the Special Court. Thus, in principle it seems possible that states could bind themselves by an international agreement to that effect, not to engage in criminal prosecutions of each others nationals, even for the commission of *jus cogens* crimes. On the other hand, given that the crimes are covered by peremptory norms of international law, and that most international instruments either defining them or creating adjudicatory mechanisms state that a duty to prosecute such crimes exists, it may be that such a treaty is against international public policy and would be as void as a treaty permitting the commission of those crimes in the first place.³⁵⁵ As we saw above, in such cases, although the amnesties might be enforceable in the territorial state, presumably they would have no effect in a third state or before an international court or tribunal.

But if we suppose that the Security Council has in some way countenanced the grant of exile, or, acting pursuant to its Chapter VII powers, ordered an amnesty the question becomes quite difficult. If the Resolution is adopted pursuant to Chapter VII of the Charter and directed to all Member States, pursuant to Article 25 of the Charter, all states would be required to comply with the amnesty agreement.³⁵⁶ The question, of course, remains whether such a resolution would be *ultra vires*. (And of course, even if it were beyond the Council's powers, would any remedy be available to a state wishing to contest the Council's actions?) This possibility appears much more probable than an "amnesty treaty" because the recent practice of the Security Council has been to accept (at least in some cases), language in Council resolutions that may immunize nationals of certain countries from prosecution for the commission of *jus cogens* crimes. The most recent example is Resolution 1593, which grants contributing states exclusive jurisdiction over their nationals for all "alleged acts or omissions arising out of or related to operations in Sudan."³⁵⁷ In this case, even the territorial state has been deprived of jurisdiction, and even if the contributing state declines to investigate allegations of war crimes.

355 Cf. Vienna Convention, *supra* note 32, art. 53.

356 U.N. Charter art. 25.

357 S.C. Res. 1593, *supra* note 172, ¶ 6. Earlier resolutions include Resolution 1497, adopted by the Council on August 1, 2003, to address the threat to peace and security in Liberia, operative paragraph 7 of which is substantially identical to Resolution 1593, *see* S.C. Res. 1497, ¶ 7, U.N. Doc. S/RES/1497 (Aug. 1, 2003), and Resolution 1422, *see* Sec. Res. 1422, ¶ 1, U.N. Doc. S/Res.1422 (July 12, 2002).

Even when acting under Chapter VII, the Security Council is limited to the powers granted it pursuant to the U.N. Charter, and the ICJ has suggested that its actions are not above the law.³⁵⁸ On the other hand, the ICJ has never invalidated a Security Council Resolution.³⁵⁹ Moreover, Article 16 of the International Criminal Court's Statute appears to grant the Council a role in criminal prosecutions in conjunction with its mandate to promote international peace. Article 16 provides that the Council may stop a prosecution from proceeding (for one year) by requiring an affirmative vote from the Council to that effect.³⁶⁰ This may suggest that the granting of an amnesty is somehow perceived by the international community as properly within the ambit of the Council's powers; or, given how narrowly it constrains the Council, it could be seen as only a small concession to the Council granted to cover an emergency situation. Certainly, a territorial state might wish to challenge such a Security Council Resolution; as to the amnesty's status before an international court, it is unclear how the International Criminal Court, for example, would treat an amnesty imposed pursuant to Security Council Resolution, although the court would presumably think hard before disregarding it out of hand.³⁶¹

358 Order with Regard to Request for Indication of Provisional Measures in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3 (Apr. 14); (Libyan Arab Jamahiriya v. U.S.), 1992 I.C.J. 114 (Apr. 14).

359 The ICJ has however affirmed its competence to decide whether U.N. organs have acted in conformity with the Charter when the issue arises in the normal course of its judicial functions. See, e.g., Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1970 I.C.J. 16, 45 (Jun. 21).

360 This provision was relied upon by the United States to bring about the adoption of Resolution 1422 (renewing the U.N. peacekeeping mission in Bosnia) on July 12, 2002, which provided that no personnel from a state not party to the Rome Statute could be brought before the International Criminal Court for a twelve-month period, pursuant to Article 16 of the International Criminal Court Statute. S.C. Res. 1422, *supra* note 357, ¶ 1; see Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 on the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503, 1511 (2002). It was renewed over the objections of several states one year later as Resolution 1487, U.N. Doc. S/RES/1487 (June 12, 2003), and in 2003, following the Abu Ghraib prison scandal, when other members of the Council voiced determined opposition, the Resolution was withdrawn.

361 See Scharf, *supra* note 132, at 522–24.

CONCLUSION

Societies in transition are messy places, in which delivering justice is a difficult, laborious and often frustrating process. Large numbers of perpetrators, overwhelmed institutions, poverty, and weak social cohesion may make the process of bringing perpetrators to book extraordinarily difficult, even impossible, particularly in the most ideal forum, the country in which the crimes were perpetrated. In such a case, international assistance, and probably international prosecutions, will be a vital component of restoring peace and combating impunity. Indeed, international law may take on a pivotal role, offering “an alternative construction of law that, despite substantial political change, is continuous and enduring.”³⁶²

Yet international criminal justice is not and should not be a “one size fits all” proposition, nor is it a panacea for the world’s ills. The South African experience suggests that although the criminal law is an important tool, where a society is able to come together in a democratic process and engage in deliberation concerning the fate of perpetrators of atrocities under a former regime, some of which may be prosecuted, others not, that decision should be respected. Yet the exception must not be substituted for the rule: both state and international practice now suggest that exile and amnesty is a largely unacceptable response to the commission of *jus cogens* crimes.

Although it may be, as the Special Court for Sierra Leone has intimated, that amnesties, even for the commission of *jus cogens* crimes, are lawful in the territorial state, a proposition that appears increasingly tenuous, the cases to date have unanimously concluded that the amnesties cannot “travel” with efficacy to other jurisdictions, and, in particular, are without force before international courts and tribunals. Indeed, whether that practice has crystallized as an absolute *legal* prohibition seems of decreasing importance, given the transnational legal process of norm construction that increasingly renders it politically and socially unacceptable (even if not illegal *per se*) in virtually all cases to promote impunity. The current practice of some governments, and particularly the United States, to reject accountability in certain circumstances thus appears either opportunistic or maybe even cynical, representing not so much a real challenge to this emerging norm of international law and politics, but an assertion of raw power. As such, offers of asylum to Saddam Hussein and Charles

362 Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2028 (1997).

Taylor, for example, do not evince the emergence of a new paradigm but instead constitute unacceptable exceptions to the rule.³⁶³

As suggested by the cases studied in this Article, individuals, as well as societies, appear to seek justice just as intently as they seek peace. Survivors pursue their tormentors across long periods of space and time, often waiting years until conditions permit their cause to be heard. As a result, the efforts by international negotiators to swap amnesty for peace appear to offer little more than a temporary respite for international criminals, and have little staying power outside the country where negotiated. Moreover, what longitudinal case studies we have suggest that our intuitions about amnesties for the commission of atrocities are correct—that they promote a culture of impunity in which violence remains the norm rather than the exception. In light of these practical realities, arguments that amnesties may contribute to or be necessary for peace seem to have little moral or persuasive force. Finally, there is some evidence that the credible threat of punishment may in time affect the behavior of perpetrators, making international criminal justice an important component of constraining inter and intra-state violence and the commission of atrocities.

States and the international community have important, independent and mutually reinforcing roles to play in this process. As the international legal system matures with the inevitability wrought by the process of globalization, and its constitutional structure emerges, international criminal law has become an important arena in which boundaries between national legal systems and the international legal order are being continuously negotiated and tested in a fascinating example of transnational legal process. International courts have been called upon to consider the validity of national amnesties and have issued important decisions reflecting upon the status and import of international legal norms. National courts have also played an important role in this dialogue, considering not only the opinions of sister tribunals but their international brethren. Although less the subject of this Article, national legislatures have entered the fray as well, debating the proper scope and application of laws based upon universal jurisdiction, and the desirability and importance of prosecuting international crimes. Emerging from this study is an extraordina-

³⁶³ Exceptions that not even the United States has seriously maintained, given that Saddam Hussein has been turned over to the Iraqi Special Tribunal for trial, and the U.S. government has come under increasing pressure to do something about bringing Charles Taylor before the SCSL. Ken Guggenheim, *Bush Urged To Take Action on Ex-Dictator*, ASSOCIATED PRESS, Apr. 9, 2005, available in LEXIS, Associated Press Online.

rily complex picture of "law in action"—of courts considering not only the importance of accountability in the interest of justice, but of appropriate limits on their own extension of power through the development and application of doctrines of comity, subsidiarity and complementarity. In this way, the global constitution is being constructed, bit by bit, piece by piece—neither exclusively from the top down, nor entirely from the bottom up—but up, down, and even sideways—all at the same time.