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REVOLUTIONS IN ACCOUNTABILITY: NEW APPROACHES TO PAST ABUSES

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INTRODUCTION

This essay examines the burgeoning development of international criminal law, focusing on the rise in prosecutions far from the locus of the original crimes, particularly through the exercise of universal jurisdiction. It surveys contemporary practice and argues that while generally this exercise is a positive development, disparities in practice, as well as the risk that practice may have negative effects elsewhere generate reason for concern.[1] Part II argues for a practice that is more consistent across jurisdictions and for caution in the application of universal jurisdiction.[2] It examines the virtues and vices of executing justice at a distance in comparison to executing justice locally. Part III argues for attentiveness to the local needs of societies where mass atrocities or gross human rights violations may occur and where distant justice is utilized.[3] Next, this essay considers one alternative to externalized justice—the mixed tribunal.[4] In such cases, prosecutions take place in the location where the crimes occurred, include international judges and often include internationally determined rules and procedures. This approach, however, also brings with it certain risks and limitations. Part VI of this essay concludes with some reflections on the great strides, but

1. *See infra* Part I (examining the uneven developments in the application of universal jurisdiction).

2. *See infra* Part II (arguing that inconsistent applications of universal jurisdiction undermines the legitimacy of the doctrine).

3. *See infra* Part III (examining the potential ramifications for transitional societies, and asking whether there are unintended adverse effects of the usage of universal jurisdiction). *See generally* Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452 (1999) (looking at general prospects for and developments in international criminal accountability); Chandra Lehka Sriram, *Universal Jurisdiction: Problems and Prospects of Externalizing Justice*, 12 FINNISH Y.B. INT'L L. 1, 47-70 (2001) (discussing the problems of distant justice and universal jurisdiction); Ruth Wedgewood et al., *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120 (2001) (providing an overview of the extensive debate over the appropriate role of international versus domestic courts); *Accountability for War Crimes: Progress and Prospects: Hearing Before the Commission on Security and Cooperation in Europe*, 106th Cong. (1999) (examining the International Criminal Tribunal for the former Yugoslavia and efforts to hold suspected Yugoslav war criminals accountable in U.S. courts), *available at* http://www.house.gov/csce (last visited Oct. 12, 2003).

4. *See infra* Part IV.A (examining the tribunal in East Timor).

also limitations, in the development of international criminal accountability.

A. UNIVERSAL JURISDICTION: THE INTERNATIONAL COMMUNITY AND DOMESTIC CRIMES

"Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings with respect to certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim."[5] This principle only applies to a limited number of crimes.[6] These crimes include war crimes, crimes against humanity, genocide, and torture. This principle also includes slavery and, for historical reasons, piracy.[7] The prosecutions against Augusto Pinochet Ugarte in Spain and Ariel Sharon in Belgium are two of the most famous examples of the use of universal jurisdiction to punish a defendant for crimes committed far from the nation and court seeking to try him or her.[8]

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5. International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 2 (2000) [hereinafter *Final Report*], *available at* http://www.ila-hq.org/pdf/Human%20Rights%20Law/HumanRig.pdf (last visited Oct. 28, 2003). *See generally* Universal Jurisdiction Information Network, *What is Universal Jurisdiction?* (providing an overview of universal jurisdiction versus other types of jurisdiction), *at* http://www.universaljurisdiction.info/index/72646,74575 (last visited Oct. 13, 2003).

6. *See* PRINCETON UNIVERSITY, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (Stephen Macedo ed., 2001) [hereinafter PRINCETON PRINCIPLES] (stating that universal jurisdiction is criminal jurisdiction based solely on the nature of the crime).

7. *See id.* at 29 (listing the serious crimes under international law and asserting that national judicial organs may apply universal jurisdiction to such crimes, even if national legislation does not provide for it).

8. *See* Chandra Lekha Sriram, *Exercising Universal Jurisdiction: Contemporary Disparate Practice*, 6 INT'L J. HUM. RTS. 49 (2002) (giving a broad survey of recent cases asserting universal jurisdiction, and noting the variance in its application); *see also Belgium Bars Sharon War Crimes Trial*, BBC NEWS, June 26, 2002 (reporting a Belgium court's ruling that the case against Ariel Sharon could not be brought because he was not in Belgium), *available at* http://news.bbc.co.uk/1/hi/world/europe/2066808.stm (last visited Oct. 14, 2003); *Belgian Court Ruling Throws Doubt on Sharon Trial*, HAARETZ.COM, Apr. 16, 2002 (discussing how a Belgium court found that no prosecution can be brought against a person in abstentia), *at*

B. A DELICATE BALANCE: UNIVERSAL JURISDICTION AND NATIONAL SOVEREIGNTY

The exercise of universal jurisdiction may constitute a significant challenge to national sovereignty, and may constitute a limitation on the principle of non-interference in the internal affairs of states.[9] Jurisdiction has historically been tied closely to territorial sovereignty, with quite limited exceptions for extraterritorial application.[10] With the exception of universal jurisdiction, extraterritorial application of jurisdiction has tended to require a nexus with the state seeking to try a case. There are four other commonly cited bases for extraterritorial jurisdiction: 1) territorial, basing jurisdiction upon the place where the offense was committed or had its effects; 2) national, based upon the nationality of the offender; 3) protective, based upon injury to the national interest; 4) and passive personality, based upon the nationality of the victim.[11] Limitations upon extraterritorial jurisdiction derive from respect for sovereignty, and they are made in large part to avoid jurisdictional conflicts and to ensure consistency and predictability. While it is important not to interfere unduly in the internal affairs of states in times of transition, this essay suggests that the exercise of universal

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http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=152850&contrassID=1&sul (last visited Oct. 14, 2003).

9. *See* U.N. CHARTER art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.").

10. *See* M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., forthcoming 2003) (manuscript at 39, 39-63) (articulating the relationship between sovereignty and the jurisdictional powers to prescribe, adjudicate, and enforce).

11. *See* United States v. Yunis, 681 F. Supp. 896, 899-903 (D.D.C. 1988) (describing the five traditional bases of jurisdiction over extraterritorial crimes). *See generally* Thomas M. Franck & Michael J. Glennon, FOREIGN RELATIONS & NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 212-15 (2d ed. 1993) (discussing cases dealing with jurisdictional issues in the United States).

jurisdiction may be particularly unsettling for transitional regimes.[12] This essay examines the burgeoning practice of universal jurisdiction, as well as the broader phenomenon of "globalizing" justice, and the ramifications of this developing practice.[13] After surveying contemporary practice of universal jurisdiction, Part II turns to the disparate practice, discerning three trends in developing jurisprudence: 1) pure universal jurisdiction, 2) universal jurisdiction "plus", and 3) non-use.[14] This essay argues that the disparities in practice should raise serious concerns as to the legitimacy and perceived legitimacy of such globalized justice.[15] Part III then examines a further consideration that globalized justice may fail to achieve many of its putative goals because it takes place far from the locus of the crime and is thus "externalized."[16] It examines the possibility, then, that certain alternative forms of globalized justice may rectify some of the problems. For example, mixed tribunals in a country, or other methods whereby internationalized justice takes place, may be viable alternatives.

The next section examines contemporary practice with regard to a wide array of countries, conflicts, and abuses, through cases filed in a smaller number of countries. While the attempt, now foreclosed by revisions to the Belgian legislation, to prosecute current Israeli Prime Minister Ariel Sharon in Belgium is perhaps one of the most

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12. *See* Nehal Bhuta, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499 (1999) (noting that a "frequently reiterated reason for opposing the extradition, and one adverted to by Lord Lloyd in the first Appellate Committee decision, is that prosecuting General Pinochet threatens to destabilize Chile's successful transition from military rule to civilian government"), *available at* http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/MULR/1999/20.html?query=%7e (last visited Oct. 14, 2003).

13. This essay will focus on only one method through which cases may be heard in domestic courts for faraway crimes. I do not examine the Alien Tort Claims Act, the Torture Victims Protection Act, or other legal tools in European countries.

14. *See infra* Part II (identifying and examining three distinct approaches to the use or non-use of the principle of universal jurisdiction).

15. *See infra* Part III (arguing that the needs of transitional societies are complex and may militate for or against punishment).

16. *See id.* (examining the needs of victims and noting the benefits of truth commissions).

newsworthy cases of the exercise of universal jurisdiction, it is far from the only one.[17] Universal jurisdiction, a part of customary international law, is included in some national legislation, international conventions, and judicial decisions. States, such as Belgium and Spain, are increasingly exercising universal jurisdiction to address crimes in places as far away as Chile and the Democratic Republic of Congo ("DRC").[18]

Part I examines several recent cases involving universal jurisdiction and demonstrates the wide variance in national approaches.[19] Courts often refer to several alternative bases for jurisdiction under international law, claiming competence based on passive personality—the nationality of the victims of crimes.[20] States

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17. *See* Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES, Mar. 28, 2003, at A8 (reporting that a group of Lebanese Palestinians filed a suit against Ariel Sharon in Belgium on charges of war crimes and due to Israel's inability to prevent mass killings in Israeli-occupied Lebanon in 1982); *see also* Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, N.Y. TIMES, Feb. 12, 2003, at A12 (reporting a Belgium court's ruling that Brussels could try Ariel Sharon for war crimes under the national law, but not as long as he enjoyed the immunity of his office as Prime Minister). *See generally* Press Release, Human Rights Watch, Belgium: Anti-Atrocity Law Limited but Case Against Ex-Chad Dictator Can Move Forward (Apr. 5, 2003) (reporting that in February 2003, the Belgian Supreme Court upheld the Belgian law which permits victims to file complaints in Belgium for abuses committed abroad, but held that sitting state officials, like Ariel Sharon, had immunity from Belgian courts), *available at* http://hrw.org/press/2003/040belgium040503.htm (last visited Oct. 14, 2003).

18. *See* Sriram, *supra* note 8, at 57-67 (providing a survey of cases applying the principle of universal jurisdiction including proceedings against Argentine junta members in Spain and proceedings against the Democratic Republic of the Congo's Minister of Foreign Affairs in Belgium).

19. *See infra* Part I (examining cases in countries including Belgium, France, and the United Kingdom).

20. *See* United States v. Yunis, 681 F. Supp. 896, 901-03 (D.D.C. 1988) (analyzing whether the passive personality principle offered the court a potential basis for jurisdiction in a case of hostage-taking and aircraft piracy); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 5, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases: (a) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.").

often also utilize a web of domestic legislation used to incorporate international criminal law of a customary or treaty-based nature in order to fulfill their obligations under relevant treaties and to enact effective domestic legislation.[21] Such legislation often makes reference not only to universal jurisdiction, but also, or rather, to passive personality.[22] This usage of universality as well as alternative bases of jurisdiction appears to be increasingly common, and is described by some as universality plus.[23]

National judges have taken radically different approaches to the exercise of universal jurisdiction. The Spanish court explicitly invoked universal jurisdiction, domestic legislation implementing international treaties and norms, and passive personality jurisdiction due to the existence of Spanish victims.[24] By contrast, the Belgian magistrate addressing the *Pinochet* case found jurisdiction based on customary international legal obligations and universal jurisdiction.[25] Clearly, practice is developing unevenly.

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21. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 5, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.").

22. *See, e.g.*, 18 U.S.C. § 2332a (2003) (criminalizing the use of a weapon of mass destruction against U.S. citizens and property in the United States and abroad); *id.* § 2441 (criminalizing war crimes when committed against nationals of United States).

23. *See* Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 10 (manuscript at 214, 216) (asserting that states' preference for universality plus may have "significant implications for the development of a broad consensus in support of principles governing the exercise of universal jurisdiction").

24. *See* Sriram, *supra* note 8, at 52 (describing the proceedings in Spain and noting that the complaint alleged Spain had jurisdiction "through a combination of domestic and international law, to address crimes of genocide, torture, and terrorism").

25. *See id.* at 55 (describing the proceedings against Pinochet in Spain and noting that "[t]he investigating magistrate found that the prohibition of crimes against humanity was part of customary international law and *jus cogens* and, thus,

Pure universal jurisdiction is the boldest and least common approach, which is best exemplified by the Belgian legislation and jurisprudence. In a few cases, domestic judges have pursued criminals for crimes established in international conventions, or that form part of *jus cogens*.[26] These judges did not feel the need to rely upon additional domestic legislation, although in the case of Belgium, at least, such legislation is available. These recent instances of pure universal jurisdiction are striking but still rare and it remains unclear whether they are anomalies or represent a trend in practice. These cases represent the boldest use of universal jurisdiction; in other cases judges have been more tentative and have relied on statutes providing for more traditional forms of extraterritorial jurisdiction along with universal jurisdiction.

Judges in national courts have usually been more comfortable combining what is to them a novel basis for jurisdiction with more familiar bases like those linked to a state's territory or interests.[27] Legislation providing for extraterritorial jurisdiction over those accused of serious crimes under international law may become more expansive, and perhaps more consistent, as nations seek to conform to their obligations as signatories to the International Criminal Court ("ICC") Statute; Belgium and Canada are among the nations that have already made such revisions.[28] In these types of cases, judges

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part of the Belgian legal order even prior to the applicability of international conventions.").

26. *See id.* at 56 (noting that in proceedings against Pinochet in Belgium, the court did not principally rely on international conventions or domestic implementing legislation). The court stated: "For these reasons we find, as a matter of customary international law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, authorizing national judicial authorities to prosecute and punish perpetrators in all circumstances." *Id.*

27. *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159 (1993) (discussing the general wariness in the application of international law and custom by domestic judges), *available at* http://www.ejil.org/journal/Vol4/No2/art2.html (last visited Dec. 12, 2003). *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-13 (4th ed. 1990) (defining *jus cogens* as customary principles of international law that are so overriding that states cannot set them aside "by treaty or acquiescence but only by the formulation of a subsequent customary rule of contrary effect").

28. *See* A. Hays Butler, *The Growing Support for Universal Jurisdiction in National Legislation*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE

utilize universal jurisdiction plus. They may seek to assert jurisdiction in accord with specific provisions of domestic legislation that provide explicitly for extraterritorial application of criminal legislation, or with domestic legislation incorporating provisions of treaties that provide for such jurisdiction, or with domestic criminal legislation. In some of these cases, judges simultaneously maintain that jurisdiction could be based additionally or solely on universal jurisdiction.

Finally, the more common practice is of non-use or non-application of universal jurisdiction. Some courts have considered the possibility that universal jurisdiction might provide them with competence to enforce international law, but then balk at that possibility and ultimately rely on domestic legislation or on passive personality as a basis for jurisdiction. In some states judges continue to rely upon ordinary domestic criminal legislation to pursue the accused. Where they seek extraterritorial jurisdiction, they prefer to rely on traditional territorial connections to establish it, such as is provided when the accused allegedly committed a crime against a national in a foreign state. In the absence of legislation broadening extraterritorial jurisdiction over those accused of committing serious international crimes, judges are often reluctant to exercise universal jurisdiction.

While others have raised concerns elsewhere with regard to the use of external judicial processes, the exercise of universal jurisdiction may be of greater concern than the application of international criminal law through institutions such as the ad hoc criminal tribunals or the recently established ICC.[29] Two reasons

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PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 10 (manuscript at 67, 67-76) (comparing domestic legislation before the pre and post ICC, and considering more restrictive legislation).

29. *But see* Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 13-67 (2001) [hereinafter *High Crimes*] (raising concerns about the International Criminal Court ("ICC") and arguing that the states that are most likely to be "implicated in serious international crimes are the least likely to grant jurisdiction over their nationals to an international court"). However, Madeline Morris raises concerns about the impact of the ICC on non-party states in this issue. *See* Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court*, 12 FINNISH Y.B. INT'L L. 1, 109-18 (2001) [hereinafter *Democratic Defect*] (expressing concern about the impact of the ICC on non-party states).

exist for this: 1) the exercise of universal jurisdiction may not take sufficient account of local needs; and 2) by taking place at a great distance from the locus of the crimes, it may fail to serve many of the putative purposes of prosecution.

Part III addresses the potential ramifications of using universal jurisdiction for transitional societies, asking whether it serves the needs of these societies, and whether there are unintended adverse effects of its usage.[30] The impact may be harmful precisely because the purpose of universal jurisdiction is not explicitly to serve the needs of the society affected by the crime. The needs of these societies are varied and may militate for or against punishment. In most instances the relevant considerations include not only the culpability of the criminal, but also other societal needs. These include stability, democratization and the rule of law, reconciliation, and social learning, all of which require thorough address of local actions.[31] Doing justice elsewhere may serve retributive purposes, may speak to the culpability of the criminal, might serve deterrent purposes and certainly is part of a process of reinforcing and elaborating upon global human rights norms, but it is far less clear that it will have positive effects upon the needs of the society itself.[32]

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30. *See infra* Part III (stressing the importance of identifying specific political needs of transitional societies).

31. *See* Chandra Lehka Sriram, *Truth Commissions and Political Theory: Tough Moral Choices in Transitional Situations*, 18 NETH. Q. HUM. RTS. 4, 471-92 (2000) [hereinafter *Truth Commissions*] (drawing on the political theories of utilitarianism, deontoligical liberalism, and communitarism to explore whether pursuing justice in transitional societies is favorable); CHANDRA LEHKA SRIRAM, JUSTICE VS. PEACE OF TRANSITIONS: CONFRONTING PAST HUMAN RIGHTS VIOLATIONS (forthcoming 2004) [hereinafter JUSTICE VS. PEACE] (providing a general account of the myriad goals, normative and political, that transitional societies might pursue and those who seek to aid them in order to have the desired local impact) (manuscript on file with the American University International Law Review).

32. *See* Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 19 (2001) (examining the impact of the American and European cases on the victims in the countries where abuses occurred); *see also* Roland Paris, *Peacebuilding and the Limits of Liberal Internationalism*, 22 INT'L SEC. 54, 54-89 (1997) (discussing broad skepticism about the liberal paradigm that guides external aid to transitional processes and peace building).

Pursuing such "globalitarian" concerns may come at the cost of local needs.

"Externalized justice" achieved through the exercise of universal jurisdiction might badly serve or even undermine the needs of transitional societies. However, there should also be cause for concern that it may fail to serve other key demands frequently imputed to judicial processes. It may bring perpetrators to justice, and this goal should not be underestimated, but it may do far worse in terms of deterrence, vindication of victims, and social learning.

C. EXTERNALIZED JUSTICE REVERSED: INTERNATIONALISED INTERNAL PROCESSES

There is reason to believe that while some of the flaws of external justice illustrated by universal jurisdiction may apply to other institutions and processes, such as the international criminal tribunals for the former Yugoslavia and for Rwanda, and in the future ICC, there may be some remedy for external actors who still wish to help societies that have experienced gross human rights violations and war crimes. One might term this "externalization reversed," whereby international actors set up quasi-international processes in the country where the events of concern took place.[33] While this may in part remedy the concerns driven by geographical distance, some lingering legitimacy concerns are likely to remain. Models such as the proposal of a mixed tribunal for Cambodia, and of the Special Court in Sierra Leone, as well as the United Nations-sponsored international tribunal in East Timor may be effective alternatives, but it is too soon to say definitively. In design, at least, they seek to remedy some of the concerns this essay raises with regard to external justice. On the other hand, the experience of the Timor body should engender some concern about the likely efficacy of externalisation reversed. Part IV examines the flaws of the mixed tribunal model through the Timorese case, and speculates on the implications of this analysis for other mixed tribunals such as those of Sierra Leone or the one proposed for Cambodia.[34]

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33. *See* Chandra Lekha Sriram & Brad R. Roth, *Externalization of Justice: What Does it Mean and What is at Stake?*, 12 FINNISH Y.B. INT'L L. 1, 3-6 (2001) (addressing reverse externalization).

34. *See infra* Part IV (discussing mixed tribunals).

This is not to suggest that the pursuit of international justice is not in itself a noble goal, and one that may often be achieved. Certainly it is not to suggest that "realism" or "pragmatism" should trump the rule of law and justice. Rather it is to call for caution in pursuing international justice, particularly external justice. Strategies for accountability must consider short-term needs of societies where crimes occurred, of victims of these crimes, and broader ramifications for deterrence of future crimes and the legitimacy of the principles they seek to uphold. At the same time, these strategies must address the longer-term needs of communities and of human rights more broadly.

I. UNEVEN DEVELOPMENTS IN THE CONTEMPORARY PRACTICE OF UNIVERSAL JURISDICTION

A. BACKGROUND: UNIVERSAL JURISDICTION AND RESPONSIBILITY

In recent years, growing numbers of cases have been brought outside the territory of states where such crimes have occurred, but they have not always met with success, partly because of the continued ability of the accused to evade arrest and prosecution.[35] While attempts by a Spanish magistrate to gain custody of former Chilean dictator Augusto Pinochet Ugarte drew significant international attention, as have cases brought against Henry Kissinger and Ariel Sharon, the principle of universal jurisdiction is part of customary international law.[36] It applies to a variety of

35. *See* A. Hays Butler, UNIVERSAL JURISDICTION: A COMPILATION OF DOCUMENTS (2000) (providing a survey of cases that have been brought in European and other states not only against Pinochet, but also for crimes, *inter alia*, in Rwanda and the former Yugoslavia); *see also* Sriram, *supra* note 8, at 57-66 (discussing proceedings involving the exercise of universal jurisdiction, including the proceeding in Spain against former Argentine junta members and proceedings in Senegal against the former ruler of Chad, Hissene Habre).

36. *See* Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT'L L. 829, 836 n.14 (2000) ("[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 law so

international crimes in connection with customary international proscriptions, a variety of international legal instruments, domestic legislation, and alternative bases for jurisdiction.[37] Victims have invoked the principle of universal jurisdiction in order to initiate legal proceedings for crimes committed in places as varied as Chad, Rwanda, Bosnia-Herzegovina, Kosovo, Argentina, Chile, and Suriname.[38]

Courts often simultaneously refer to alternative bases for jurisdiction under international law, claiming competence based on passive personality, or the nationality of the victims of crimes.[39] States also utilize a web of domestic legislation in order to incorporate international criminal law of a customary or treaty-based nature and to fulfill their obligations under relevant treaties to enact effective domestic legislation. Such legislation often makes reference not only to universal jurisdiction, but also, or rather, to passive personality.[40] This usage of universality as well as alternative bases

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as to infringe a *jus cogens*. 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.").

37. *See* United States v. Yunis, 681 F. Supp. 896, 899-903 (D.D.C. 1988) (analyzing whether the passive personal principle offered a basis for the court's jurisdiction over the hostage-taking and aircraft piracy charges against Yunis). The court also assessed its jurisdiction under domestic law, including the Hostage Taking Act, 18 U.S.C § 1203, as well as the Destruction of Aircraft Act, 18 U.S.C. § 32. *See id.* at 904-09; *see also* PRINCETON PRINCIPLES, *supra* note 6, at 29 (stating that a judicial body of any state may exercise universal jurisdiction in connection with serious crimes under international law such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture).

38. *See* Sriram, *supra* note 8 (providing a survey of recent cases involving the application of universal jurisdiction to seek accountability for crimes that took place in another jurisdiction).

39. Newer international criminal law treaties sometimes confer such competence by consent among signatories. *See* Convention Against Torture, *supra* note 20, art. 5(1)(c) (stating that State Parties shall take necessary measures to establish jurisdiction offenses enumerated in article 4 in the cases "[w]hen the victim is a national of that State if that State considers it appropriate").

40. *See, e.g.*, *Yunis*, 681 F. Supp. at 899-907 (asserting the court's jurisdiction over Yunis based on the universal jurisdiction and passive person jurisdiction principles). The court quotes the Hostage Taking Act, 18 U.S.C. § 1203, which provides that "a defendant is properly chargeable for offenses occurring outside the United States if . . . the offender or the person seized or detained is a national of the United States." *Id.* at 904.

of jurisdiction appears to be increasingly common, and is described by some as universality plus.[41]

In essence, under universal jurisdiction, a state is competent to judge an accused alleged to have committed certain international crimes and found in its territory.[42] Unlike other bases for jurisdiction, such as passive personality, specific contacts with the state seeking to assert jurisdiction are not required.[43] The nationality of the victims and the location were the crimes took place is not relevant; such jurisdiction over international crimes enables states to fulfill treaty commitments to try or extradite individuals suspected of certain crimes. Such ample jurisdiction is generally justified on the grounds that there are certain crimes under international law that affect the international community or mankind generally, such as genocide, terrorism, war crimes, and torture.[44] Some claim that such jurisdiction signals that certain crimes are so heinous that they both threaten the international community and are forcefully condemned by it; it is in the interests of justice everywhere that perpetrators be brought to justice.[45] At the same time, the general principle is often asserted that immunity of states and officials does not hold where the crimes alleged are certain international crimes, such as genocide or slavery.[46] This becomes important when potential defendants attempt to claim immunity as heads, or former heads, of state. While the decision by the International Court of Justice ("ICJ") in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic*

41. *See* Orentlicher, *supra* note 23 (asserting that universality plus is the current trend among states' preferences).

42. *See Final Report*, *supra* note 5, at 2 (noting that the principle of universal jurisdiction may entitle or even require a state to prosecute an individual for crimes regardless of where they happened).

43. *See id.* at 2-3 (explaining universal jurisdiction and the rationale behind the principle).

44. *See id.* at 5-9 (listing examples of crimes subject to universal jurisdiction).

45. *See id.* at 3 (nothing that another justification for universal jurisdiction is its deterrent effect).

46. *See* Sriram, *supra* note 8, at 50-52 (providing a survey of cases exercising universal jurisdiction including cases against heads or former heads of states such as Augusto Pinochet Ugarte).

Republic of the Congo v. Belgium)[47] did affirm foreign minister immunity, the court has not yet accepted a similar claim by DRC in the *Case Concerning Certain Criminal Proceedings in France (Democratic Republic of the Congo v. France)*.[48]

As the examination of a wide array of contemporary cases here clearly indicates, national judges find different ways to confront the problem of addressing the serious crimes which may fall under universal jurisdiction. For example, while the Spanish court seeking the extradition of Augusto Pinochet Ugarte of Chile claimed that Spain could assert universal jurisdiction, it also relied upon passive personality jurisdiction. Domestic legislation implementing international treaties and norms were the basis for the bulk of the arguments.[49] By contrast, the Belgian magistrate addressing the *Pinochet* case found jurisdiction based on customary international legal obligations and universal jurisdiction in the absence of domestic implementing legislation or passive personality.[50] Clearly, practice is developing unevenly, raising several concerns. Such disparities and the concerns they engender make clear the need to rationalize practice.

Concerns raised by such disparities include, but certainly will not be limited to, questions of fairness, of legitimacy, and of competing jurisdictions. Certainly, it will seem transparently unfair, especially

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47. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (discussing how the International Court of Justice ruled that Belgium must cancel an international arrest warrant against the former Congolese Minister for Foreign Affairs), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm (last visited Dec. 13, 2003).

48. *See* Certain Legal Proceedings in France (Dem. Rep. of the Congo v. France), 2003 I.C.J. 129 (July 11) (stating how the International Court of Justice rejected the indication of provisional measure submitted by Republic of Congo), *available at* http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm (last visited Oct. 15, 2003).

49. *See* Sriram, *supra* note 8, at 53 (providing that the Spanish court determined that it had jurisdiction under the Law on Judicial Powers, "which established Spanish competence to examine certain acts proscribed by international conventions (including the Genocide Convention) whether committed by Spaniards or foreigners outside national territory").

50. *See id.* at 56 (reporting that the Belgian court held that the acts constituted crimes against humanity, and even without treaty-based obligations, the court, as well as all courts, had a common responsibility to punish such acts).

to the victims of repressive regimes, that certain individuals are more likely to escape accountability because the courts of a country in which they seek refuge, passage, or medical treatment hold to a narrow basis for jurisdiction. Further, it has not escaped the notice of many that the states seeking to apply universal jurisdiction are largely countries of the "global north," prompting some to suggest that these activities are illegitimate and even that they imply a degree of neo-colonialism. Finally, as we have already seen in the *Pinochet* case, numerous states might seek to assert jurisdiction over the same individual. Reconciling these competing claims will be further complicated by the absence of coherent principles and the presence of multifarious grounds for jurisdiction.[51]

While it might be the case that such practice converges over time, an overview of the case here demonstrates that this has yet to happen. This underscores the importance of developing consistent, hopefully progressive, principles and practice. It is beyond the purview of this essay to resolve competing state interests or to identify what the principles should be. The primary purpose here is to present the current range of practice as a foundational step to enable further discussion and the refinement to proceed.

B. THE PINOCHET CASES: SPAIN, THE UNITED KINGDOM, AND CHILE

The procedures seeking to bring General Augusto Pinochet Ugarte to justice for killings, torture, disappearances, and genocide during his rule have taken place in several countries in recent years.[52] Because many articles address the *Pinochet* case in detail,[53] this

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51. *See* Orentlicher, *supra* note 23 (manuscript at 233-37) (assessing competing claims to jurisdiction).

52. *See generally* Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927 (1999) (providing an overview of the *Pinochet* case, including his arrest and the evidence underlying the warrant for his arrest), *available at* http://muse.jhu.edu/journals/humans_rights_quarterly/v021/ (last visited Oct. 12, 2003).

53. *See* Richard Falk, *Assessing the Pinochet Litigation: Whither Universal Jurisdiction?, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 10

section will only briefly summarize the proceedings against him in Spain, the United Kingdom, and Chile.

1. Proceedings in Spain

On July 4, 1996, the Union Progresista de Fiscales ("UPF"), a group of Spanish prosecutors, brought a complaint against Pinochet and others in a penal chamber of the Spanish Audiencia Nacional for crimes against humanity and genocide committed between 1973 and 1990.[54] The complaint laid the groundwork for factual and legal claims that others would use in subsequent actions against Pinochet.

The complaint addressed actions occurring between the coup that carried Pinochet and his junta to power in Chile on September 11, 1973 through the return of the country to democratic rule in April 1990. It alleged that the Pinochet regime kidnapped, detained, tortured, killed, or "disappeared" individuals supportive of the deposed regime, and subsequently protected its members through the 1978 self-amnesty legislation and the institution of "Senator-For Life" status for Pinochet.[55]

The complaint alleged that Spain has jurisdiction, through a combination of domestic and international law, to address crimes of genocide, torture, and terrorism. Under the Spanish Law on Judicial Power, Spanish courts are competent to hear cases addressing these crimes though they occur outside Spanish territory and regardless of

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(manuscript at 97, 97-120) (assessing the short-term and long-term ramifications of the Pinochet legal proceedings).

54. *See* Derechos Chile, *Chronology – 1996* (noting the date on which Spanish prosecutors brought the complaint against Pinochet), *at* http://www.chipsites.com/derechos/1996_eng.html (last visited Dec. 16, 2003).

55. *See The Withdrawal of Augusto Pinochet's Parliamentary Privileges: Another Brick in the Wall*, ANDEAN NEWSLETTER (quoting from Article 58 of the 1980 Chilean Constitution), *available at* http://www.cajpe.org.pe/informa/mayo2000/E_INF10.HTM (last visited Oct. 13, 2003).

> No representative or senator, beginning on the day of his election or appointment, or on the day of his incorporation, whichever is the case, can be tried or deprived of his liberty, except in the case of crime detected by authority, if the court of appeals of the respective jurisdiction, as a matter of law, does not previously authorize the charges, declaring that there is due cause. *Id.*

whether a Spaniard or a foreigner commits them.[56] Thus, the argument under domestic law was that Spain could address these crimes even if there was no killing of a Spanish citizen in Chile, although, as the complaint and subsequent judicial orders emphasize, there were in fact Spanish victims.[57] It was also claimed that Spain has a sovereign interest in the cases due to the presence of Spanish victims; and it was further claimed that this undermined the Chilean junta's self-amnesty, which could only have legal effect, if at all, in Chile. Domestic legislation was not the only ground articulated for the exercise of jurisdiction by Spain. The complaint turned to international law as a further basis to pursue crimes through universal and other bases for jurisdiction.[58]

Crimes committed under Pinochet were also said to constitute crimes of genocide under the 1948 Genocide Convention, and of torture.[59] The Convention Against Torture does not allow for defenses such as obedience to superior orders or official status,[60] and under the International Covenant on Civil and Political Rights

56. *See* Fiona McKay, Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide 37 (Redress 1999) (noting that Article 23 "confers jurisdiction on Spanish courts over crimes committed outside Spain"), *available at* http://www.redress.org/publications/UJEurope.pdf (last visited Nov. 5, 2003).

57. *See* Falk *supra* note 53 (manuscript at 97-120) (dealing more extensively with the court's bases for jurisdiction, both under domestic and international law).

58. *See* MCKAY, *supra* note 56, at 38-39 (providing a summary of the bases for jurisdiction the Audiencia Nacional considered).

59. *See* Sriram, *supra* note 8, at 5 (providing an overview of the laws addressed in the complaint against Pinochet); *see also* Genocide Convention, *supra* note 21, art. 1 (stating that "Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish"). Spain incorporated the Convention on the Prevention and Punishment of Genocide into the Spanish Penal Code with Law 44/71 of 15 November 1971. *See* Sriram, *supra* note 8, at 68 n.15.

60. *See* Convention Against Torture, *supra* note 21, arts. 1.1, 2.3 (defining torture and stating that "an order from a superior officer or public authority" cannot serve as a justification for torture); *see also id.* arts. 4-5 (discussing the measures that countries should take to punish torture and stating the extent of a state's jurisdiction over such crimes).

("ICCPR") there is no immunity for persons acting in an official capacity.[61]

The complaint requested that the ministries of justice and external affairs provide further information on all of the cases of Spanish citizens and others who were killed or who disappeared in Chile during this period, as well as identify judicial processes that were, or were not, pursued for these acts.[62] It called for a rogatory request to the United States to obtain information in government archives regarding such crimes, for freezing the assets of the accused, and if appropriate, for the issuance of international arrest warrants.[63] The complaint also requested extradition of those responsible to Spain under the treaty of judicial assistance and extradition between Spain and Chile.[64]

Late in 1998, Judge Baltasar Garzon of Investigating Court Number Five determined that Spain had jurisdiction to hear allegations of genocide and torture that took place under Pinochet's leadership, and in November 1998, the Criminal Division of the Spanish National Court unanimously upheld his ruling.[65] The Chilean

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61. *See* International Covenant on Civil and Political Rights, Oct. 5, 1977, 999 U.N.T.S. 171, 6 I.L.M. 368 art. 2.3(a) (1966) [hereinafter ICCPR] (ensuring that a person whose rights have been violated is entitled to an effective remedy "notwithstanding that the violation has been committed by persons acting in an official capacity").

62. See *The Criminal Procedures Against Chilean and Argentinean* Repressors in Spain: A Short Summary (Nov. 11, 1998) [hereinafter *Criminal Procedures in Spain*] (reviewing the content of the 1996 complaint), *at* http://www.derechos.net/marga/papers/spain.html (last visited Dec. 16, 2003).

63. *Id.*

64. *See* Treaty on Extradition and Judicial Assistance in Criminal Matters, Apr. 14, 1992, Spain-Chile, art. 1, 1854 U.N.T.S. 122 (stating that the Contracting Parties undertake the responsibility to extradite persons being sought by the other state's judiciary).

65. *See* Derechos Human Rights, Spain-Chile: Writ of the Instructing Court accepting the Jurisdiction of the Pinochet case (Sept. 20, 1998) [hereinafter Writ of the Court] (relying on the Convention on the Prevention and Punishment of Genocide and the International Pact on Civil and Political Rights, the Central Investigatory Court determined that Spain had the jurisdiction to judge crimes of genocide and torture), *available at* http://www.derechos.org/nizkor/chile/juicio/jurie.html (last visited Oct. 11, 2003); *see also* Wilson, *supra* note 52, at 950-65 (describing the court's reasoning in finding jurisdiction).

government objected vehemently to this assertion, arguing that Spanish courts were not competent to judge allegations of crimes against humanity committed in third countries and that Pinochet had immunity as an ex-head of state and had parliamentary immunity as a "Senator-for-Life."[66]

In October of 1998, despite Chilean objections and acting on information regarding Pinochet's presence in the United Kingdom for medical treatment, Judge Garzon ordered Pinochet to provisional imprisonment, issued an extradition request, and an international arrest warrant allowing for his extradition from the United Kingdom to Spain for trial.[67] He also ordered the freezing of Pinochet's assets and those of other accused criminals.[68]

Building on preliminary facts alleged in the complaints, facts provided by the Chilean National Commission on Truth and Reconciliation, and a 1982 Spanish parliamentary investigation, the Spanish court determined that the alleged acts could constitute genocide, terrorism, and torture. It held that such acts are subject to judicial action under domestic and international law and are subject to universal jurisdiction under a number of interpretations.[69] Further, the court claimed extraterritorial jurisdiction under the Law on Judicial Power, which established Spanish competence to examine certain acts proscribed by international conventions, including the Genocide Convention, whether committed by Spaniards or foreigners outside national territory.[70]

Additionally, judicial orders provided that Spain had power to address the crime of genocide under the Genocide Convention,

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66. *See* Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999) [hereinafter Pinochet II] (summarizing Chile's anticipated argument regarding immunity).

67. *See Criminal Procedures in Spain, supra* note 62 (discussing the procedural history of actions against Pinochet in Spain).

68. *See Pinochet Assets Frozen*, BBC NEWS ONLINE (May 15, 2001) (addressing the freezing of the assets of Pinochet), *at* http://news.bbc.co.uk/go/em/fre/-/1/hi/world/americas/1332560.stm (last visited Dec. 16, 2003).

69. *See* Writ of the Court, *supra* note 65 (granting jurisdiction to hear the case, even though the alleged crimes occurred abroad).

70. *See id.* (noting that the international community has the obligation to "preserve the right to live").

which Spain incorporated into its domestic law in 1971.[71] The court further found the proscription of genocide to be *jus cogens*.[72] It also found that if Spain had jurisdiction over crimes of genocide and terrorism, which also encompasses torture, then it had jurisdiction over crimes of torture as defined in the Convention Against Torture.[73]

2. Extradition Proceedings in the United Kingdom

On October 17, 1998, British authorities arrested Pinochet based on Judge Garzon's arrest warrant.[74] Along with his claims of

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71. *See id.* ("The crime of genocide is defined in the Convention of the 9th of December of 1948, and this definition has been included in our own Judicial Code, through the law 44/1971 of 15 November, as a consequence of our adherence to the Convention.").

72. *See Criminal Procedures in Spain, supra* note 62 (describing findings that Pinochet's actions were subject to universal jurisdiction because genocide is considered to be a *jus cogens* principle).

73. *See* Writ of Court (recognizing universal jurisdiction for torture under article 5.1). The International Covenant on Civil and Political Rights also prohibits torture. *See* ICCPR, *supra* note 61, art. 7 ("No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."). The Convention Against Torture also provides that states will take measures necessary to ensure jurisdiction when, for example, the victim is a national of that state. *See* Convention Against Torture, *supra* note 21, art. 5 ("Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases: (a) When the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate.").

74. *See* Pinochet II *supra* note 66; *see also* Regina v. Bow Street Stipendiary Magistrate and Others Ex Parte Ugarte, [2000] 1 A.C. 61 (H.L. 1998) [hereinafter Pinochet I] (noting that on October 16, 1998, a Metropolitan Magistrate issued a provisional warrant for Pinochet's arrest pursuant to section 8(1)(b) of the Extradition Act of 1989, and issued a second warrant on October 22, 1998 based on the application of the Spanish Government, which did provide a hearing for Pinochet), *available at* http://www.derechos.net/doc/hl.html (last visited Oct. 11, 2003). *See generally*, Bhuta, *supra* note 12 (providing an account of the Pinochet proceedings in the United Kingdom, and examining the national security doctrine and state violence in Latin America); Amnesty International, United Kingdom: The Pinochet Case—Universal Jurisdiction and Absence of Immunity for Crimes against Humanity (Jan. 1999) (providing an account of the Pinochet case, including how the acts alleged in the case amount to crimes against humanity, an

immunity, Pinochet claimed he had never been a subject of Spain, and thus alleged that an extraditable crime was not identifiable.[75] A somewhat complex process followed in which the Chilean government intervened in the British proceeding, arguing that it involved an exercise of jurisdiction over Chilean subjects contrary to international law.[76] The Chilean government also argued that the proceedings directly affected Chilean "rights," including its transition to democracy and its relations with the United Kingdom and Spain. It argued that the Chile was the appropriate place to judge Pinochet, and asserted national "sovereignty" as specifically alleged immunity for ex-heads of state.[77] In support of these claims, the government cited practice and policy related to non-interference in the "sovereign" acts of nations. The Law Lords concluded that ex-head of state immunity did not apply in the case of certain international crimes such as torture, hostage taking, and other grave crimes.[78] Pinochet, however, brought an appeal to set aside the decision based upon links between one of the Law Lords and Amnesty International. A reconstituted panel held that while ex-

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explanation of universal jurisdiction over crimes against humanity and torture, and an overview of criminal responsibility under international law of heads of state for crimes against humanity), *available at* http://web.amnesty.org/library/index/ENGEUR450011999 (last visited Oct. 22, 2003).

75. *See* Pinochet II, *supra* note 74 (citing decrees establishing him as president of the junta and as head of state).

> Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed. *Id.* at 582.

76. *See* Christine M. Chinkin, *International Decision: United Kingdom House of Lords: Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 93 AM. J. INT'L L. 573, 704 (1999) (providing an account of the legal process against Pinochet, starting with Magistrate Baltasar Garzon's initiative to take advantage of Pinochet's presence in the United Kingdom to seek his extradition to Spain).

77. *Id.*

78. *See* Pinochet II, *supra* note 74, at 592-93, 596-97 (discussing the issue of sovereign immunity under the Vienna Convention on Diplomatic Relations). The interpretation of the State Immunity Act 1978 of the United Kingdom was also relevant to the court's decision. *Id.* at 593, 597, 603.

heads of state did enjoy immunity in the United Kingdom with respect to the exercise of official functions, torture could not fall under that rubric.[79] It imposed a significant temporal limitation under domestic law, limiting crimes to those occurring after the United Kingdom ratified the Convention Against Torture in 1988.[80] After that date, any torture committed outside the United Kingdom is also a crime in the United Kingdom. Conspiracy in Spain to murder someone in Spain was also found to be an extraditable crime.[81]

Home Secretary Jack Straw authorized extradition proceedings on December 9, 1998, and although he reconsidered the matter in light of the massive reduction of extraditable charges, he confirmed his decision on April 15, 1999.[82] He reversed this stance in March 2000, due to Pinochet's health, specifically his mental fitness to stand trial.[83] Pinochet returned to Chile on March 3, 2000 amidst significant outcry from other states and human rights organizations.[84]

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79. *See id.* at 583 (reasoning that Pinochet's official duties could not encompass acts of torture as defined under the Convention Against Torture).

80. *See id.* at 582, 613 (concluding that a court cannot apply the Convention Against Torture retroactively to make torture a crime in the United Kingdom before it was ratified in 1988).

81. *See id.* at 582-88 (explaining that dual criminality generally requires that an act be a crime in the United Kingdom at the time of commission and at the time that extradition was sought). Charges were upheld treating conspiracy in Spain to murder someone in Spain as an extraditable crime of terrorism under the European Convention for the Suppression of Terrorism. *Id.* at 588.

82. *See* Letter from Jack Straw about the Extradition of Pinochet, Derechos Human Rights (Apr. 15, 1999) (observing that the Secretary of State had taken careful account of the representation presented by the legal representative of Senator Pinochet, the Spanish Government, the Chilean Government, and legal representatives for the "Interveners," and had issued the new Authority to Proceed), *available at* http://www.derechos.org/nizkor/chile/juicio/straw.html (last visited Oct. 11, 2003). The English Court was in agreement with the decision to allowing the proceedings against Pinochet. *See* Derechos Human Rights, Judgment of the English Court Allowing the Extradition of Pinochet (Oct. 8, 1999) (allowing the extradition of Pinochet), *available at* http://www.derechos.org/nizkor/chile/juicio/extra2.html (last visited Nov. 5, 2003).

83. *See Jack Straw's Full Commons Speech*, GUARDIAN UNLIMITED, Jan 12, 2000 (reporting on the Secretary of State's remarks that "[t]he unequivocal and unanimous conclusion of the three medical practitioners and the consultant neurophysiologist was that, following recent deterioration in the state of Senator Pinochet's health, which seems to have occurred principally during September and October 1999, he is at present unfit to stand trial, and that no change to that

3. Proceedings in Chile

Pinochet's return to Chile did not mark the end of legal action against him. Charges were filed in Chile for a number of killings of political prisoners in 1973, which sought to hold Pinochet responsible for actions of his official delegate, General Sergio Arellano Stark.[85] The first hurdle the prosecution faced was the parliamentary immunity Pinochet held as "Senator-for-Life." Proceedings would have to first strip him of that immunity. On June 5, a Santiago Court of Appeals did just that.[86] The defense appeal of this ruling reached the Chilean Supreme Court, which upheld the stripping of Pinochet's immunity.[87] In December, a judge charged Pinochet with kidnapping and ordered his arrest, but this Supreme Court overruled this decision, while leaving open the possibility of recommencing action against Pinochet at a later time.[88]

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position can be expected."), *available at* http://www.guardian.co.uk/pinochet/Story/0,11993,194674,00.html (last visited Oct. 22, 2003).

84. *See Belgium Human Rights Groups Challenge Pinochet Medical Exam*, CNN.COM, Jan. 25, 2000 (reporting that Belgium and six human rights groups filed petitions Tuesday with the court, seeking judicial review of the medical advice that influenced British Home Secretary Jack Straw to allow Pinochet to return to Chile), *available at* http://www.cnn.com/2000/WORLD/europe/01/25/britain.pinochet.02/ (last visited Oct. 22, 2003).

85. *See* Amnesty International, *Pinochet Case: Step by Step Towards Justice*, June 6, 2000 (praising the Santiago Court of Appeals decision to lift Pinochet's parliamentary immunity), *at* http://web.amnesty.org/library/Index/ENGAMR220122000?open&of=ENG-CHL (last visited Oct. 22, 2003); Press Release, Human Rights Watch, Questions and Answers on the Return of Pinochet to Chile (2000) (providing an account of the status of the cases against Pinochet in Chilean courts), *available at* http://www.hrw.org/press/2000/02/pinq&a.html (last visited Oct. 22, 2003).

86. *See Chilean Court Strips Immunity from Pinochet*, CNN.COM, June 5, 2000 (explaining how Pinochet was stripped of his immunity), *at* http://www.cnn.com/2000/WORLD/americas/06/05/pinochet/ (last visited Dec. 18, 2003). Curiously, these proceedings were not directly based on universal jurisdiction.

87. *See* Clifford Krauss, *Pinochet Reportedly Stripped of Immunity in Secret Vote*, N.Y. TIMES, Aug. 2, 2000, at A4 (reporting on the Chilean Supreme Court's decision).

88. *See* Clifford Krauss, *High Court Voids Charges for Pinochet; Sets New Date*, N.Y. TIMES, Dec. 21, 2000, at A11 (reporting that the Chilean Supreme

4. Proceedings against Pinochet in Other Countries

a. Proceedings in France

Upon Pinochet's arrest in the United Kingdom pursuant to a Spanish warrant, several French victims filed complaints in October 1998, requesting the initiation of proceedings against him in France for crimes against humanity, kidnapping, torture, and disappearances.[89] French courts issued two international arrest warrants concerning five cases.[90] In two others the domestic statute of limitations barred the cause of action.[91] Previous decisions had already established that under French law, universal jurisdiction does not exist for crimes against humanity.[92] However, under international law, France could have jurisdiction in cases involving torture where the accused is later present in France, and its enforcement competence would generally be based on territoriality. Nonetheless, under the penal code passive personality jurisdiction can apply for acts committed outside France against a French victim by a foreigner.[93] France has refused to characterize the acts committed as

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Court affirmed the decision of an appeals court, stating since the investigative judge failed to obtain a detailed deposition, the judge improperly ordered Pinochet's house arrest).

89. *See* Brigitte Stern, *International Decision: French Tribunal de Grande Instance (Paris)*, 93 AM. J. INT'L L. 696, 696 (1999) (discussing a warrant issued on Nov. 2, 1998, which related to the disappearance of three French citizens in Chile under Pinochet's rule); *see also* MCKAY, *supra* note 56, at 24 (stating that criminal jurisdiction in France is based on the territorial, active personality, and passive personality principles).

90. *See* Stern, *supra* note 89, at 697 (noting that the first warrant related to three victims, French citizens who were residing in Chile, and the second warrant concerned two French citizens who disappeared in Argentina).

91. *See id.* (noting that Judge Roger Le Loire, juge d'instruction du Tribunal de grande instance of Paris, decided that the relevant statute of limitations barred two of the cases from prosecution).

92. *See* MCKAY, *supra* note 56, at 24 (noting that criminal jurisdiction in France rests on the territorial, active personality, and passive personality principles).

93. *See id.* (noting that articles 113-117 of the French Penal Code state that France retains jurisdiction in cases where a foreigner commits a crime against a French citizen).

genocide, thus such acts are treated under other domestic criminal law and statutes of limitation will bar certain prosecutions.[94]

b. Proceedings in Belgium

Following Pinochet's arrest in the United Kingdom, Chilean exiles filed complaints against him in Belgium.[95] The investigating magistrate found that the prohibition of crimes against humanity was part of customary international law and *jus cogens*, and thus, part of the Belgian legal order even prior to the applicability of international conventions.[96] Referring to the customary obligation to initiate prosecution or to extradite, the magistrate found a direct obligation of Belgian authorities to ensure punishment of such crimes irrespective of where the crime took place. The magistrate found that Pinochet would ordinarily be immune from prosecution in Belgium for actions taken in exercise of his function as a head of state, but held that the crimes alleged, such as torture, could not be official acts under the authority or normal functions of a head of state.[97] While Belgium only enacted implementing legislation for the Geneva

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94. *See id.* at 697-700 (stating that the statute of limitations could bar cases such as murder and torture, whereas the statute of limitations did not bar ongoing crimes such as kidnapping and disappearances).

95. *See* Luc Reydams, *International Decision: Belgian Tribunal of First Instance of Brussels (investigating magistrate)*, 93 AM. J. INT'L L 700, 700 (1999) (stating that the six Chilean exiles residing in Belgium filed a criminal complaint alleging the Pinochet committed crimes under international law, as defined in the Belgian statute which implemented the Geneva Convention and Protocols); *see also* MCKAY, *supra* note 56, at 18 (providing that the 1993 legislation mandated that certain breaches of the Geneva Convention and its Additional Protocols I & II could be tried in Belgium courts).

96. *See* Reydams, *supra* note 95, at 702 (noting that the court determmined that crimes against humanity have become cusotmery international law).

> The concept of crime against humanity has been incorporated in several international documents but these texts codify only a customary law crime. This is proven by the fact that several of these documents were drafted after the commission of the acts . . . we find that, before being codified in a treaty of statute, the prohibition on crimes against humanity was part of customary international law and of international *jus cogens*, and this norm imposes itself imperatively and erga omnes on our domestic legal order. *Id.*

97. *See id.* at 700 (noting that the official function of the head of state is to protect his subjects, and thus the court could not grant immunity for crimes such as torture, murder, and hostage taking).

Conventions and Additional Protocols in 1993, which provided Belgian courts with universal jurisdiction, the court held that the legislation was retroactive because the acts defined in the legislation were already punishable in Belgium as common crimes.[98] The judge also found that the Geneva Conventions and Protocols required the existence of an armed conflict and, thus the 1993 legislation was not applicable to Chilean peacetime oppression.[99] However, the acts were crimes against humanity that were so unspeakable that, even in the absence of treaty-based obligations, punishment was a common responsibility of all states.[100] The decision did not rely heavily upon specific international conventions or domestic implementing legislation, but stated that as a matter of customary international law, or even more strongly as a matter of *jus cogens*, universal jurisdiction over crimes against humanity exists, and authorizes national judicial authorities to prosecute and punish the perpetrators in all situations.[101] In February of 1999, the Belgian Parliament passed legislation establishing universal jurisdiction in Belgian courts over genocide and other crimes against humanity, which included certain forms of systematic torture.[102]

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98. *See id.* at 702 (stating that "when ratifying the Genocide Convention, Belgium did not deem it necessary to implement the Convention in its domestic legislation because 'the principles of the Convention could already be considered part of the Belgian legal order'").

99. *See id.* at 701 (discussing that the magistrate considered the available information about the situation in Chile at the time of the allege crimes, and that there was no internal armed conflict, according to the definition provided in Article 1 of Additional Protocol II).

100. *See id.* (explaining that the court referred to statutes and jurisprudence of the Nuremberg, former Yugoslavia and Rwanda tribunals, municipal statutes, and judicial decisions, and found that there was a prima facie evidence that Pinochet's acts constituted crimes against humanity).

101. *See id.* at 700 (stating that "[c]ustomary international law is equivalent to conventional international law and is directly applicable in the Belgian legal order.").

102. *See* MCKAY, *supra* note 56, at 18 (explaining that the motivation behind the new law was to implement Belgium's obligations under the Genocide Convention and to allow Belgium to take actions against the genocide in Rwanda).

c. Other Various Proceedings

The widow of a Swiss national also filed a complaint and a court in Geneva sought an arrest warrant based on passive personality jurisdiction in October 1998.[103] While Switzerland did request extradition from the United Kingdom, Pinochet's return to Chile foreclosed further proceedings.[104] German citizens filed charges against Pinochet in Germany. In November 1998, the case was assigned to a regional court.[105] However, the jurisdiction was based on passive personality.[106]

On November 26, 1997, human rights advocates and others filed a complaint against Pinochet in Ecuador concerning the deaths of four Ecuadorians during his rule in Chile.[107] The President of Ecuador's Supreme Court was to decide whether to open a summary investigation.[108]

When Pinochet visited Amsterdam in May of 1994, he was spotted and a complaint was filed against him in a Dutch court based on the Convention Against Torture.[109] However, the prosecutor decided not to prosecute, and the Amsterdam Court of Appeal subsequently

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103. *See id.* (reporting that the widow of Alexei Jaccard, a Swiss national who disappeared in Chile in 1977, filed a complaint in Switzerland).

104. *See id.* (noting that Switzerland's extradition request was based on the principle of passive personality).

105. *See id.* (describing the charges brought by German citizens against General Pinochet for alleged kidnapping and ill-treatment in Chile).

106. *See id.* (stating that the German courts did not base competence on universal jurisdiction).

107. *See* Derechos Human Rights, Ecuador: Criminal Complaint Filed Against Augusto Pinochet (Nov. 27, 1997) (summarizing the parties and the charges filed against Pinochet in Ecuador), *available at* http://www.derechos.org/press/chile1.html?pinochet (last visited Oct. 13, 2003).

108. *See id.* (reporting that "Hector Romero Parducci, President of the Ecuadorian Supreme Court of Justice, will have to rule on the opening of a summary investigation and the criminal prosecution of Pinochet as well as other people responsible for these crimes.").

109. *See* MCKAY, *supra* note 56, at 34 (outlining the Criminal Law in Wartime Act, enacted in the Netherlands in 1952, and its implications as well as describing the Dutch case against Pinochet). The U.N. Committee Against Torture later questioned the Dutch about their failure to pursue charges against Pinochet. *Id.* at 35.

upheld the decision on the ground that the case would have faced too many legal hurdles.[110]

C. THE ARGENTINE JUNTA

1. Proceedings in Spain

On March 28, 1996, a group of Spanish prosecutors filed a complaint in Spain against former Argentine junta members and others with regard to disappeared Spaniards in Argentina.[111]

As with charges against Pinochet, the complaint alleged that junta leaders violently subverted the constitutional order through a coup in 1976 and did not reinstate democratic rule until 1983, carrying out a systematic campaign of repression through kidnapping, disappearances, torture, and murder, as well as the illegal adoption of children. The complaint alleged that some thirty thousand persons remain disappeared and that among the disappeared at least thirty-five were Spanish citizens.[112]

As with the Pinochet case, the complaints and subsequent judicial holdings used a mixture of domestic and international, as well as a mixture of customary and conventional law to assert jurisdiction. Spain claimed competence to hear the crimes based upon universal jurisdiction, but also referred to the Spanish citizenship of the disappeared, thereby based jurisdiction on the passive personality principle.[113] The complaint indicated that the acts alleged could

110. *See id.* (noting further that the only case to come before the Dutch courts involved a Bosnian Serb in relation to war crimes committed during the Balkan conflict).

111. *See* Richard J. Wilson, *Spanish Criminal Prosecutions use International Human Rights Law to Battle Impunity in Chile and Argentina* (describing Spanish prosecutors complaint addressing human rights violations in Argentina), *available at* http://www.derechos.org/koaga/iii/5/wilson.html (last visited Dec. 17, 2003).

112. *See id.* ("The action, which began with less than 10 named victims, now includes more than 300 persons of Spanish nationality or their relations lost in the Argentine dirty war.").

113. *See* Writ of the Court, *supra* note 65 (finding that Spanish domestic law recognized universal jurisdiction).

constitute crimes of genocide and terrorism under domestic law.[114] As discussed above, the Law on Judicial Power recognizes universal jurisdiction over crimes of genocide and terrorism. Furthermore, under the Genocide Convention, genocide is a crime subject to universal prosecution and thus can be pursued by Spain whatever the place of commission or the nationality of the perpetrators or victims.[115] The complaint alleged further that pursuing the perpetrators was an exercise of Spanish "sovereignty," as some of the disappeared were Spanish citizens.[116] It also alleged that since no law of a foreign land can act as a limitation on the exercise of sovereign competence, the procedural limitations and pardons granted in Argentina could have no effect on Spanish competence. Furthermore, the Spanish Constitution prohibits general amnesties. The defense of due obedience to orders is generally recognized in Spanish law, but not where orders are clearly illegal.[117] Finally, Article 2 of the Convention Against Torture states that superior orders can not serve as a justification for torture.[118]

The case went forward under Judge Garzon, who affirmed Spanish competence to hear the case on June 28, 1996.[119] Garzon dispatched a rogatory commission under a bilateral treaty of judicial assistance to obtain information from Argentina, and Argentina rejected the request for information due to alleged formal deficiencies in the

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114. *See Criminal Procedures in Spain, supra* note 62 (discussing the arguments asserted in the complaint regarding universal jurisdiction under Spanish law).

115. *See infra* notes 130-131 (asserting that combination of articles 5 and 6 implicitly require Contracting Parties to exercise universal jurisdiction); *see also Criminal Procedures in Spain, supra* note 62 (arguing in the alternative that the Genocide Convention also provides a basis of universal jurisdiction).

116. *See Criminal Procedures in Spain, supra* note 62 (describing the basis for complain by Spanish prosecutors).

117. *See* JUSTICE VS. PEACE, *supra* note 31, at 191-212 (discussing the obedience to orders defense).

118. *See* Convention Against Torture, *supra* note 20, art 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture.").

119. *See* Juicio por los desaparecidos espanoles en Argentina: *Providencia del Magistrado Juez D. Baltasar Garzon*, (Jan. 23, 1997) [hereinafter *Providencia de Juez D. Baltasar Garson*] (stating the response of Argentine Ministry of Foreign Affairs as well as the judge's commentary), *available at* http://www.derechos.org/nizkor/arg/espana/coop.html (last visited Oct. 13, 2003).

request.[120] The proceedings went forward nonetheless and in March and October 1997, Judge Garzon issued orders of unconditional provisional imprisonment against former junta leaders, including Admiral Luis Massera and Leopoldo Galtieri.[121] One of the accused, Adolfo Francisco Scilingo, was taken into custody and Judge Garzon rejected a government request to release him.[122] In October 1998, Judge Garzon issued an order freezing the accounts of the accused and fixing the number of disappeared Spaniards at 330. The next month, Spanish jurisdiction was reconfirmed by the Spanish National Court despite a host of objections,[123] and the next year international arrest warrants were sought through Interpol for forty-eight Argentineans accused of genocide and torture.[124] However, the Argentine government resisted requests for information and detention in Argentina of the extraditable individuals. In September 2000, however, Garzon's attempts to bring Argentine abusers to justice returned to the public eye with the arrest of Ricardo Miguel Cavallo in Mexico under a warrant issued by Garzon for crimes

120. *See id.* (reporting that Judge Garzon requested the intervention of the ministries of justice and external affairs after Argentina rejected a subsequent request for information). *See generally* Treaty on extradition and judicial assistance in criminal matters, Mar. 3, 1987, Spain-Arg., tit. 2, 1579 U.N.T.S. 162, 168-71 (creating the formal procedure for requesting judicial assistance between Spain and Argentina).

121. *See* Isabel Garcia-Zarza, *Spain Holds Scilingo, Orders More Arrests*, REUTERS, Oct. 10, 1997 (covering October 1997 orders by Judge Garzon for more arrests), *available at* http://www.mosquitonet.com/~prewett/spainordersmorearrest.html (last visited Dec. 16, 2003).

122. *See id.* (addressing rationale behind Judge Garzon's rejection of a government request to release Scilingo).

123. *See Criminal Procedures in Spain, supra* note 62 (describing procedures towards establishing jurisdiction over Pinochet in Spanish courts).

124. *See* BBC News, *Argentina Officers Wanted in Spain* (July 9, 2003) (addressing issuance of arrest warrants for additional Argentineans), *at* http://news.bbc.co.uk/2/hi/americas/3052333.stm (last visited Dec. 15, 2003)

committed in Argentina.[125] In June 2003, the Mexican Supreme Court issued an order for his extradition.[126]

Spain was held to have competence under its Law on Judicial Power to pursue certain crimes, whether committed by a national or a non-national and although the crime occurred abroad. According to the court, the acts alleged could legally constitute the crime of genocide under the penal code.[127] The court also determined that crimes alleged could constitute the crime of terrorism even though the legal order that was subverted was Argentinean rather than Spanish.[128] The acts could also constitute crimes of torture under the penal code.[129]

Spain also had competent jurisdiction under international law. While the Genocide Convention does not itself explicitly assert universal jurisdiction for genocide, it does place upon state parties the duty to pursue all crimes of genocide.[130] While article VI of the Genocide Convention only mentions prosecutions in territory where crimes were committed or through international tribunals, this does

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125. *See* Tim Weiner & Ginger Thompson, *Wide Net in Argentine Torture Case*, N.Y. TIMES, Sept. 11, 2000, at A6 (summarizing the filings against Cavallo, the order calling for his imprisonment to allow extradition, and the extradition request itself).

126. *See Argentina Faces "Dirty War" Trial*, BBC NEWS, Jun 11, 2003 (covering the Mexican Supreme Court's issuance of an order for Cavallo's extradition), *at* http://news.bbc.co.uk/2/hi/americas/2980514.stm (last visited Dec. 15, 2003).

127. *See Order of the Criminal Chamber of the Spanish Audiencia Nacional Affirming Spain's Jurisdiction* (Nov. 5, 1998), *in* THE PINOCHET PAPERS 95, 103 (Reed Brody & Michael Ratner eds., 2000) [hereinafter Nov. 5 Order] (recognizing that acts alleged in the criminal investigation constitute genocide, and that consequently Article 23(4) of the Organic Law of the Judicial Branch applied to the case).

128. *See id.* at 104-05 (discussion the applicability of Spanish law to criminalize international terrorism).

129. *See* MCKAY, *supra* note 56, at 37 (noting that Spain incorporated torture into the penal code in 1978).

130. *See* Genocide Convention, *supra* note 21, art. 5 ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.").

not constitute an explicit exclusion of other bases of jurisdiction.[131] Further, according to the court, the duty to pursue criminal responsibility for genocide also constituted a *jus cogens* norm and, thus, was broader than the Genocide Convention.[132] The court interpreted the domestic law as being consistent with the Convention, though it articulated jurisdiction that the Genocide Convention does not mention.[133] Further, the court interpreted Spain's right and duty to prosecute in light of, *inter alia*, the ICCPR, the 1949 Geneva Conventions, the Charter of the International Military Tribunal at Nuremberg, and the Statute of the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[134]

The court also found that domestic procedural bars to prosecution violated *jus cogens* and international treaties to which Argentina was party, and would not be relevant to the assertion of extraterritorial

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131. *See id.* art. 6 (failing to explicitly exlude other bases of jurisdiction, including universal jurisdiction).

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

132. *See* Sriram, *supra* note 8, at 59 (stating that "[t]he court also found that domestic procedural bars to prosecution violated *jus cogens* and international treaties to which Argentina was party, and would not be relevant to the assertion of extraterritorial jurisdiction by Spain.").

133. *Id.*

134. *E.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 194, 6 U.S.T. 3217,75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War,, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 59 Stat. 1544, 82 U.N.T.S. 279; Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159.

jurisdiction by Spain. With the order in June 2003 by the Mexican Supreme Court to extradite accused Argentinean Ricardo Miguel Cavallo to Spain to face charges of genocide and terrorism, at least one significant case arising out of the "dirty war" will proceed.[135]

2. Proceedings in Italy

In 1996, prosecuting attorney Antonio Marini and lawyers for the families of those who disappeared requested that charges be filed regarding 617 Italians who disappeared in Argentina. In early 1997, Judge Claudio D'Angelo authorized the criminal investigation into six murders and two kidnappings of Italian citizens in Argentina imputed to former junta members. Seven people were indicted for murder and kidnapping in May of 1999.[136] In December 2000, an Italian judge sentenced two generals in absentia to life imprisonment and sentenced five other officers in absentia to twenty four years in jail.[137] However, the court did not base its decision on universal jurisdiction, but rather on the penal code, which provides for punishment of Italian or foreign nationals who commit "political

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135. *See Argentine faces 'dirty war' trial*, BBC NEWS, June 11, 2000 (recounting the arrest of Cavallo as well as describing the principle of universal jurisdiction as applied in the Cavallo case), *available at* http://www.news.bbc.co.uk/2/hi/americas/2980514.sm (last visited Oct. 12, 2003). *See generally* Larry Rohter, *Now the Dirtiest of Wars Won't Be Forgotten*, N.Y. TIMES, June 18, 2003, at A4 (noting President Nestor Kircher's, the new Argentine President, views on the 1976-1983 military dictatorship and urging the Supreme Court to take action regarding this case).

136. *See* MCKAY, *supra* note 56, at 31 (explaining the application of domestic law and universal jurisdiction in Italy as a means to address human rights violations). In addition, the article discusses several cases in Italy. *Id.* at 32-33.

137. *See* Amnesty International, Report: Italy (2001) (reporting that "[i]n December, Rome Court of Assizes sentenced two Argentine generals to life imprisonment and five other former members of the Argentine armed forces to 24 years' imprisonment, following their trial in absentia in connection with the abduction and murder of seven Italian citizens and the kidnapping of the child of one them during the years of military rule in Argentina (1976-1983)."), *available at*
http://web.amnesty.org/web/ar2001.nsf/webeurcountries/ITALY?OpenDocument (last visited Oct. 23, 2003).

crimes" abroad. The code limits such crimes to crimes committed against Italian citizens or the state itself.[138]

D. EXAMPLES OF CRIMES COMMITTED IN ONE JURISDICTION AND LEGAL PROCEEDINGS IN ANOTHER JURISDICTION

1. The Alfredo Astiz case

In March of 1990, France convicted and sentenced Argentine captain Alfredo Astiz for the torture and disappearance of two French nuns in Argentina.[139] An international arrest warrant was issued in 1985, but was never executed. However, the French court based its jurisdiction upon claims of passive personality, due to the French nationality of the victims and did not assert universal jurisdiction.[140]

2. Crimes in Honduras: Proceedings in Spain

Billy Joya, a Honduran military officer, fled legal proceedings in his home country where he was accused of torture and illegal detention.[141] Upon reaching Spain, he went into hiding. When he emerged, he requested political asylum, which Spain denied under refugee and asylum legislation that excludes such a status where there is a well-founded reason to believe the applicant has committed, *inter alia*, crimes such as torture and disappearances.[142] In August 1998, a claim filed against Joya in Spain asserted universal

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138. *See* MCKAY, *supra* note 56, at 32 (recognizing that article 8 of Italy's penal code, provides that an Italian or foreign national who commits certain "political crimes" on foreign territory can be punished according to Italian law, at the request of the Minister of Justice).

139. *See id.* (stating that Argentine Captain Alfredo Astiz was convicted and sentenced in absentia).

140. *See id.* (describing the Judgment of the Cour D'Assises de Paris).

141. *See* MCKAY, *supra* note 56, at 40 (stating that Joya was accused of torturing students and being a member of a Honduras death squad).

142. *See* Nicaragua Solidarity for Greater New York, *Weekly News Update on the Americas*, Aug. 9, 1998 (discussing the Spanish government's reaction to Joya's asylum petition), *at* http://www.tulane.edu/~libweb/RESTRICTED/WEEKLY/1998_0809.txt (last visited Dec. 18, 2003).

jurisdiction under the Convention Against Torture, and his capture was requested.[143]

3. Crimes Committed in the Former Yugoslavia

a. Proceedings in France

On July 20, 1993, several Bosnian nationals residing in France filed a complaint in a criminal court in Paris charging war crimes, torture, genocide, and crimes against humanity.[144] Plaintiffs alleged that France had jurisdiction to judge the crimes alleged under domestic and international law. They claimed that the court could hear acts constituting genocide under the Code of Penal Procedure in connection with the Genocide Convention.[145] France was also said to have competence to hear crimes under the European Convention on Human Rights and the 1949 Geneva Conventions.[146]

However, the court rejected claims to French enforcement jurisdiction, citing the Code of Penal Procedure, which legislation incorporating the U.N. Security Council Resolution creating the ICTY (modified on January 2, 1994).[147] The court stated that such

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143. *See Latin America Briefs*, ASSOCIATED PRESS, Dec. 16, 1998 (explaining the claim that brought about Joya's capture), *available at* 1998 WL 23512017.

144. *See* MCKAY, *supra* note 56, at 24 (revisiting the March 26, 1996 ruling of the Cour de Cassion that French courts did not have jurisdiction based on universal jurisdiction in this matter). *See generally* Brigitte Stern, *Universal Jurisdiction over Crimes Against Humanity Under French Law-Grave Breaches of the Geneva Conventions of 1949-Genocide-Torture-Human Rights Violations in Bosnia and Rwanda,* 93 AM. J. INT'L L. 525 (1999) (providing an overview of the proceedings *In re Javor*).

145. *See id.* at 525 (noting that the plaintiffs also invoked international instruments such as the Convention on the Non-Applicability of the Statute of Limitations to War Crimes and Crimes against Humanity of November 26, 1968).

146. *See* Stern, *supra* note 144, at 526 (discussing the rejection of the majority of the Plaintiffs contentions regarding the rationale for France's jurisdiction in this matter). The court found jurisdiction but under French law, stating that Article 689-1 claims passive personality jurisdiction over extraterritorial crimes. *Id.* Furthermore, Article 689-2 establishes jurisdiction over torture, etc., under the Convention Against Torture, where the perpetrator is later found in France. *Id.*

147. *See* MCKAY, *supra* note 56, at 25 (denying jurisdiction of the offenses committed abroad). Article 689-2 was itself enacted to give domestic effect to France's ratification of the Convention Against Torture. *Id.* at 24.

jurisdiction required the material presence of the presumed perpetrator on the territory of France at the time of enforcement.[148] The court also rejected the use of the four 1949 Geneva Conventions to gain jurisdiction on the ground that the duties enumerated therein were too general to directly create competence extraterritorially.[149]

b. Proceedings in the Netherlands

In November 1995, Dutch courts initiated a preliminary inquiry into crimes allegedly committed by Darko Knesevic in the former Yugoslavia. The application alleged that the crimes described constituted violations of the laws and customs of war, in particular, as referred to in the domestic Wartime Criminal Law Act ("WCLA") and under the Geneva Conventions.[150] The examining magistrate concluded in that December that the Netherlands lacked jurisdiction. A decision by the Court of Appeals (Military Division) only partly supported the magistrate's conclusion and determined that the ordinary Dutch courts, rather than the military courts, had competence to hear the case. The Supreme Court of the Netherlands ruled that a Dutch military court could try Knesevic for war crimes on the basis of universal jurisdiction as reflected in the grave breach provisions in the Geneva Conventions.[151]

c. Proceedings in Austria

The first trial on the basis of universal jurisdiction for crimes related to the conflict in the former Yugoslavia took place in Austria. In July of 1994, Austrian courts charged Dusko Cvjetkovic with genocide, murder, and arson.[152] The penal code, which provides

148. *See id.* (reporting that the court denied jurisdiction because the Penal Code only grants jurisdiction where those accused of the crime were "actually present in France").

149. *See id.* (explaining that France had not directly given effect to the Geneva Conventions in codified French law).

150. *See id.* at 35-36 (providing a background for Dutch cases involving universal jurisdiction).

151. *See* MCKAY, *supra* note 56, at 35 (stating that the court upheld the universal jurisdiction provisions under four Geneva Conventions).

152. *See* MCKAY, *supra* note 56, at 16-17 (outlining the background of the case against Cvjetkovic).

Austria the power to apply Austrian criminal law for actions committed abroad—so long as any non-Austrian offender is present in Austria, the offender cannot be extradited to another state, and the act is punishable in the place where it was committed.[153] The court accepted this basis for jurisdiction and considered whether it could assert jurisdiction under the Genocide Convention. The court noted that the Genocide Convention specifies that courts of the state where defendants allegedly committed crimes or international tribunals should try the accused.[154] The court reasoned, however, that since neither venue was currently possible, Austria's failure to exercise jurisdiction would undermine the intent of the Convention.[155] Nonetheless, a jury acquitted the defendant due to insufficient evidence.[156]

d. Proceedings in Denmark

Despite limited provisions in the Danish law for pursuing aliens for crimes committed abroad, Denmark successfully prosecuted a war crimes case against a Bosnian Muslim, Refik Saric, who sought asylum in Denmark.[157] The court based its jurisdiction upon the penal code, which establishes jurisdiction over international crimes when

153. *See id.* at 16 (characterizing Austrian law as particularly wide reaching).

154. *See* Genocide Convention, *supra* note 21, art. 6 (requiring that when an individual is charged with a specified crime in violation of article III, he or she "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

155. *See* MCKAY, *supra* note 56, at 17 (noting that the provision in the Genocide Convention "presupposed that there was a functioning criminal justice system in the state where the crime was committed").

156. *See id.* (noting that the jury's determination that there was a lack of evidence linking the accused role to the Bosnian genocide).

157. *See id.* at 22 (explaining that Article 8(6) of the Danish penal code limits jurisdiction over international crimes to circumstances where another state has requested extradition, it has been refused, and the alleged behavior is a crime under Danish law); *see also* Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L. L. 334, 341 (1999) (stating that the Danish courts based jurisdiction under a law that implemented the Geneva Conventions and tried Saric under municipal criminal law); Peter Ford, *Answering for Rights Crimes*, CHRISTIAN SCI. MONITOR, Oct. 8, 1999, at 1 (reporting that Saric is serving an eight year prison term in Denmark).

an international treaty creates an obligation for Denmark to prosecute, and in this case the Geneva Conventions relative to the Treatment of Prisoners of War Convention and relative to the Protection of Civilian Persons in Time of War obligated Denmark to prosecute the alleged crimes.[158]

e. Proceedings in Germany

German courts have heard four cases related to the conflict in the former Yugoslavia and transferred one at the request of the ICTY. Three other cases have gone forward — one in the Bavarian high court and two in the Dusseldorf high court — resulting in two convictions with the third case still pending.[159] The Bavarian High Court convicted one defendant of aiding and abetting the killing of fourteen persons, but could not establish the requisite intent for genocide.[160] The court based jurisdiction on the German penal code, which deals with crimes for which a court may exercise universal jurisdiction and where an international treaty establishes the obligation to prosecute.[161] The court found jurisdiction in relevant treaty provisions in the Geneva Civilian Convention, and in provisions of the penal code, which provide competence to prosecute

158. *See* MCKAY, *supra* note 56, 22-23 (explaining the justification for prosecution as well as the subsequent conviction and sentencing of Saric); *see also* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 20 U.S.T. 3316, 75 U.N.T.S. 135 (providing that the "High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following article"); *see also* Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 (stating that each "High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts").

159. *See* MCKAY, *supra* note 56, at 29-30 (discussing the cases of Dusko Tadic, who was transferred to the ICTY, Nikola Jorgic and Novislav Djajic, who were convicted and sentenced, and a Bosnian Serb facing proceedings before the Dusseldorf high court).

160. *See id.* at 29 (reporting that Serb soldiers had shot the fourteen victims on a bridge as an act of revenge to terrorize the Muslim population).

161. *See id.* (stating that Article 6.9 of the German Penal Code addresses crimes for which universal jurisdiction applies as a result of an international treaty obligation).

foreigners found in Germany for crimes committed abroad where there has been no request for extradition, such a request was refused, or is not feasible.[162] Another German court convicted a defendant of genocide, also based on the penal code. Even though the Genocide Convention does not explicitly confirm universal jurisdiction, the court determined that it also did not exclude such jurisdiction. Further, the court reasoned that the establishment of the ICTY and Germany's law of cooperation with the Tribunal supplemented universal jurisdiction under international law.[163]

f. Proceedings in Switzerland

In a July 1997 case, Switzerland prosecuted a defendant accused of war crimes in the former Yugoslavia.[164] The Swiss Military penal code provided the basis for the charges, since Swiss prosecutors alleged violations of the laws and customs of war under the Geneva Conventions and the two Additional Protocols.[165] However, due to debates about mistaken identity and other evidence, the court acquitted the defendant.[166] Prior to the verdict, the military tribunal affirmed its competence under the Military penal code, which covers all armed conflicts and thus allows the use of universal jurisdiction.[167]

4. Crimes Committed in Guatemala

The Spanish Supreme Court took a narrow view of the extent to which it could exercise universal jurisdiction with regard to massacres committed by the Guatemalan military against Mayan

162. *See id.* (noting that the court relied on Article 7.2 of the German Penal Code).

163. *See* MCKAY, *supra* note 56, at 30 (discussing that Germany had enacted a Law on Cooperation in relation to the Statute of the ICTY).

164. *See id.* at 41-43 (providing the background for the cases tried in Switzerland).

165. *See id.* 41-42 (noting that the war crimes were committed during the summer of 1992 in Serbian detention camps in North Western Bosnia).

166. *See id.* at 42 (reporting that the defendant claimed he was already in Europe at the time the alleged offense took place).

167. *See* MCKAY, *supra* note 56, at 42 (explaining that the court found itself competent to try the case under Article 109 of the Swiss Military Penal Code).

Indians during their thirty-plus year rule. In a genocide case, the court found, by a narrow margin, that the Spanish courts had no competence to investigate the genocide on the grounds that the courts could only invoke the principle of universal jurisdiction in cases involving special Spanish interests.[168] The court found that such specific interests did not exist, and that Spain could only pursue actions under the Torture convention for an assault on the Spanish embassy in 1980, involving three Spanish nationals.[169] The dissenters responded that those who perpetrate genocide are common enemies of mankind, and that sufficient time had passed without Guatemalan courts addressing these crimes.

5. Crimes Committed in Rwanda

a. Proceedings in France

As with the cases in France pertaining to crimes in the former Yugoslavia, the absence of the accused in French territory frustrated early prosecution attempts for crimes committed during the genocide in Rwanda.[170] An investigating Judge started criminal investigations in a case against Wenceslas Munyeshyaka, a priest accused of crimes against Tutsi refugees, who was on French soil.[171] The penal code

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168. *See* Amnesty International, *Spain/Guatemala: University Jurisdiction Should Apply to Crimes Against Humanity* (Dec. 14, 2000) (noting the decision of the Audiencia Nacional declaring Spanish courts not competent for the time being to hear the case filed in Spain by the Rigoberta Menchú Foundation against former Guatemalan officials), *available at* http://web.amnesty.org/library/index/engEUR410152000?open&of=eng-gtm (last visited Dec. 18, 2003).

169. *See* American Society for International Law, *International Law in Brief* (April 22, 2003) (summarizing the holding of the Supreme Court of Spain in the Judgment on the Guatemalan Genocide Case), *at* http://www.asil.org/ilib/ilib0607.htm#j02 (last visited Dec. 18, 2003).

170. *See* MCKAY, *supra* note 56, at 24 (noting that very few provisions in the French law provide a basis for universal jurisdiction).

171. *See* Stern, *supra* note 144, at 528 (explaining that under French law, in order to charge a person, that person must be on French soil, charges against Munyeshyaka could only begin once he was known to be on French soil); *see also* MCKAY, *supra* note 56, at 26 (noting that the Munyeshyaka decision would not help answer questions regarding French jurisdiction over accused persons with no link to France).

and the Code of Penal Procedure provided the foundation for charges of genocide and other crimes against humanity.[172] The Tribunal de Grande Instance initially declared jurisdiction with regard to claims under the Convention Against Torture, but a court of appeals reversed on the grounds that jurisdiction could be established only for genocide, and that because French courts did not have domestic universal jurisdictional competence for genocide, there could be no jurisdiction for crimes committed in Rwanda.[173] However, the Court de Cassation reversed the ruling, based on subsequent French legislation enacted in relation to the establishment of the International Criminal Tribunal for Rwanda ("ICTR"), and the case is now being heard.[174] Under the later legislation, French law allows prosecution of those who are accused of certain crimes over which there is universal jurisdiction, *i.e.* violations of the laws of war and genocide, and those who are present in France.[175]

b. Proceedings in Belgium

Belgium brought cases against four Rwandans in 1995 for violations of Additional Protocol II to the Geneva Conventions in relation to the genocide in Rwanda.[176] The ICTR requested the transfer of three defendants and a fourth defendant faced the charge of genocide. The court rejected a motion to dismiss on the claim that failure to extradite a defendant to the ICTR indicated a lack of

172. *See* Stern, *supra* note 144, at 527 (noting that the Torture Convention was incorporated into French law through Article 689-2 of the French Code of Criminal Procedure, and therefore, it could serve as a basis for universal jurisdiction).

173. *See* MCKAY, *supra* note 56, at 21 (providing the case history for the case against Munyeshyaka).

174. *See* Stern, *supra* note 144 (discussing the procedural history).

175. *See* MCKAY, *supra* note 56, at 26 (noting that France enacted the new law pursuant to U.N. Security Council Resolution 955 on May 22, 1996).

176. *See id.* at 18 (summarizing the approach to universal jurisdiction in Belgium); *see also* Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 1,1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (creating international protection to victims of intra-territorial conflicts).

evidence to support the charges.[177] Belgium also used the universality principle while requesting extradition of a Rwandan present in Tanzania, who was suspected of killing ten Belgian peacekeepers and Rwanda's former Prime Minister. In May 1999, Tanzania extradited him to Rwanda instead.[178]

c. Proceedings in Switzerland

In July of 1998, Switzerland charged a Rwandan who had been granted political asylum in Switzerland with crimes against humanity, genocide, and war crimes.[179] A military tribunal heard the case, which based charges of genocide and crimes against humanity on customary international law.[180] Switzerland, however, is not a party to the Genocide Convention and charges of war crimes were based on Swiss law. The court rejected jurisdiction over genocide and non-treaty-based war crimes due to the absence of domestic implementing provisions. Nonetheless, the court allowed charges of violations of the Geneva Conventions to go forward, and in April 1999, convicted the defendant of war crimes under these treaties.[181]

6. The Habre Case

Hissene Habre ruled Chad from 1982 to 1990, and, according to a commission of inquiry set up by the current president, his administration was responsible for about 40,000 political assassinations and 200,000 torture cases during his reign.[182] In

177. *See* MCKAY, *supra* note 56, at 20 (explaining that the court dismissed the motion, found evidence that explicitly dealt with the defendant's involvement in the genocide, and ordered the action to continue).

178. *See id.* (noting that Belgium requested the extradition of Bernard Ntuyahaga in connection with killings that occurred in 1994).

179. *See id.* at 42 (examining the proceedings in Switzerland against a Rwandan after an arrest in 1996).

180. *See id.* (explaining that Switzerland based its jurisdiction on customary international law because it was not a party to the Genocide Convention).

181. *See* MCKAY, *supra* note 56, at 43 (reporting that the court sentenced the defendant to life imprisonment).

182. *See Senegal Court Charges Ex-Chad Leader with Torture*, 16 INT'L ENFORCEMENT L. REP. 3, 3 (2000) (reporting that the indictment took place on Feb. 3, 2000); *see also* WORLD ORGANIZATION ON TORTURE USA, *Submission to*

February of 2000, the Dakar regional court in Senegal indicted Habre on charges of torture and political killings and placed him under house arrest.[183] Criminal complaints by individuals as well as the Chadian Association of Victims of Political Repression accused Habre of torture and crimes against humanity, citing Senegal's obligations under the Convention Against Torture and its obligation to prosecute crimes against humanity under customary international law.[184] Filings before the court detailed crimes verified by the Chadian commission of inquiry, a French medical group, as well as other crimes carried out largely by the Security and Documentation Agency, Habre's internal security force.[185] Habre's lawyers objected that Senegal has no jurisdiction over crimes committed in Chad and that the domestic statute of limitations had run.[186] In July of 2000, amid assertions of political interference by Senegal's new president,

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the Supreme Court of Senegal on the Authority and Jurisdiction of Senegal to Criminally Prosecute Hissene Habre, Former President of Chad, For Violations of the Convention Against Torture, Jan. 31, 2001 [hereinafter WOT Submission to Senegal Court] (providing the Supreme Court of Senegal with an analysis of legal principles as they apply to Hissene Habre), *available at* http://www.criminalaccountability.org/SampleBriefs-HabreE.htm (last visited Oct. 22, 2003). *See generally* Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissein Habre*, 16 HARV. HUM. RTS. J. 147, 147-77 (2003) (examining the prosecution of Hissein Habre and analyzing the different roles of those involved with the case).

183. *See Senegal Court Charges Ex-Chad Leader with Torture*, *supra* note 182 (reporting that the indictment took place on Feb. 3, 2000); *see also* Norimitsu Onishi, *An African Dictator Faces Trial in His Place of Refuge*, N.Y. TIMES, Mar. 1, 2000, at A3 (noting that human rights organizations state that Mr. Habre was involved in 97 cases of political killings, 142 cases of torture and 100 cases of disappearance); Editorial, *An African Pinochet*, N.Y. TIMES, Feb. 11, 2000, at A30 (comparing Habre to Pinochet); Press Release, Human Rights Watch, Ex-Chad Dictator Indicted in Senegal (Feb. 3, 2000) (declaring the charging of Habre as a victory for Chad and noting that this was the first time a foreign country had charged a former African head of state with human rights violations), *available at* http://www.hrw.org/press/2000/02/hab023.htm (last visited Oct. 22, 2003).

184. *See* WOT Submission to Senegal Court, *supra* note 182 (providing a factual basis and background for the charges against Habre).

185. *See id.* (noting the mandate of the Security and Documentation Agency was to gather materials concerning Chad's national security, but that the agency coordinated the repression of targeted ethnic and regional grounds, using mass arrests, destroying entire villages, and through summary executions).

186. *See id.* (stating that the lawyers also argued that Habre had immunity as a head of state).

the indicting chamber found that Senegal had no jurisdiction to prosecute torture—a decision that is being appealed.[187] Since then, victims and their families filed at least fifty lawsuits in Chad against the ex-dictator's political police alleging crimes of torture, murder, and disappearances.[188] In the face of ongoing lobbying by international non-governmental organizations ("NGOs") and the U.N. special rapporteurs on torture and on the independence of judges and lawyers, Senegal's President Wade asked Habre to leave the country.[189] It was only with the intervention of UN Secretary-General Kofi Annan that Habre did not leave.[190] There remains some possibility that cases filed in Belgium may yet proceed.

7. Proceedings in the Netherlands Involving Suriname's Military Dictatorship

Suriname, a former Dutch colony, attained full independence in 1975.[191] In February 1980, sixteen non-commissioned officers overthrew what began as a constitutional democracy.[192] They suspended the legislature, dissolved the constitution, and installed a

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187. *See* Editorial, *Justice Denied in Senegal*, N.Y. TIMES, July 21, 2000, at A18 (reporting that the decision that Senegal did not have jurisdiction to prosecute torture abroad was disappointing because Senegal has one of the most independent judiciaries in Africa); *see also* Anthony Faiola, *'Pinochet Effect' Spreading*, WASH. POST, Aug. 5, 2000, at A1 (noticing the increased number of prosecutions being filed for alleged war crimes, and reporting that the new President's intervention in the Habre was a setback).

188. *See* Douglas Farah, *Chad's Torture Victims Pursue Habre in Court; Pinochet Case Leaves Ex-Dictator Vulnerable*, WASH. POST, Nov. 27, 2000, at A12 (noting human rights advocates' and diplomats' surprise that the cases have not been dismissed).

189. *See* Sharp, *supra* note 215, at 171 (noting that the criticism against President Wade was not intended to cause the President to ask Habre to depart).

190. *See id.* (stating that as Habre was effectively under house arrest without pending criminal charge, Annan's request could have raised difficult questions about Habre's rights).

191. *See* U.S. Department of State, *Background Notes: Suriname*, Dec. 2003 (reporting state background information on Suriname, including information about its government, which is a constitutional democracy), *available at* http://www.state.gov/r/pa/ei/bgn/1893.htm (last visited Dec. 16, 2003).

192. *See id.* (stating that the "military-dominated government then suspended the constitution, dissolved the legislature, and formed a regime that ruled by decree").

nominally civilian regime that was in fact run by a member of the military, Desi Bouterse.[193] Under domestic and international pressure to return to civilian rule, the military arrested and killed fifteen opposition leaders in December 1982.[194] Despite international pressure, conflict continued. While the government instituted a new constitution and civilian government in 1987, domestic insurgents did not broker a settlement until 1992. In 1993, Bouterse stepped down as head of the armed forces. The party he founded, however, has continued to succeed in national elections and many of his supporters retain important governmental posts.[195] The government has yet to respond to calls to address past rights abuses. Even though Suriname took part in an independent conference on "truth and reconciliation" in 1998, its participation did not result in substantial action.[196]

Two of the victims' relatives brought proceedings in the Netherlands against Bouterse for the "December killings", resulting in attempts to subpoena Bouterse from Suriname in December 1999.[197] In a March 3, 2000 decree, the High Court of Amsterdam declared that the relatives appropriately served Bouterse and the prosecution went forward. The court rejected the assertion that Bouterse could be tried as a Dutch citizen because his citizenship had

193. *See id.* (noting that Desi Bouterse actually ruled the country, even though a civilian was in the post of president).

194. *See id.* (noting that journalists, lawyers, and trade union leaders were among the prominent opposition leaders killed).

195. *See id.* (stating that Desi Bouterse founded the National Democratic Party in the early 1990s and in May 1996, the party won more seats in the National Assembly than any other party).

196. *See* U.S. State Department, Bureau of Democracy, Human Rights, and Labor, *1999 Country Reports on Human Rights, and Labor* (reporting that there was one incident of extrajudicial killing, police mistreat detainees, guards abuse prisoners, and the judiciary remains ineffective), *available at* http://www.usis.usemb.se/human/human1999/ (last visited Oct. 22, 2003).

197. Gerechtshof Te Amsterdam, Beschikking van 3 mart 2000 van de vijfde meervoudige kamer belast met de behandeling van burgerlijke zaken op het beklag met de rekestnummer R 97/163/12Sv en R 97176/12Sv [hereinafter *Gerechtshof Case*] (Karen Resnick, translator, on file with American University International Law Review).

terminated in 1975.[198] The plaintiffs alleged that Bouterse participated personally in the 1982 torturing and killing of victims. Based on the evidence presented, the court found grounds to open an investigation into Bouterse's responsibility as a perpetrator and turned to the question of jurisdiction.[199] The court recognized the primary responsibility of Suriname to pursue accountability, but pointed out that this was unlikely and that there had been historical ties between the Netherlands and Suriname.[200] Furthermore, there was evidence that at least one of the victims was Dutch and the plaintiffs resided in the Netherlands. The court ruled in favor of the plaintiffs, ruling that it had jurisdiction over the crime against of humanity of torture.[201]

The court expressed doubt about the applicability of allegations of war crimes to the murders, pointing out that there was no protracted armed conflict. It nonetheless requested more information. The court found that despite the relatively small number of victims, the murders might constitute crimes against humanity because they were part of a widespread or systematic attack on the civilian population. The court appointed an expert in customary international law to address a series of questions posed by the decree, including the applicability of extraterritorial jurisdiction under customary international law over non-nationals for crimes against humanity, with subsidiary questions regarding whether the presence of the accused on Dutch soil (which, under customary international law provides general enforcement jurisdiction) or the nationality of the victims would affect the legal outcome. In November 2000, a Dutch

198. *See* AMNESTY INTERNATIONAL, END OF IMPUNITY 90, 99-100 (Nov. 19, 2001) (discussing the history of the Bouterse case), *available at* http://web.amnesty.org/aidoc/ai.nsf/362d2dfa88d393cf80256cbf004dcabe/d30bedf44b02953580256ab90052ddb1/$FILE/ch5.pdf (last visited Dec. 18, 2003

199. *See Gerechtshof Case*, *supra* note 197 (noting that "Bouterse is a serious suspect in the case and must be called before a judge").

200. *See id.* (asserting that Suriname, nor any other state, was likely to iniaite proceedings in the near future, thus, due to the level of the relationship between Surinace and the Netherlands, "[p]rosecution in Netherlands is most favorable").

201. *See* AMNESTY INTERNATIONAL, *supra* note 198, at 100 (ruling in favor of the plaintiffs).

high court ordered prosecutors to open a formal investigation into charges against Bouterse.[202]

8. The Potential Case Against Sharon: Belgian Jurisdiction Extends and Retracts

In 1982 a massacre took place, perpetrated by members of the Israeli military, in Palestinian refugee camps of Sabra and Shatila.[203] The current Prime Minister of Israel, Ariel Sharon, was then defense minister with command responsibility.[204] The Belgian Supreme Court, in early 2003, extended the exercise of universal jurisdiction, and raised the possibility of a case against Sharon when he leaves office. The Court ruled that such a case could take place even in the absence of the accused.[205] The only constraint was head of state immunity while he remained prime minister; thereafter it appeared that Belgium could try him. This decision also opened the way for a possible prosecution of Habre, a prospect made more likely as the Senegalese president offered to hand Habre to another jurisdiction willing to prosecute the case.[206]

Political outcry from Israel and its allies, as well as vocal outrage from the United States over cases filed against General Tommy Franks for alleged crimes arising out of the second war in Iraq subsequently led Belgium to revise its universal jurisdiction

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202. *See* Marlise Simons, *Dutch Court Orders an Investigation of '82 Killings*, N.Y. TIMES, Nov. 26, 2000, sec. 1, at 1 (reporting the efforts of Dutch courts to address the prosecution of the "December murders" of 1982).

203. *See* Marlise Simons, *Sharon Faces Belgian Trial after Term Ends*, N.Y. TIMES, Feb. 13, 2003 (providing background to the announcement of the Belgian Court in its decision regarding the prosecution of Sharon).

204. *See id.* (reporting that an Israeli commission of inquiry conducted in 1983 came to the conclusion that the defense minister, Sharon, was responsible for the events).

205. *See id.* (reporting that the court overturned the lower court's decision which held that an accused person must be present in Belgium before a trial may proceed).

206. *See* Reed Brody, *An Unfinished Assignment for Israelis: Sharon on 1982*, INT'L. HERALD TRIBUNE, Feb. 21, 2003, at 8 (explaining that Israel is angry at the Belgian ruling, which "leaves the way open for an investigation into the alleged role of Ariel Sharon in a 1982 massacre").

legislation.[207] Belgian courts will no longer hear cases where the victim's home state protects the right to a fair trial, and the Ministry of Justice has decided to transfer the case to Israel, subject to a finding that a fair trial would be possible.[208] In June 2003, faced with a threat by the United States to remove NATO headquarters from Brussels, the Belgian government announced that it would only hear cases involving a Belgian national or resident as victim or accused.[209]

10. Democratic Republic of the Congo v. Belgium and Republic of the Congo v. France: Challenging the Extension of Jurisdiction at the ICJ

In April 2000, a Belgian magistrate issued an international arrest warrant, seeking the detention for extradition of the DRC's Minister for Foreign Affairs, Yerodia Ndombasi for alleged crimes constituting serious violations of international law.[210] The DRC filed a case before the ICJ contesting Belgium's jurisdiction and seeking provisional measures to discharge the warrant immediately. [211] The DRC contended that as there was no evidence of jurisdiction based

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207. *See* Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES, Apr. 1, 2003, at A8 (reporting the Belgian response to International critique of its powers of universal jurisdiction); *see also* Press Release, Human Rights Watch, Belgium: Anti-Atrocity Law Limited (Apr. 5, 2003) (stating that subsequent limitations on the universal jurisdictional powers of Belgium will not prevent the case against Habre from continuing), *available at* http://www.hrea.org/lists/hr-headlines/markup/msg00973.html (last visited Oct. 22, 2003). Advocates for the victims have raised the concern that Palestinians will not have access to Israeli courts. *See* Laurie King-Irani, *The Sabra and Shatila Case in Belgium: A Guide for the Perplexed*, ELECTRONIC INTIFADA, June 16, 2003 (arguing that Belgium is sending confusing messages, in part thanks to the media, about who can and who cannot be prosecuted for war crimes), *available at* http://electronicintifada.net/v2/article1568.shtml (last visited Oct. 22, 2003).

208. *See* King-Irani, *supra* note 207 (characterizing the changes in the law as highly politicized).

209. *See Belgium Alters War Crimes Law*, WASH. POST, Apr. 6, 2003, at A18 (reporting that because of the subsequent change in Belgian law, Belgium no longer has a basis for an action against Sharon), *available at* 2003 WL 17426154.

210. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121, para. 3 (Feb. 14) (describing the procedural history of the case).

211. *See id.* para. 1 (alleging that Belgium violated the United Nations' charter when it issued the warrant).

on territory, *in personam* jurisdiction, or harm to the security or dignity of Belgium, grounds for arrest were lacking, and the actions of Belgium violated, *inter alia*, the principle of sovereign legal equality.[212] The DRC contended that a variety of multilateral conventions addressing specific international offenses created universal jurisdiction, but only where the alleged perpetrator was on the territory of the state seeking jurisdiction, and it also asserted diplomatic immunity for the accused.[213] Belgium requested that the ICJ remove the case from its list. In December 2000, the court rejected that request but also refused to take the provisional measure of discharging the warrant requested by the DRC.[214]

In February of 2002, the court issued its decision in the case. Most importantly, it did not explicitly reject the exercise of universal jurisdiction by Belgium. Instead, it found that the exercise in this instance violated of legal obligations of Belgium towards the DRC because it failed to respect the immunity from criminal jurisdiction enjoyed by an incumbent minister under international law. [215] The court did not accept claims that the acts for which the arrest warrant was issued could not be legal acts within the performance of official duties, but rather indicated that the warrant would have undermined the conduct of foreign relations by the minister.[216] The court ordered Belgium to cancel the international arrest warrant.[217] The limitation of the exercise of universal jurisdiction by diplomatic immunity has now been clearly articulated, but gray areas remain, particularly to

212. *See id.* (accusing Belgium of attempting to exercise its authority on the territory of the Congo).

213. *See id.* paras. 4-5 (explaining why the DRC believes that the Belgian warrant violates international law).

214. *See id.* para. 18 (rejecting Belgium's removal request unanimously).

215. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121, para. 73 (Feb. 14) (noting that Congo's submission only addressed the arrest warrant, and that on the final submission, its request was silent as to the broader objection to universal jurisdiction).

216. *See id.* para. 55 (concluding that while in office, a Minister of Foreign Affairs must enjoy immunity in an official as well as a private capacity and that "if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office").

217. *See id.* para. 78 (finding that Belgium failed to respect the immunity of Minister Ndombasi).

immunities of former diplomats or heads of state for acts undertaken in office.

France initiated proceedings for torture and crimes against humanity in the DRC's (formerly Zaire) neighbor, the Republic of the Congo, under articles 689-1 and 689-2 of the French Code of Criminal Procedure.[218] The Republic of the Congo challenged attempts by France to undertake investigations and prosecutions against, *inter alia*, sitting President Denis Sassou Nguesso and Minister of the Interior Pierre Oba.[219] The Republic of the Congo sought provisional measures to compel France to suspend its judicial proceedings.[220] The case poses a more direct challenge to universal jurisdiction than *DRC v. Belgium*, in which the DRC challenged the legality of the arrest warrant but dropped its objections regarding the legality of an arrest warrant as part of the exercise of universal jurisdiction.[221] The Republic of the Congo asserted that a sitting head of state or minister of the interior is immune from any "act of authority" by another state that would hinder them in the exercise of their duties, and that the "unilateral" exercise of by a state of

218. *See* Certain Criminal Proceedings in France (Rep. of the Congo v. Fr.), 2003 I.C.J. 129, Requete et Demande D'indication de Mesure Provisoire [hereinafter Request for the Indication of Provisional Measures] (providing that on December 5, 2001, la Federation internationale des ligues des droit de l'homme was a party in filing a complaint), *available at* http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iapplication_20020209.pdf (last visited Oct. 15 2003).

219. *See id.* (noting that the Congo alleged that France violated its sovereign rights under the United Nations charter); *see also* Pieter H.F. Bekker, *Prorogated and Universal Jurisdiction in the International Court: The Congo v. France*, ASIL INSIGHTS, Apr. 2003 (explaining that the Congo believes France violated "the rule that a state may not, in breach of the principle of sovereign equality among all member states of the United Nations, exercise its authority on the territory of another state"), *available at* http://www.asil.org/insights/insigh103.htm (last visited Dec. 13, 2003).

220. *See* Request for the Indication of Provisional Measures, *supra* note 218 (providing a summary of the nature of Congo's demand).

221. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (noting that in connection with the Belgium case, Congo limited its demand to the arrest warrant).

universal jurisdiction was a violation of sovereign equality enshrined in article 2(1) of the U.N. Charter.[222]

On June 17, 2003, the ICJ issued an order denying the request for the indication of a provisional measure. The court rejected claims by the Congo that immediate measures were necessary in order to prevent irreparable prejudice to the accused or to the Congo or damage to French-Congolese relations, largely on the grounds that Congo had not put forth concrete evidence of such harm.[223] French law recognizes the immunities of heads of state, and so the court reasoned, there was no urgent concern that a case would go forward against the president, and the other individuals being investigated had yet to be the subject of any procedural measures.[224] The provisional measures stage did not address the direct challenge to universal jurisdiction.

Several states have taken advantage of universal jurisdictional competence in order to pursue the perpetrators of international crimes. Many states simultaneously assert jurisdiction based on passive personality or based solely on universality. However, the degree of acceptance of the theory and variance in its application illustrates the need for clearer guidelines for judges, as well as recognition of the politicized nature of pursuing such crimes.

Clearly, the DRC's assertion that universal jurisdiction requires the presence of the accused on the territory of the state seeking to

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222. *See* Request for the Indication of Provisional Measures, *supra* note 218 (noting that in the complaint, Congo asserted that France's actions would interfere with the public order in Congo).

223. *See* Certain Criminal Proceedings in France (Rep. of the Congo v. Fr.), 2003 I.C.J. 129, ¶29 (June 17) (voting fourteen to one against the request), *available at* http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.pdf (last visited Oct. 15, 2003).

> Whereas in any event the Court notes that it has not been informed in what practical respect there has been any deterioration internally or in the international stating of the Congo, or in the Franco-Congolese relations, since the institution of the French criminal proceedings, nor has any evidence been placed before the Court of any serious prejudice or threat of prejudice of this nature. *Id.*

224. *See id.* ¶31 (noting France's contention that under Article 656 of the French Code of Criminal Procedure, France would have to obtain the express consent of Congo in order to approach President Sassou Nguesso to give evidence).

assert jurisdiction differed radically from the interpretations of Spanish or Belgian magistrates. It is worth noting that in its final pleadings to the ICJ, the DRC did not re-state its blanket objection to universal jurisdiction. Similarly, Spain and many other countries choose to rely not solely upon universality, but also upon domestic implementing legislation and passive personality jurisdiction, while Belgium has sought jurisdiction based purely upon international obligations and universality. Also, France has sometimes chosen, as in the Alfredo Astiz case, to base jurisdiction upon passive personality when universal jurisdiction could also have applied. States have also turned to their obligations under the ICTY and ICTR and implementing legislation to justify their proceedings. Clearly, a whole host of factors contribute to the rather disparate array of sources and arguments marshaled by domestic judges—confusion with regard to the scope, content, and authority of international legal sources, confusion about the relation of these sources to domestic law and politics, and even broader political realities in the international arena persists. It is beyond the scope of this paper to examine these factors in great detail, but it is clear that there remains a wide variance among national practices. Such variance in results raises concerns of fairness, legitimacy, and competing jurisdictions that need to be resolved. While the progressive development of exercise of universal jurisdiction appears to be a promising step for human rights, the variance in practice will need to be rationalized over time.

II. BEYOND THE FAMOUS CASES: THE UNEVENLY EXPANDING SCOPE OF UNIVERSAL JURISDICTION AND THE PROBLEM OF LEGITIMACY

When Spain submitted an extradition request to the United Kingdom for the former Chilean dictator Augusto Pinochet Ugarte the world's attention was riveted for the first time on the principle and practice of universal jurisdiction. Even if the principle of universal jurisdiction underpinned the very possibility of legal proceedings against Pinochet, it turned out not to be the central basis

for the House of Lords' willingness to extradite.[225] We should not, in any event, allow the most notorious cases to distract our attention from other prosecutions in which universal jurisdiction has played a role. States are relying on universal jurisdiction more commonly. However the summary presented above and the analysis of recent cases presented below shows that courts most often use universal jurisdiction as one basis among others for initiating legal proceedings for serious crimes, it is typically not being used as the sole basis for asserting jurisdiction.

I identify three distinct approaches to the use or non-use of the principle of universal jurisdiction. The practice of universal jurisdiction is developing unevenly, with only a very few judges and countries exercising "pure" universal jurisdiction, that is universal jurisdiction as the sole basis for prosecution. More common is the exercise of "universal jurisdiction plus," in which claims about the universal nature of the crime are combined with reliance on ordinary domestic criminal legislation or other principles of extraterritorial jurisdiction. In a third set of cases, national courts have considered relying on universal jurisdiction and have instead relied exclusively on domestic criminal legislation and other theories of extraterritorial jurisdiction.

While the increased resort to universal jurisdiction is a promising way of holding accountable those accused of serious crimes, the project of articulating common standards for the use of universal jurisdiction should receive greater attention. The inconsistent use of universal jurisdiction could exacerbate conflict among states and jurisdictions and encourage perceptions that the exercise of universal jurisdiction is illegitimate, arbitrary, or even "imperialistic." In some instances, there is a concern that pursuing alleged criminals via universal jurisdiction might jeopardize democratic transitions or upset post-conflict efforts to build peace.[226] Such exercises of universal jurisdiction may, as Pablo de Grieff observes, create

225. See *supra* notes 76-81 (discussing that universal jurisdiction was not the central basis for extradition from the United Kingdom).

226. *See* Sriram, *supra* note 3, at 47-70 (examining the potential impact of the exercise of universal jurisdiction upon states).

conflicts with regard to the priority of claims over defendants.[227] Reconciling these competing claims will be difficult in the absence of coherent principles and procedures to resolve such disputes. As the exercise of universal jurisdiction becomes increasingly common, the world community needs clearer principles to guide the use of universal jurisdiction and to make this use more consistent.

As we observe the expanding practice of universal jurisdiction we should be mindful of the dangers of inconsistency. International law, already subject to serious skepticism about its status as a coherent body of real law, may thus be subject to the further objection that application is piecemeal or arbitrary. Differential application of accountability for serious breaches across various jurisdictions may lead to massive inconsistencies in the application of human rights and humanitarian norms. Such inconsistencies may seem unfair, and victims of repressive regimes in particular will balk at the idea that certain perpetrators are more likely to escape accountability because the courts to whose jurisdiction they might be subject hold to narrow bases for such jurisdiction. It also has not escaped the notice of many that, save for one exception, the states seeking to apply universal jurisdiction are all countries of the "global north," while those from whom defendants are sought are nearly all in the "global south." There is a risk that these activities may seem like "jurisdictional imperialism."[228]

After articulating the three trends among states' assertions of universal jurisdiction, this essay examines the risks that such inconsistencies may engender: illegitimacy, consistency, unfairness, and competing jurisdiction. This part ends by emphasizing the importance of developing consistent principles and practice so as to

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227. *See* Pablo de Greiff, *Comment: Universal Jurisdiction and Transitions to Democracy*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, *supra* note 10 (manuscript at 121, 126-27) (asserting that "deomcray is a system that requires that citizens see themselves as the authors and the executors of their own laws").

228. *See Final Report*, *supra* note 5, at 19-20 ("[T]he decision to initiate proceedings on the basis of universal jurisdiction may be objected to."). States exercising universal jurisdiction on this basis may be accused of jurisdictional imperialism because universal jurisdiction is only likely to be exercised in powerful states with regard to crimes committed in less powerful states. *Id.*

avoid the strong objections that will arise if the exercise of universal jurisdiction is understood to be inconsistent and unfair.

A. UNIVERSAL JURISDICTION IN PRACTICE: THREE APPROACHES

1. "Pure" Universal Jurisdiction: Claiming Competence without the Backstop of Domestic Legislation

Courts rarely exercise universal jurisdiction as the sole basis for a criminal prosecution. Judges have so far been markedly wary of acting without the support of additional bases of action.

Belgium, which already has one of the most expansive approaches, further broadened its approach with its revision of legislation to adopt the statute of the International Criminal Court, and with the holding by the Supreme Court that it could hold trials *in absentia*.[229] Not only has a Belgium court recognized universal jurisdiction as a matter of customary international law, or *jus cogens*, but the legislation adopted in 1999 sought to specifically apply universal jurisdiction to genocide and crimes against humanity.[230] Belgium again relied upon the universality principle in charges brought against four Rwandans arrested in Brussels in 1995: three of these were transferred to the International Criminal Tribunal for Rwanda, while proceedings against a fourth, Vincent Ntezimana, were initiated in Belgium.[231] The DRC challenged Belgium's expansive use of universal jurisdiction in a case before the ICJ, and challenged the international arrest warrant issued by Belgium for the former Minister of Foreign Affairs (now the Minister of

229. *See* MCKAY, *supra* note 56, at 18 (conveying that Belgium was the first state to comply with the statute).

230. *See id.* (explaining that the motivation for Belgium was to act strongly against genocide in Rwanda); *see also* Luc Reydams, *International Decision: Belgian Tribunal of First Instance of Brussels*, 93 AM. J. INT'L. L. 700 (1999) (explaining that the court considered the application of the Belgian implementation of legislation for the Geneva Conventions and Additional Protocols, rejecting it on unrelated grounds).

231. *See* MCKAY, *supra* note 56, at 19 (noting that the complaints alleged complicity in genocide).

Education).[232] The ICJ sided with the DRC, treating foreign minister immunity as a bar to the exercise of universal jurisdiction.[233] Debate continues in Belgium over the appropriate scope of universal jurisdiction legislation, and as discussed above, in April 2003, Belgium reduced its scope.

In a rare instance of the courts of a developing country seeking to exercise universal jurisdiction, Senegal indicted former Chadian dictator Hissene Habre.[234] In a decision tainted with accusations of political interference, the indicting court then determined that Senegal had no jurisdiction to prosecute torture.[235]

Universal jurisdiction in its "pure" form has also played a role in Spain, though not in the famous proceedings against Augusto Pinochet. Rather, a case involving a Honduran military officer, Billy Joya, relied on universal jurisdiction for activities criminalized under the Torture Convention.[236] Spanish courts refused to find competence in a genocide case in Guatemala, absent special Spanish interests, but have since successfully sought agreement to extradition by Mexico of an Argentine implicated in dirty war abuses.[237]

In these few cases, domestic judges have seen fit to pursue criminals for crimes established in international conventions, or that form part of *jus cogens*. These judges did not feel the need to rely upon additional domestic legislation, although in the case of Belgium, at least, such legislation is available. These recent instances of "pure" universal jurisdiction are striking but still rare. It remains

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232. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14) (describing the procedural history of the case).

233. See *supra* notes 215-217 (noting that the ICJ held that use of universal jurisdiction violated certain legal obligation Belgium held towards the DRC).

234. *See* Human Rights Watch, *The Case Against Hissene Habre, an "African Pinochet"* (indicating that due to Habre's exile in Senegal, the Senegalese courts attempted to try him), *available at* http://www.hrw.org/justice/habre/intro_web2.htm. (last visited Oct. 16, 2003).

235. *See id.* (asserting that the political situation in Senegal forced the courts to dismiss the case).

236. *See* McKay, *supra* note 56, at 40 (noting that the Spanish court relied on universal jurisdiction).

237. See *supra* notes 125-126 (noting that Mexico has agreed to extradite Ricardo Miguel Cavallo).

to be seen whether they are anomalies or represent a trend in practice.

2. *Universal Jurisdiction Plus: Backstopping with Other Bases of Jurisdiction*

Judges in national courts have usually been more comfortable combining what is to them a novel basis for jurisdiction with more familiar bases, those linked to a state's territory or interests.[238] Legislation providing for extraterritorial jurisdiction over those accused of serious crimes under international law may become more expansive, and perhaps more consistent, as nations seek to conform to their obligations as signatories to the ICC statute. Belgium and Canada are among the nations that have already made such revisions. In this category of cases, judges simultaneously acknowledge that universal jurisdiction exists under international law, and at the same time demonstrate nervousness about exercising it in the absence of other more particular and familiar connections to the crimes. Judges may seek to assert jurisdiction in accord with specific provisions of domestic legislation that provide explicitly for extraterritorial application of criminal legislation, or with domestic legislation incorporating provisions of treaties that provide for such jurisdiction, or with domestic criminal legislation. In some of these cases, judges simultaneously maintain that jurisdiction *could* be based in addition to, or solely on, universal jurisdiction.

The *Finta* case, for example, involved charges in Canada for war crimes and crimes against humanity based upon sections of the Canadian Criminal Code, which provided for extraterritorial jurisdiction based upon the current Canadian nationality of the accused even if the accused was not Canadian at the time of the commission of the crimes.[239] The court upheld the statute, but

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238. *See* Benvenisti, *supra* note 27 (providing a comparative analysis of national courts' enforcement of international law).

239. *See* Regina v. Finta, [1994] 1 S.C.R. 701, ¶¶ 63-65 (explaining that the accused could be tried because he committed an act against the laws of Canada in force at the time even though he was not a Canadian citizen.); *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, *supra* note 10 (manuscript at 168, 168-90)

required that charges be brought for domestic crimes, such as murder, rather than genocide.[240] New Canadian legislation simplified prosecutions by allowing the court to bring forth charges directly for international crimes such as genocide.[241]

In the *Pinochet* case in Spain, jurisdiction was based upon provisions in the Spanish penal code that provide for extraterritorial jurisdiction. The case also relied upon provisions in international treaties, customary international law, and Spanish implementing legislation.[242] The court did not require the existence of any territorial nexus, such as the victims' nationality. Interestingly, the court nonetheless identified specific Spanish victims. It seems plausible that the court sought to proceed based upon domestic legislation and universal jurisdiction, but sought to establish passive personality jurisdiction as a legal backstop. Courts involved in cases against the members of the Argentine junta applied similar legal reasoning. These cases contributed to the revival of legal proceedings in Argentina, where a judge invalidated amnesty and other legislation.[243]

A 1997 case in the Netherlands, involving crimes in the former Yugoslavia, relied upon universal jurisdiction along with domestic legislation implementing the Geneva Conventions.[244] In another case

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(addressing the proper limits of universal jurisdiction, which does not require "a link between any part of the offence and the state seeking to exercise jurisdiction").

240. *See Finta*, [1994] 1 S.C.R. 701, ¶ 323 (reasoning that questions of international law are best left to a judge).

241. *See* Butler, *supra* note 28 (manuscript at 70-71) (discussing Canada's new statute concerning universal jurisdiction, which attempts to eliminate the obstacles created by the *Finta* decision).

242. *See* Falk, *supra* note 53(manuscript at 115) (explaining that the court reasoned that genocide was *jus cogens*, and therefore universal jurisdiction thus existed).

243. *See Argentine Decision Invalidating Amnesty Welcomed, World Report 2001: Argentina*, HUMAN RIGHTS WATCH (stating that by declaring "Due Obedience" and "Full Stop" laws unconstitutional, Argentina signaled the end of impunity), *available at* http://www.hrw.org/press/2001/03/ArgentinaAmnesty306.htm (last visited Dec. 13, 2003).

244. *See* MCKAY, *supra* note 56, at 35 (noting that the Netherlands upheld the universal jurisdiction provisions under the grave breaches regime of the four Geneva Conventions).

involving the former dictator of Suriname, a Dutch court in March 2000, exercised universal jurisdiction relying upon crimes established in the Torture Convention, as well as the passive personality theory. In an attempt to clarify the applicability of different modes of extraterritorial jurisdiction, this court appointed an expert to consider the applicability of extraterritorial jurisdiction over non-nationals for crimes against humanity, and to consider whether the presence of the accused in the Netherlands or the nationality of the victims would effect the legal outcome.[245]

In 1994, an Austrian court based jurisdiction to try an accused war criminal from the former Yugoslavia on domestic legislation and treaty provisions.[246] The court found jurisdiction under the Austrian penal code and the Genocide Convention, concluding that the intent of the convention would be undermined if Austria did not exercise jurisdiction.[247]

In Denmark, the law does not explicitly refer to universal jurisdiction, but it does create extraterritorial jurisdiction where there appears to be no territorial nexus. Article 8(5) of the Danish penal code establishes jurisdiction to prosecute war crimes and other crimes under international law whenever Denmark is obligated to prosecute by international treaty or convention to prosecute.[248] On this basis, Denmark brought a case against a Bosnian under the Geneva Prisoner of War Convention and the Geneva Civilian Convention.[249]

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245. *See* Amnesty International, *supra* note 198, at 100 (noting that a court appointed expert determined that the Dutch court should exercise jurisdiction).

246. *See* MCKAY, *supra* note 56, at 35 (explaining the case against Dusko Cvjetkovic).

247. *See id.* at 17 (noting that the provision in the Genocide Convention presupposed "that there was a functioning criminal justice system in the state where the crime was committed").

248. *See id.* at 22 (including breaches of the Geneva Convention as bases for jurisdiction).

249. *See id.* at 22-23 (recounting the case of Refik Saric); *see also* Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 341 (1999) (explaining that Saric's residence in Denmark supplied the basis for Danish Jurisdiction even though he did not commit crimes in Denmark or against Danish citizens).

The German penal code provides jurisdiction for crimes for which an international treaty establishes universal jurisdiction and an obligation to prosecute.[250] The Fourth Geneva Convention provides for such jurisdiction.[251] The Genocide Convention, however, does not explicitly confer universal jurisdiction so German courts have not found jurisdiction under its provisions. Nevertheless, the penal code provides for jurisdiction over genocide.[252] In a case arising out of atrocities in the former Yugoslavia, a German court found that although the Genocide Convention does not explicitly confer universal jurisdiction, neither does it explicitly exclude it. The court found further that the establishment of the ICTY and German legislation enacted to facilitate cooperation with that Tribunal, have the effect of supplementing the universal jurisdiction that exists under international law. The court clearly recognized the existence of universal jurisdiction in international law, while relying upon domestic legislation.[253]

A Swiss military tribunal in July 1997 exercised universal jurisdiction in a case of alleged war crimes in the former Yugoslavia, involving beatings of civilians and other forms of degrading treatment.[254] The tribunal proceeded pursuant to the Military penal code, which allowed for the use of universal jurisdiction for crimes involving violations of the Geneva Conventions and additional protocols. The courts in Switzerland allowed other prosecutions to go

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250. *See* MCKAY, *supra* note 56, at 28 (noting Germany's commitment to apply universal jurisdiction for "certain crimes committed abroad against internationally protected legal values").

251. *See id.* at 29 (noting that in the case against Djajic, a Bosnian Serb, the court based jurisdiction on the Fourth Geneva Convention Articles 146 and 147, and Additional Protocol One).

252. *See id.* at 28 (noting that Germany's Penal Code provides for universal jurisdiction for certain crimes, such as genocide).

253. *See id.* at 30 (noting that the court held that the accused had the relevant intent "to destroy, in whole or in part, a national, racial, religious or ethnically distinct group" and therefore satisfied the definition of genocide, as contained in Article 2 of the Genocide Convention and Article 220a of the German penal code).

254. See MCKAY, *supra* note 56, at 41 (noting that the crimes occurred in the Serbian run detention camps of Omarska and Keraterm in North Western Bosnia in 1992).

against a Rwandan national in 1998 based upon the Geneva Conventions but *not* under customary international law.[255]

Courts most commonly exercise universal jurisdiction on the basis of domestic legislation that seeks to implement a state's treaty obligations.[256] Judges often refer to the principle of universal jurisdiction and also seek the support of domestic statutes. One important development here is the fact that increasing numbers of states are expanding the jurisdiction of national courts as they revise their laws to comply with their obligations under the ICC Statute and the ad hoc international criminal tribunals for Rwanda and the former Yugoslavia. Some national courts have, furthermore, interpreted these revised laws expansively. These states are increasingly exercising universal jurisdiction while also backstopping with domestic legislation. France is an illustrative example of this practice.

Traditionally, French courts rejected universal jurisdiction and allowed for extraterritorial jurisdiction only based on active or passive personality, *i.e.* the French nationality of the victims or the perpetrators of crimes.[257] Accordingly, in the 1990 case of Alfredo Astiz, an Argentine captain sentenced in absentia in 1990 for the torture and disappearance of two French nuns in Argentina, the court based its jurisdiction on the French nationality of some victims.[258]

In a case brought by five Bosnian Muslims residing in France, the court denied jurisdiction for claims relating to crimes in the former

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255. *See id.* at 43 (explaining that due to the lack of a genocide or crimes against humanity provision in Swiss law, the Swiss could only bring charges based on violations of the Geneva Convention).

256. *See id.* at 3-5 (providing a background on the definition of universal jurisdiction and noting that under the four Geneva Conventions of 1949, states have the obligation to prosecute or extradite suspects who have allegedly committed grave breaches of these Conventions).

257. *See id.* at 24 (noting that France had very few provisions which explicitly provided for universal jurisdiction).

258. *See id.* at 26 (noting that France tried the accused in absentia after Britain refused to allow French authorities to question him and after the Argentinean authorities refused to respond to France's request for assistance); *see also* Press Release, Human Rights Watch, Extradite Astiz, Argentine Government Urged (July 27, 2001) (noting that Human Rights Watch has called for Astiz's extradition to Italy, and he is being held on an Argentine judge's order), *available at* http://www.hrw.org/press/2001/07/astiz-0727.htm (last visited Dec. 13, 2003).

Yugoslavia because the accused was not present in France.[259] France has also rejected extraterritorial jurisdiction under the Geneva Conventions in the past, but this will be far less likely today in light of the legislation and case law following the establishment of the ICTR.

French practice has been shifting to allow greater scope for the exercise of universal jurisdiction. This shift has involved both changes in legislation and judicial interpretation. In 1994 France amended the penal code to include genocide and other crimes against humanity.[260] In addition, France adopted legislation in 1996 to implement the U.N. Security Council Resolution establishing the Rwanda tribunal, allowing for the prosecution of perpetrators of grave breaches of the Geneva conventions, the laws and customs of war, genocide, and crimes against humanity, so long as the accused is present in France.[261] In 1998, in proceedings involving Wenceslas Munyeshyaka, accused in France of crimes in Rwanda, a court exercised universal jurisdiction for war crimes and genocide.[262] While this legislation and case law pertains to crimes in Rwanda, it would likely be persuasive in other, analogous situations, such as that of crimes committed in the former Yugoslavia.

In cases brought in France in 1998 against Pinochet, the court issued two international arrest warrants on the basis of domestic criminal legislation, the Criminal Procedure Code and the penal code amended in 1994, which include genocide and crimes against humanity committed abroad, so long as the accused is present in

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259. *See* MCKAY, *supra* note 56, at 25 (noting that the French did not have implementing legislation that would give effect to the Geneva Convention and thus Article 689, which governed jurisdiction over offenses committed abroad, did not apply).

260. *See id.* at 24 (noting that although the French Penal Code specifically incorporated penal sanctions for certain offenses classified as international crimes, the legislation made no reference to universal jurisdiction).

261. *See id.* at 26 (reporting that in the *Munyeshyaka* decision, the court based its jurisdiction on the French law implementing the U.N. Security Council resolution establishing the international criminal tribunal for Rwanda).

262. *See* Brigitte Stern, *Universal Jurisdiction Over Crimes Against Humanity under French Law - Grave Breaches of the Geneva Conventions of 1949 – Genocide-Torture-Human Rights Violations in Bosnia and Rwanda*, 93 AM. J. INT'L L. 525, 528 (1999) (providing a procedural history of the *Munyeshyaka* case).

France.[263] For many years, French courts denied the exercise of universal jurisdiction for crimes against humanity, while indicating that it might be exercised in cases of torture where the accused is later present in France.[264] While French legislation still does not explicitly recognize universal jurisdiction for crimes against humanity, the 1998 *Munyeshyaka* case marked a significant change in practice. This was a significant advance from the 1990 case brought against Alfredo Astiz, which relied upon the nationality of the victims. The extension of universal jurisdiction in France in the past decade is partly a consequence of new legislation, but also due to innovative and progressive judicial interpretation.

3. Non-Application: The Refusal to Rely on Universal Jurisdiction

Some courts have considered the possibility that universal jurisdiction might provide them with competence to enforce international law, but then balked at that possibility and ultimately relied on domestic legislation or on passive personality as a basis for jurisdiction.

An Italian court heard charges against Pinochet based not on universal jurisdiction but on a provision in the penal code providing for punishment of crimes committed abroad against Italy or its citizens.[265] Similarly, a case against Alfredo Astiz in Italy has been built upon the Italian nationality of some of his victims.[266] The cases brought against Pinochet in Germany and Switzerland based their

263. *See* MCKAY, *supra* note 56, at 27 (noting that the French court issued arrest warrants based on the passive personality principle).

264. *See id.* at 24 (noting that the application of universal jurisdiction was uncertain in France until the *Munyeshyaka* case).

265. *See* Giancarlo Capaldo, Institute for Policy Studies, *Proceedings in Italy Against Latin American Dictators and Military Personnel* (Mar. 26, 2001) (noting that under Italian law it is possible to prosecute those responsible for committing crimes outside of Italy only when the crime in question is political and was committed against an Italian citizen, or when Ministry of Justice requests the prosecution to proceed), *available at* http://216.239.41.104/search?q=cache:NYPbdYkZWwMJ:www.ips-dc.org/projects/legalscholars/capaldo.PDF+pinochet+and+italy++and+jurisdiction+&hl=en&ie=UTF-8 (last visited Oct. 22, 2003).

266. *See* Press Release, *supra* note 258 (providing that Italy sought Asitz due to his role in the kidnapping of Italian citizens).

jurisdiction entirely upon the passive personality, namely, the nationality of some of the victims.[267] In some states judges, then, continue to rely upon ordinary domestic criminal legislation to pursue the accused. Where they seek extraterritorial jurisdiction, they prefer to rely on traditional territorial connections to establish it, such as is provided when crimes have been committed abroad against nationals. In the absence of legislation broadening extraterritorial jurisdiction over those accused of committing serious international crimes, judges are reluctant in many places to exercise universal jurisdiction.

These disparate practices give rise to inconsistencies, which lead to concerns about legitimacy, consistency, fairness, and conflict among jurisdictions. These concerns have also been raised in the context of the proliferation of international criminal tribunals, and they are indeed serious.

B. CONCERNS DUE TO THE INCONSISTENT APPLICATION OF UNIVERSAL JURISDICTION

1. Legitimacy

The appearance of unfair discrepancies in the exercise of universal jurisdiction may give rise not just to complaints about fairness, but to more fundamental objections, such as the illegitimacy of the doctrine of universal jurisdiction. For example, objections based upon the perceived unfairness of differential applications globally may lead to the implication that it is an illegitimate system of law that results in courts from developed countries pursuing dictators and war criminals from developing countries, but not the reverse. The Habre exception and the pursuit of war criminals from the former Yugoslavia may mitigate these objections somewhat, but the image of universal jurisdiction seems likely to remain a DRC defendant in a Belgian court. More generally, the likelihood of judges from a small number of states exercising this power over defendants from many others creates the potential for abuse by states acting upon a particular conception of customary international law. The rule legitimacy of

267. *See* MCKAY, *supra* note 56, at 30 & 43 (affirming the use of the nationality of the victims for jurisdiction in the cases against Pinochet).

universal jurisdiction is bound up with the concerns already raised; it is worth addressing this issue further.

Thomas Franck has argued that four indicators—pedigree, determinacy, coherence, and adherence—provide a means to assess the legitimacy of rules.[268] Pedigree is the depth of the rule's roots in an historic process, in state practice, treaty, and expert writings.[269] Universal jurisdiction has a long history, articulated in universalistic expressions of jurisprudence dating back to the writings of Grotius and firmly rooted in the punishment of piracy. Universal jurisdiction has been further entrenched in positive international law since the end of the Second World War, although this fact has yet to make many domestic judges more amenable to its exercise. Determinacy, or clarity, is the rule's ability to communicate content.[270] Clearly, this aspect is not settled, as the disparate understandings of the principle of universal jurisdiction by judges, foreign ministries, and even legal scholars would seem to indicate.[271] Coherence is the rule's internal consistency and its connectedness to the principles underlying other rules.[272] This aspect is also not settled; as some argue that there are two not entirely consistent justifications for the rule—the overriding interests of the international community in protecting core values, and the pragmatic need of the community to have an enforcement mechanism that can transcend sovereignty. However, the principle itself is clearly tied to and consistent with the corpus of human rights

268. *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 50-194 (Oxford Univ. Press 1990) (examining the role of legitimacy in international law). Franck sets forth a list of characteristics and components that comprise legitimacy and explains their relationships and effects on international law). *Id.*

269. *See id.* at 94-95 (explaining that pedigree is usually earned by longevity of an institution or rule of law and is a particularly universal form of symbolic validation).

270. *See id.* at 52 (stating that "transparency" is another term that may be employed for determinacy and these terms - along with "clarity" - taken together illustrate that conduct is most effectively regulated when a higher degree of lucidity exists).

271. *See id.* at 52-54 (remarking that ambiguity in text can result in judicial decisions contrary to legislative intent).

272. *See id.* at 153 (noting that inconsistencies must advance an intrinsic, logical, and rational basis of distinction to allow coherence to serve as a key indicator of legitimacy).

law. Adherence, finally, is the connection between a specific rule and higher principles.[273] Specifically, adherence is the degree to which the rule is consistent with substantive fundamental principles of international order. Two such fundamental principles of international order, *jus cogens* and respect for sovereignty, are potentially in tension, and the doctrine of universal jurisdiction is thus bolstered by the former and not the latter. Here, to the degree that universal jurisdiction applies squarely to a set of heinous crimes clearly proscribed under international law, much of which is not mere custom but *jus cogens*, it would appear to be on reasonably safe ground. However, it may also infringe upon sovereignty, respect for which remains central to international law and politics.

2. Consistency

Piecemeal application of accountability for grave breaches of international law could give rise to serious inconsistencies in the levels of protection offered to fundamental human rights across jurisdictions. Differing interpretations of the scope of universal jurisdiction may give rise to serious gaps in the coherence of international law.[274] Yet, as one commentator asserts, "the coherence of international law is important to the maintenance of a peaceful and beneficial international legal system."[275] Gaps and inconsistencies may lead to unpredictability in legal, as well as political, relations

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273. *See id.* at 184 (providing that essentially, "adherence . . . is the vertical nexus between a primary rule of obligation . . . and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted, and applied").

274. *See* Jonathan I. Charney, *The Impact of the International Legal System of the Growth of International Courts and Tribunals*, 21 N.Y.U. J. INT'L L. & POL. 697, 703-07 (1999) (indicating that different tribunals interpret the breadth and depth of international law in various ways and this leads to disparate or asymmetrical results).

275. *See id.* at 707 (arguing that while diversity, experimentation, and competition are vital characteristics to a stable system of international law, coherence of law is paramount to allowing such a system to flourish); *see also* Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U.J. INT'L & POL. 791, 796 (1999) (averring that in an increasingly complex system of international law, coherence aids in the process of accomplishing the goals of international law).

among nations; lawyers and others value the predictability in these relations for their putative contribution to peace and stability.

It is worth noting that although these concerns of consistency may be significant ones, it may also be the case that the disparities are much smaller than initially feared and such disparities are a necessary part of the progressive development of international law.[276] It may well turn out to be the case that fears of inconsistency are seriously exaggerated, and that practice that at first appears very divergent does converge over time. Further, it may well be the case that it is only through such divergent practice that change is effected, in particular change that would achieve greater protection of fundamental rights and freedoms. Thus, we should perhaps tolerate some inconsistencies in order to advance the cause of human rights and accountability; it cannot be the case that for the sake of consistency of practice that we should abandon the pursuit of accountability.

A final risk may exist, inconsistent standards give states the scope to vex and harass their political opponents. Fear of such politically motivated cases is already a primary ground offered by the United States for remaining outside of the ICC, and has also been raised in objection to the use of universal jurisdiction, most notably by Henry Kissinger.[277] There is certainly a risk that such vexatious prosecutions will be initiated, but this fear remains largely hypothetical. It is not at all clear that prosecutions that are initiated that might appear politically vexatious would be state-driven. Thus far most of the courts hearing cases are clearly politically

276. *See* Charney, *supra* note 359, at 699-700 (concluding that in core areas of international law, most tribunals share a relatively coherent and similar view of those doctrines of international law).

277. *See* Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 90 (2001) (contending that if the United States were to submit to a system of universal jurisdiction, the chance for bias-based pressure and the desire to place responsibility may engender indictments that are unfounded). While the U.N. Security Council retains the right to quash an indictment in the ICC, veto power remains strong and ultimately a prosecutor needs only one country to support the indictment in order to exercise virtually unlimited discretion. *Id.*

independent. For example, the Spanish government was in fact *opposed* to the attempts by Garzon to pursue Pinochet. [278]

3. Fairness

Such inconsistencies in the application of jurisdiction and accountability for grave breaches will likely seem unfair, particularly to victims of repressive regimes. At the same time, the use of universal jurisdiction largely has taken place and continues to take place where northern or western courts seek defendants for crimes committed by southern regimes, leaving the door open for accusations of bias as well. The rare exceptions are the proceedings initiated in Suriname against former Chadian dictator Hissene Habre, the Argentinean request for extradition of Pinochet, and the case brought in Ecuador against Pinochet, though the latter two cases did not explicitly address universal jurisdiction. The case brought by the DRC against Belgium in the ICJ disputing the issue by a Belgian judge of an international arrest warrant against the Minister of Foreign Affairs of the DRC illustrates the vehemence with which states may reject universal jurisdiction on the grounds of sovereignty and opposition to what is perceived to be legal imperialism.[279]

It may be worth considering the possibility that, accusations of unfairness notwithstanding, there may be at least one plausible argument in favor of disparate practice. This might be the same type of argument that underpins the doctrine employed by the European Court of Human Rights that allows for some reasonable degree of variation in state practice to take account of political, cultural, social, and historical specificity—the doctrine of *margin of appreciation*.[280]

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278. *See Spain Blocks Challenge to Pinochet's Possible Release*, CNN.COM, Jan. 20, 2000 (noting the Spanish government's unease at Garzon's efforts to "extend his human rights crusade beyond Spanish borders"), *available at* http://www.cnn.com/2000/WORLD/europe/01/20/pinochet.02/ (last visited Oct. 22, 2003).

279. *See* Case Concerning the Arrest Warrant of 11 Apr. 2000 (Dem. Rep. of the Congo v. Belg.), 2000 I.C.J. 121 (Feb. 14) (rejecting both the DRC's request for provisional measures that the arrest warrant be discharged immediately, and Belgium's request that the case be removed from the list). As noted above, the ICJ treated foreign minister immunity as a bar to Belgian jurisdiction. *Id.*

280. *See* Eyal Benvenesti, *Margin of Appreciation, Consensus, and Universal Standard*, 31 N.Y.U. J. INT'L L. & POL. 843, 843 (1999) (defining the margin of

The court thus allows each society some leeway in resolving the inherent tension between the rights of the individual and of the nation. So some variance in practice is permissible.[281] However, this analogy ought not be stretched too far, as the variance in practice here is across jurisdictions seeking to try individuals, and *not* in the practice of courts where alleged abuses occurred.

4. Competing Claims

Last, but not least, a lack of clear priority in application may give rise to competing claims, raising difficulties with regard to competing jurisdictions and divergent jurisprudence dealing with the same rules or legal concepts.[282] As one commentator suggests in an analogous context: "It is evident that such situations create dissatisfaction for the States concerned because they introduce a measure of legal insecurity. This should be avoided as much as possible."[283] Competing claims, like inconsistency in practice, introduces a measure of unpredictability to international law and relations, bringing with it risks of instability and diplomatic, if not violence and conflict.

In regards to Pinochet, numerous courts, including those of his own country, sought to pursue cases against him. In such instances, who prevails? In the absence of clearer principles with regard to such conflicts, increased confusion and serious conflicts over the appropriate hierarchy of claims seems likely to result. While it will of course be impossible to develop a rigid hierarchy of claims with regard to priority, there are a host of considerations to place in the balance in identifying the appropriate forum for a case.

Undoubtedly, there will be instances where the proliferation of mechanisms of accountability, reconciliation, etc. may be complementary. For example, commissions of inquiry in one locale would not necessarily preclude prosecutions elsewhere. But the same

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appreciation as it applies in a general context to the European Court of Human Rights).

281. *See id.* at 843-47 (discussing the rationale for the margin of appreciation).

282. *See* Dupuy, *supra* note 275, at 797-98 (discussing this issue in the context of the proliferation of tribunals).

283. *See id.* at 798.

cannot be said of competing claims for legal accountability. Principles of double jeopardy and *non bis in idem*[284] dictate that properly pursued prosecutions must foreclose future proceedings on the same charges. This makes even more imperative that where a case is brought, it is not a sham proceeding, and that it is brought in an appropriate forum. Considerations for selection among competing jurisdictions ought to include, among others, treaty obligations; the place of the commission of the crime; the nationality connection of the victim and the accused to the state seeking to prosecute; the likelihood, good faith, and effectiveness of the prosecution; fairness and impartiality; convenience to the parties and the witnesses; and the interests of justice. States may resolve competing claims through a balancing act that takes into consideration those same factors.

This balancing act will likely be complicated further as courts and politicians seek to determine the weight that amnesties and immunities ought to carry. Certainly, the place of commission of the crime will frequently, but not always, receive priority in its claim to adjudicate a case. However, it will often be the case that the country where the crime occurred will not be able to pursue the case due to the country's domestic legislation, encompassing amnesties, procedural limitations, and immunities. There is no hard and fast rule for the resolution of such competing claims, but rather a delicate balance to be struck that must take into account the myriad factors listed above.

C. THE NEED FOR A MORE COHERENT REGIME

This discussion has illustrated the fact that the practice of universal jurisdiction, while expanding in recent years, is still quite disjointed. This should not be surprising; while the principle of universal jurisdiction is strongly entrenched, the practice described here is quite nascent, though expanding. Different jurisdictions have quite distinct practices with regard to whether they can pursue individuals accused of certain grave breaches where the breaches did not occur on their territory, were not perpetrated against their nationals, and were not perpetrated by their nationals. This disparity

284. *See id.* (explaining that anyone tried through the exercise of universal jurisdiction for serious crimes under international law can raise this claim against further proceedings against him or her in national or international venues).

in practice occurs notwithstanding the purported status of the principle as customary international law. As a result, only a very few courts are liable to rely upon "pure" universal jurisdiction, while most others will take a more mixed approach of relying upon traditional bases in tandem with universal jurisdiction. Finally, some courts will not rely on the doctrine, turning instead to the traditional bases alone. This disparity ought to be of some concern, as I suggest, for several reasons—concerns of consistency, fairness, legitimacy, and competing claims. While more traditional considerations used in conflict of laws may resolve some of these concerns, these disparities as a whole run the risk of creating greater legitimacy concerns with regard to international law generally, as well as very real inconsistencies and perceptions of injustices in specific cases. Concerns about politically motivated prosecutions may also undermine universal jurisdiction if inconsistency is significant and appears driven by biased agendas. To avoid increasing confusion with regard to the application of this doctrine, concerted effort to rationalize the application of it is in order.

III. UNIVERSAL JURISDICTION: PROBLEMS AND PROSPECTS OF EXTERNALIZING JUSTICE

A. OVERVIEW: EXTERNALIZED JUSTICE

The cases described thus far illustrate that externalization of justice increased over the past five or so years, and it seems likely to continue in coming years. Such externalization, whether in the form of ad hoc international tribunals or the exercise of universal jurisdiction, will soon extend to the work of the ICC. The appropriate role of international courts and tribunals, as well as other domestic mechanisms, remains seriously disputed. This article argues for caution, particularly with regard to the exercise of universal jurisdiction for two reasons beyond those articulated above: it may not take sufficient account of local needs, and by taking place at a great distance from the locus of the crimes, it may fail to serve many of the putative purposes of prosecution.

This section examines the potential ramifications for transitional societies of the use of universal jurisdiction, asking whether it serves the needs of these societies, and whether there are unintended

adverse effects of its usage. I suggest that the impact may be harmful precisely because the purpose of universal jurisdiction is not explicitly to serve the needs of the society or nation affected by the crime. The two most frequently cited justifications for the use of universal jurisdiction point to the normative interests and supporting pragmatic considerations of the international community. Reference is not made to the needs of transitional societies at all. Building on previous work that develops some implications of several strands of political theory for normative arguments about transitional justice, this essay will seek to articulate potentially important normative goals that may address accountability in transition. The essay will then turn to practical considerations of peace building and reconciliation, which build upon these normative concerns, but may be at odds with the rationales for the use of universal jurisdiction. It argues that there are significant risks posed by externalization of justice and in particular the exercise of universal jurisdiction. While it may occasionally be of utility, international actors should not view it as a panacea, but instead recognize that each society may need to respond to the legacy of serious human rights violations and other abuses.

Two key arguments are made to underpin the application of universal jurisdiction, both of which address the needs and interests of the international community.[285] One version depends upon an account of international morality—certain crimes are so heinous that they affect all of mankind, and thus deserve punishment.[286] A related version, in essence the practical underpinning of the first, treats universality as a procedural convenience that addresses the practical difficulties of addressing crimes that are seen as illegal around the world.[287] While both of these are of valid rationales and need further articulation in order to surmount objections based upon sovereignty,

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285. *See* Mark A. Drumbl, *Juridical and Jurisdictional Disconnects*, 12 Fin. Y.B. Int'l L. 119, 134-40 (2001) (setting forth arguments against the application of universal jurisdiction).

286. *See id.* at 127-30 (citing examples of extreme violence and genocide to support the theory that some offenses innately deserve punishment).

287. *See id.* at 134-36 (suggesting that while they are not without problems, extraterritorial prosecutions can be the best alternative when there is no other mechanism to encourage or enforce accountability).

they do not speak to the needs and interests the state or society where the atrocities occurred or the needs of the victims.[288]

Nations in transition face numerous challenges that are normative and practical. One can identify goals ranging from stability to reconciliation to satisfaction of the victims to doing justice, some of which are complementary, some which are not. Some responses, such as truth commissions or prosecutions, satisfy some goals, but not others. Clearly, there is no room for a one-size-fits-all prescription; what is needed is a society-specific approach within a defined context.

This essay does not argue that it is never appropriate to do justice "elsewhere" or to exercise universal jurisdiction.[289] Externalizing prosecution may at times be the only solution where a state or society is unwilling or unable to come to terms with the past; amnesties may have precluded legal action domestically, or the state may lack the technical capacity to act.[290] However, there is a serious risk that solutions that speak first to the interests of the international community at large will fail to take account of the goals articulated above. This may be most true in the context of universal jurisdiction, where the prosecuting state has no territorial or other nexus to the offense, and thus may be particularly insensitive to the needs of the territorial state, or worse, have its own biased agenda.

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288. *See id.* at 140-41 (discussing the broad risks of conducting trials that do not take account of the local context).

289. *See* Kissinger, *supra* note 277, at 86-96 (objecting to the exercise of universal jurisdiction). *But see* Kenneth Roth, *The Case for Universal Jurisdiction*, 80 FOREIGN AFF. 150-54, (Sept./Oct. 2001) (responding to Kissinger's piece and categorizing his objections to the exercise of universal jurisdiction as misplaced and asserting that Kissinger's alternatives have little merit).

290. *See* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 314-15 (1999) (arguing that such amnesties run counter to the "stated purpose of international humanitarian law"); *see also* Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 64-75 (2001) (discussing the complicated relationship between courts and post-conflict peace building, and a reflection on the role that international tribunals can play).

B. WHY UNIVERSAL JURISDICTION?

Two bases for universal jurisdiction have generally been offered, which do not appear to be perfectly consistent, though the second is frequently offered in service of the first. The first is that core values and overriding interests of the international community exist that may transcend sovereignty.[291] The second is that, for pragmatic reasons, the international community may need an enforcement mechanism that can occasionally override sovereignty.[292] It is beyond the scope of this paper to analyze these two positions in detail; the most important aspect of these positions is that *both* rationales advert to the interests of the international community, and make no reference to the interests of the state where crimes occurred.[293] These bases are used to either protect a set of normative goals and interests held by the international community, or for the sake of convenience, to allow the international community to act in the absence of action by relevant states. These bases do not necessarily hold the concerns of the state or society as the uppermost consideration.

Certainly, given the narrow scope of crimes for which a court may assert universal jurisdiction, and the heinousness of those crimes, such international interests, normative and pragmatic, cannot be denied. However, given that a court will use universal jurisdiction in lieu of domestic legal proceedings, and may overcome domestic political pacts, amnesties, or other legal considerations, it is worth

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291. *See Final Report*, *supra* note 5, at 3 (stating that under one rationale, "[d]omestic courts and prosecutors bringing the perpetrators to justice are not acting on behalf of their own domestic legal system but on behalf of the international legal order.").

292. *See* Alison M. McIntire, *Be Careful What You Wish For Because You Just Might Get It: The United States and the International Criminal Court*, 25 Suffolk Transnat'l L. Rev. 249, 261 (2001) (noting that supporters of international tribunals seek to strengthen enforcement mechanisms, which may help ensure the protection of human rights). McIntire also notes that one main opposition to the strengthening the enforcement mechanisms is that doing so may change the concept of sovereignty. *Id.*

293. *See* Bhuta, *supra* note 12, at 529 ("By deeming systematic human rights violations to be crimes which threaten world order, concepts such as *jus cogens* crimes and universal jurisdiction exemplify attempts to place human dignity at the apex of the legal order's hierarchy of values .... Nevertheless, the tension between the 'law of peoples' and the traditional rights of states remains unresolved in practice.").

examining the ramifications of the exercise of universal jurisdiction. What is required, then, is a consideration of the needs of transitional societies, and the normative underpinnings supporting prosecutions or lesser forms of accountability.

1. Justice After Transition: What is at Stake Normatively and Politically?

There is a vast and expanding literature addressing the normative choices of transition, which I will not address in great detail in this section.[294] I argue elsewhere that what is needed before engaging in debates about what modes of response to atrocities are appropriate—amnesty, truth commission, lustration, and prosecution—is a consideration of what is at stake normatively in choices about transition.[295] Such an examination makes clear the importance of *national* decisions with regard to what is best for society. By this I do not mean that decisions made by elite pacts, which often include perpetrators, in which choices are made *for* the society take sufficient consideration of the needs of the domestic society. Rather, the society in question must make a serious examination of its needs to determine regard to what is best for it. In the heat of discussions about accountability, considerations of the needs of the domestic society may be lost, and when decisions are made by parties too far removed from the issues, they may be ignored altogether.[296] Such considerations lead not to simple one-size-fits all policy prescriptions, but a more nuanced understanding of what is at stake

294. *See generally* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003) (providing a recent overview of the issue and proposing a relevant genealogy of transitional justice); David J. Scheffer, *Gary Jonathan Bass's Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, 95 AM. J. INT'L L. 970 (2001) (book review) (examining whether the international community will respond to the next atrocity more easily and effectively).

295. *See Truth Commissions*, *supra* note 31, at 471-92 (2000) (examining whether there can be other goods besides justice yielded in a pursuit for accountability for past human rights violations). The article stresses the importance of understanding normative issues and addressing them in state-specific contexts. *Id.*

296. *See* Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 370-85 (1999) (explaining that the benefit of differing goods must be weighed against one another within a specific context).

in these choices, and recognition of the uniqueness of each transitional context.

a. Local Needs

The distinction between the normative and political issues of transitional justice is of course a false one; these issues are linked intimately. However, it is important to identify the specific political needs of transitional societies in more detail. The needs of these societies are complex, and may militate for or against punishment; in most instances—and this point is central—the relevant considerations include not only the culpability of the criminal, but also other societal needs. These needs include stability, democratization and the rule of law, reconciliation, and social learning, all of which require thoroughly addressing local actions.[297] Pursuing justice outside of the domestic society may serve retributive purposes, may speak to the culpability of the criminal, might serve deterrent purposes, and certainly is part of a process of reinforcing and elaborating upon global human rights norms, but it is far less clear that external proceedings will have positive effects upon the needs of the society itself.[298] Pursuing "globalisation" of justice may come at the cost of local needs.

b. Stability, Democratization, and the Rule of Law

Transitional societies have numerous urgent needs, with key needs being stability and the enhancement of the rule of law.[299] What is

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297. *See* JUSTICE VS. PEACE, *supra* note 31, at 1-32 (providing a more general account of the myriad goals, normative and political, that might be pursued). These are but some of the goals that transitional societies, and those who seek to aid them, might pursue; the focus here is on those actions relating to accountability that arguably need to be taken locally in order to have the desired local impact. *Id.*

298. *See* Lutz & Sikkink, *supra* note 32, at 19 (articulating possible impacts of foreign proceedings on individuals and on societal/institutional practices).

299. *See* Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 96 AM. J. INT'L L. 86, 92-99 (2001) (describing the variety of institutional structures that societies may select); *see also* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformations*, 106 YALE L.J. 2009, 2014 (1997) (explaining that in its ordinary social function, law provides order and stability but in transitions, the law can be paradoxical). Rule of law can maintain order while still allowing change during a period of transition. *Id.*

most likely to aid in the satisfaction of these needs is frequently less clear. Punishment in domestic institutions might prove counterproductive if it provokes a response from elements of the old regime that undermines the nascent democracy, weakening its legitimacy or undermining its authority over the security forces.[300] Such unrest could easily end the democratic experiment and undermine democratic stability. Advocates of democracy view democratic rule as morally good, and may be willing to compromise interests of justice in order to preserve the nascent democracy.[301] Thus, democratizers frequently choose to trade away some degree of accountability in pursuit of a future state where the rule of law reigns and human rights abuses do not take place. Reformers will recognize that the chances of the emergence of a democratic government are slim where members of the current regime fear future retribution.[302] There is a danger that the threat of prosecutions, which are intended

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See generally Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001) (examining the transitions in Kosovo and East Timor and concluding that a temporary military-run judiciary can be more effective than attempting to develop an independent judicial system post political collapse).

300. *See* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: the Case of Argentina*, 100 YALE L.J. 2619, 2639 (1991) (explaining how domestic measures, which may be thought of as passivity instead of punishment by other nations, can actually be a safeguard in deterring future violations).

301. *See* Jamal Benomar, *Justice After Transitions*, 4 J. DEMOCRACY 1, 4-5 (1993) (contending that since the end goal is to promote and protect democracy, the best way to preserve this is for countries to adopt a more conciliatory policy of national reconciliation and amnesty for past abuses). This viewpoint is articulated as the "reconciliation view." *Id.*; *see also* Naomi Roht-Arriaza, *Conclusion: Combating Impunity*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 281, 296 (Roht-Arriaza ed., 1995) (analyzing objections to prosecution in light of the fundamental belief that there is a "right to democracy"); Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L.J. 2537, 2545 (1991) (arguing the case against prosecutions since fragile democracies may not be able to survive military power or politically motivated trials during periods of transition).

302. *See* Jon M. Van Dyke & Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENV. J. INT'L L. & POL'Y 243, 246 (1992) (emphasizing that regimes that are likely to face punishment are less likely to voluntarily relinquish power). Therefore, the authors illustrate that a system with certain criminal prosecutions may not be the best way to foster effective and efficient transitions while protecting fledgling democracies. *Id.*

to strengthen the rule of law, could have the effect of strengthening the non-democratic regime. This threat may prompt reformers to accept amnesties and other compromises.[303] Moreover, the large number of potential defendants may render prosecution of all of them unrealistic.[304] There is a risk in this situation that prosecutions carried out abroad put these careful domestic compromises and amnesties in peril.

Of course, it may be that prosecutions aid the reinforcement of the rule of law, human rights, and the democratic processes. For example, prosecution may help prevent another dirty war, not only because members of the former junta (or potential copycats) fear punishment, but also because the rule of law is so entrenched as to make the return to lawlessness or abuse of law virtually impossible.

Thus, punishment may serve to restore, or install democracy, the rule of law, and respect for human rights by making it clear that certain actions are proscribed by law and subject to punishment.[305] On the other hand, an amnesty might encourage future abuses by appearing to condone them. The most important aspect of accountability is to demonstrate that the rules of a civilized society

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303. *See* Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7, 34-35 (1995).

304. *See* Van Dyke & Berkley, *supra* note 302, at 252 (elucidating the implausibility of securing convictions against large numbers of military or political dissidents due to time and cost restraints). Further, a state that lacks institutional infrastructure and whose leaders and army are essentially destroyed may not be able to withstand lengthy and numerous prosecutions. *Id.*

305. *See* Van Dyke & Berkley, *supra* note 302, at 244-45 (presenting five arguments in favor of punishment which include reasserting law and order, promoting democratic ideals, and serving as a deterrent); *see also* Raul Alfonsin, *"Never Again" in Argentina*, 4 J. DEMOCRACY 15, 18-19 (1993) (expressing that some beneficial effects of punitive measures include the deterrence of future crimes, the clarification of the circumstances under which the crime was committed, the condemnation of past abuses, and the increased awareness that all individuals must obey the law); Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 308-14 (1990) (arguing that punishment maintains stability and advances society by "modifying the behavior of potential lawbreakers" through deterrence, rehabilitation of lawbreakers, and the isolation of criminals from the rest of society).

"cannot be flouted."[306] Further, in addition to enshrining the rule of law and rights in the new society, prosecution may aid social peace by preventing a potential cycle of violence perpetrated by those seeking vengeance for prior wrongs.[307] Some might argue that the very social splits that appeared in Chile during the Pinochet proceedings in the United Kingdom illustrated the degree to which the transitional process failed to promote social healing through amnesty.[308]

Internal trials are thus a tool of some utility for the restoration of the rule of law and democracy, though they have mixed effects upon stability. External trials, on the other hand, take place because the rules of law and democracy have not been restored, or because, although the rule of law and democracy has been established, the state is not willing to take domestic action. Typically, external trials do little to aid in the strengthening of nascent democracies. Furthermore, they might well serve to contribute to weak judicial and state capacity. To the extent that human rights cases are consistently carried out outside of the country, they will then stand no chance of helping to establish, train, and reform the judiciary.

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306. *See* ARYEH NEIER, WAR CRIMES BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 222 (1998) (noting that criminal trials acknowledge the hardship of the victims and reinforce the application of the law); *see also* Cohen, *supra* note 303, at 19 (illustrating the deterrent impact of truth-telling since fear of discovery may help deter future abusers); Diane Orentlicher, *Transition to Democracy and the Rule of Law*, 5 AM. U. J. INT'L L. & POL'Y 965, 1056 (1990) (arguing that the failure to punish crimes can lead to an assumption that the government tolerates such behavior).

307. *See* Amnesty International, *Policy Statement on Impunity*, *in* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 219, 219-221 (Neil J. Kritz ed., 1995) (arguing that "the phenomenon of impunity is one of the main contributing factors to these continuing patters of violations"); *see also* Human Rights Watch, *Policy Statement on Accountability for Past Abuses*, *in* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra*, at 217, 217-18 (arguing that government has a responsibility to seek accountability for gross human rights violations); Nigel Rodley, *Transition to Democracy and the Rule of Law*, 5 AM. U. J. INT'L L. & POL'Y 965, 1044 (1990) (noting that the position of Amnesty International on the question of amnesty is more complicated, flatly opposing pre-conviction, but not post-conviction, amnesties).

308. *See* Bhuta, *supra* note 12, at 531 (1999) (raising the possible objection to amnesty as Pinochet's arrest and trial led to diverse reactions in Chile and ultimately hindered the healing process).

c. The Needs of Victims

There is another powerful reason to pursue prosecutions: concern for the victims. This requires acknowledgment of costs that the victims have already incurred, and the potential future costs that they may incur if their claims are ignored.[309] Victims of violence, in general, tend to lose their sense of control and autonomy, and often feel isolated. After state-sponsored human rights abuses, victims may feel especially isolated, as others in the community will often have distanced themselves from victims of such abuses, contending that they must have done something to deserve this, or fearing guilt by association.[310]

The paramount concern then should be to lessen victims' suffering in ways responsive to the harm they have suffered; the state or relevant international actors should help them to regain a sense of control and to re-integrate into society. It is also important that the victims actively participate in the process, which would help them to find meaning and a catharsis following seemingly random

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309. *See* Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 301, at 13, 16-19 (arguing that such a focus on the victim is necessary in order prevent them from becoming isolated); *see also* Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 301, at 160 (suggesting that a victim-centered theory of punishment responds to the victims' loss of self-worth and purpose).

310. *See* Roht-Arriaza, *supra* note 309, at 19 (noting that the larger society often responds to the victims as a group of individuals who brought their problems on themselves, or responds with the fear of being tainted by association with the victims); *see also* Malamud-Goti, *supra* note 309, at 166-68 (examining the act of blaming as a social practice as a large portion of the population often denies the victims' allegations or accuses the victims of bringing the hardship upon themselves); *Punishment and a Rights-Based*, *supra* note 337, at 9 (claiming that the role of punishment provides a "political remedy" to a community's lost sense of self-respect); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 21 (Beacon Press 1998) (arguing that nations recovering from atrocity must address the question of how to help heal all members of the society, including the victims, bystanders, and even the perpetrators); Cohen, *supra* note 303, at 19 (presenting the concept of a "double problem" to victims whereby victims are first accused of not telling the truth, and then have to address the notion that their conduct was deserved since they were guilty of crimes themselves).

victimization,[311] and restoring their dignity by giving them "their day in court."[312]

To aid victims, any procedure should promote the perception of procedural fairness and participation of the victims by allowing them to tell their own stories to the greatest extent possible. However, while a formalized adversarial setting is important, the process does not necessarily have to lead to incarceration of perpetrators or compensation for the victims. A significant portion of the benefit for victims come in publicly telling the truth and having it formally acknowledged and pronounced. The "truth" about abuses is often known, but what is important is the official acknowledgment of their experiences.[313] Furthermore, public disclosure of the identities of perpetrators is a form of punishment in itself.[314]

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311. *See* Roht-Arriaza, *supra* note 309, at 19 (suggesting that a victim-centered approach to punishment allows the victims to reestablish their sense of control and fosters their reintegration into the community).

312. *See* Van Dyke & Berkley, *supra* note 302, at 244 (listing arguments in favor of prosecuting culprits who abused official positions by violating the rights of citizens). One such argument addressed the need "to reassert the inherent dignity of each individual by providing the victims and their families their day in court." *Id.*; *see also* Lynn Berat & Yossi Shain, *Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 163, 166 (1995) (pointing out that retribution not only exposes the truth of past atrocities, but that it also penalizes the perpetrators); *see also* Juan E. Méndez, *In Defense of Transitional Justice*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 3-4 (A. James McAdams ed., 1997) (suggesting that "letting bygones be bygones" is disrespectful to the victim because it does not acknowledge the dignity of the victim).

313. *See* THE JUSTICE AND SOCIETY PROGRAM OF THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON? 93 (1989) (highlighting Professor Thomas Nagel's observance that acknowledgement results when knowledge is made accessible to the public); *see also* Aryeh Neier, *What Should be Done About the Guilty?* THE N.Y. REVIEW OF BOOKS, Feb. 1, 1990, at 34 (pointing out that governments are accountable to the people and that accountability is more than a "political tactic" as it encompasses recognizing moral responsibilities such as listening to and acknowledging the pleas of the victims); Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607-09 (1994) (stressing the importance of acknowledging the truth, rather than just finding it, since acknowledgement indicates that the state admitted its crimes); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE ATROCITY AND TERROR 24-27 (Routledge 2001) (arguing that the basic goal of a truth commission is "sanctioned fact finding" and that official recognition opens a topic for discussion and public review); MINOW, *supra* note 310, at 60-62 (noting that a truth commission is distinctive from prosecution in its focus on all victims and that

Truth commissions may be one tool to address the pain of the victims. In South Africa many commentators have argued that simply having an official and public commission provided some catharsis for victims, and in El Salvador the truth commission made a point of naming the names of certain perpetrators, while recognizing the improbability of prosecutions.[315]

While punishment is useful, then, it is not the only, or even frequently the best, solution to address the concern of the victims. Trials may be of use, but so may truth-telling procedures such as truth commissions. Victims may benefit by having a public platform, by having the truth officially endorsed, and by receiving compensation.

Of course, while this approach may have significant benefits for those directly victimized by previous abusive regimes, it may ignore larger societal needs, such as the re-establishment of the rule of law and faith in the legitimacy of the regime through public accountability (*e.g.*, through prosecutions or open recognition of accountability). A failure to establish the new regime's commitment to human rights and the rule of law might inadvertently undermine deterrence and send the wrong message to potential coup-makers.[316]

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such commissions afford individuals the opportunity to have their stories officially acknowledged). *But see* Benomar, *supra* note 301, at 10 (1993) (discussing the establishment of the Truth Commission in Chile, which was intended to serve as a moral reflection on the atrocities, and acknowledging the rightist opposition's argument that the Commission's report induced a new wave of terrorism).

314. *See* Roht-Arriaza, *supra* note 309, at 19-21 (acknowledging that public scorn, namely publication of the names of those found to have "committed murders, inflicted torture, and caused disappearances," serves as a useful deterrent); *see also* Van Dyke & Berkley, *supra* note 302, at 246 (suggesting that punishment does not need to incorporate criminal prosecution and incarceration, but that it can involve "loss of rank, job, or pension rights, and monetary fines"); *see also* Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, 20 L. & SOC. INQUIRY 79, 105-07 (1995) (citing Honduras as an example in which the findings of a commission may be used to facilitate regular judicial proceedings).

315. *See* MINOW, *supra* note 310, at 59 (noting that the South African truth commission was distinctive in its reconciliation and healings, and noting that regular broadcasts of the commission's hearings placed the stories of the victim in public view).

316. *See* Roht-Arriaza, *supra* note 301, at 292 (noting that successful economic and social systems serve as precursors to an established rule of law by providing

Lingering resentments over the past may also resurface later, posing problems for the new regime.[317]

If it is true that such domestic trials only address some of the needs of victims, it may be the case that external trials address even fewer of these needs. External trials provide for acknowledgment of the crimes, but the acknowledgment comes from outsiders instead of the state or parties implicated in the abuses. Further, given the distance of proceedings, the victims may achieve little sense of satisfaction, and they may not even be aware of the proceedings, much less able to participate.

d. Social Pedagogical Effects of Trials

Trials may do more than deter abuses, set past harms right, or satisfy the victims; they may strengthen a new democracy through their educational impact.[318] They are public spectacles that foster discussion and force society to face its recent past. These discussions could help prevent a reversion to the patterns of abuse that occurred in the past. The goal of a trial need not be to construct a single narrative of victims and victimizers, but rather to open a dialogue that embodies and enables the liberal virtues of tolerance and respect.[319]

However, prosecutions on this basis are still risky, and it may be as destabilizing for a new regime to have a trial conducted for pedagogic purposes as it would be to have a trial conducted for deterrence or pure punishment. Instead of fostering dialogue, a trial for pedagogic reasons may widen and reify rifts in society. Actors

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the citizens with a stake in the society's future, and that the failure to establish them could weaken the effect of the punishments).

317. *See* Berat & Shain, *supra* note 312, at 166-67 (presenting potential risks involved with retribution as accused individuals who used to yield power may attempt to "derail the democratic process").

318. *See* MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 1-2 (1997) (declaring that a primary role of criminal trials in democratic transitions is to promote public discussion and to provide the public with the opportunity to examine how such events could have happened and how to prevent future occurrences).

319. *See id.* at 2 (putting aside the traditional objectives of criminal law in order to encourage dialogue and promote virtues such as "toleration, moderation, and civil respect")

that one might seek to re-educate are likely to be resistant to assertions that their actions were morally wrong.

Internal trials, then, may have mixed effects as pedagogical tools. If they spark backlash, then they may provide the wrong lesson. Trials conducted externally may have an even more limited effect as social instruction, where much of the citizenry may be unaware of the trials, or where past abusers can contend that the proceedings are attacks on the nation by interfering outsiders.

e. National Reconciliation

Post-conflict or transitional societies face difficulties in reconciliation, as victims and perpetrators may live in close proximity.[320] Amnesty for the purpose of "national reconciliation" is often suspect, because it may be based on cynical self-serving arguments made by officials of abusive regimes.[321] Locating the normative core of the "national reconciliation" defence of amnesty is difficult. Meanwhile, many so-called "Laws of National Reconciliation" are frequently nothing more than final-hour self-amnesties by outgoing regimes, padded with rhetoric about a societal need to forgive, if not forget.

However, one might argue that forgiveness is a part of social healing. In countries where massive abuses have occurred, mistrust of fellow citizens and the justice system is widespread, possibly

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320. *See* Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, 20 INT'L SECURITY 136, 137 (1996) (suggesting that ethnic civil wars are best resolved when the opposing groups are physically separated into defensible territories). Other responses such as peace enforcement or suppression only temporarily quiet the conflict until future aggregation. *Id. But see* Nicholas Sambanis, *Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature*, 52 WORLD POL. 437, 479-82 (2000) (disputing Kaufmann and presenting a hypothesis that the combination of several ethnic groups in one state will reduce the likelihood of new wars). Although partition could feasibly reduce the frequency of internal wars, it would likely increase the frequency of international wars; resources should consequently be focused on "enhancing ethnic diversity while strengthening political institutions." *Id.* at 479-80.

321. *See* Cohen, *supra* note 303, at 36 (highlighting the somewhat ironic concept of "national reconciliation" since the same individuals who are responsible for the destruction then turn around and support reconciliation as a healing process).

rendering prosecutions counterproductive or ineffective.[322] It might be preferable to pass an amnesty law and attempt to begin social healing by focusing on the future rather than the past. In some instances it might be healthier for all concerned to forgive, if not forget, and move forward.[323] It might be the case that reconciliation is not a moral "second-best" because there is no practical preferable option. There may still be some moral virtue in the process of reconciling narratives, and attempting to reconcile groups and persons.[324]

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322. *See* Peter Uvin, *Difficult Choices in the New Post-conflict Agenda: the International Community in Rwanda after the Genocide*, 22 THIRD WORLD Q. 177, 181 (2001) (acknowledging the insurmountable task of establishing justice after the genocide on account of the damage suffered by the justice system, the scope of the crimes, and the extensive number of people involved); *see also* Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 220-22 (2003) (noting that the Rwandan government and a portion of the population negatively perceive the Criminal Tribunal in Rwanda, as they view the Tribunal as relatively ineffective and its punishments as too lax); Michael P. Scharf, *Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide*, 52 J. INT'L AFF. 621, 628 (1999) (reviewing Amnesty International's criticisms of the Rwandan domestic trials that the trials were too short, the defendants lacked adequate representation, and the overall environment lacked courtroom etiquette necessary for fair adjudication); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civics in Rwanda*, 75 N.Y.U.L. REV. 1221, 1254-56 (2000) (suggesting that criminal trial may not appropriately respond to the dilemma since perpetrators tend to take a defensive posture, leading them to deny involvement and refute accusations); Frank M. Afflitto, *Victimization, Survival, and the Impunity of Forced Exile: A Case Study from the Rwandan Genocide*, 34 CRIME, L., & SOC. CHANGE 77, 90-93 (2000) (illustrating that victimization continues due to continued impunity through the story of a Tutsi survivor of the genocide who cannot return to Rwanda for fear of being killed by the same man who killed her family).

323. *See* Van Dyke & Berkley, *supra* note 302, at 246 (presenting arguments against prosecution that trials further hatred and division between the people, thus preventing forgiveness and reconciliation); *see also* Cohen, *supra* note 303, at 41-42 (arguing that it is only through acknowledgement of the past that victims can truly forgive since they must "know what it is they are forgiving"). This acknowledgement and forgiveness allows the nation to look to the future after it has properly acknowledged its past. *Id.* at 42; *see also* DONALD W. SHRIVER, JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 42-44 (1995) (relying upon Christian teachings to emphasize that forgiveness leads to the "renewal of a social relationship" and that this power to forgive lies with the people).

324. *See generally* Susan Dwyer, *Reconciliation for Realists*, 13 ETHICS & INT'L AFF. 81 (1999) (discussing moral implications of reconciliation methods).

While social reconciliation may necessitate amnesty, it does not preclude other forms of "punishment." The revelation of the truth, for example, may both enable the victims to heal, and also punish the perpetrators through public shaming. It may also serve to encourage national debate over past events that can eventually enable reconciliation.[325]

However, amnesty on any grounds will still be highly suspect. Amnesty may not enable stability, and a stable democracy cannot be built on a weak foundation. A government that begins its term by rejecting the rule of law and accountability undermines its own claims to legitimacy. Additionally, a society may not achieve social reconciliation by simply turning a blind eye to the past. Victims and victimizers alike need a process to achieve reconciliation. At the very least, a public revelation of the truth, or prosecutions, may be necessary. Further, even if offering forgiveness and seeking to enable social reconciliation is the "right" approach, it is for the victims, rather than the government or any external actors, to make the decision.

Frequently, new democracies choose to compromise by instituting a truth commission. National reconciliation, or at the very least stability, is sought by offering elements of the old regime amnesty, while at the same time providing various benefits to victims and society as a whole through revelation of the truth. These benefits are sought through a formalized mechanism of truth-telling. There were at least fifteen truth commissions, some government sponsored, some not, between 1974 and 1994, and more have been developed since, most notably in Guatemala and South Africa.[326] This particular compromise has been especially common following transitions in Latin America, where old authoritarian and military rulers retained

325. *See* Cohen, *supra* note 303, at 36-37 (noting that public knowledge enables a nation to debate openly and honestly the causes of the conflict and future prevention measures).

326. *See* Hayner, *supra* note 313, at 607 (recognizing that the importance of truth commissions lies in their ability to conduct "sanctioned fact finding" and to create an accurate account of the events).

significant control over the process of transition, limiting the political feasibility of accountability efforts beyond truth-telling.[327]

These efforts sought to reap the putative benefits of truth-telling: vindication of the victims, official acknowledgment of the truth, and, in some cases, identification of the perpetrators.[328] While acknowledging these efforts are compromises made because of political obstacles, advocates of truth commissions say they aid reconciliation and stability.[329] They may do so further where the mandate of the commission empowers its members to recommend specific measures of judicial, military, police, or other institutional reform.

If local trials have limited conciliatory effect, it seems likely that distant trials have less to offer to reconciliation. They may either fail to permeate society, or be interpreted in ways that actually undermine reconciliation.

C. DISTANT JUSTICE: WHAT DOES IT OFFER?

This section has already suggested that "externalized justice" achieved through the exercise of universal jurisdiction, might not serve the needs of transitional societies.[330] This claim will be further

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327. *See* Popkin & Roht-Arriaza, *supra* note 314 (exploring the truth commissions in Chile, El Salvador, Honduras, and the proposed commission in Guatemala through a comparison of their achievements and limitations in light of the political and institutional realities of each country).

328. *See id.* at 100-01 (noting that the commissions' work proved to be successful in "fostering a sense of redress for victims" through the process of listening to their accounts and through the presentation of an official report acknowledging the crimes).

329. *See id.* at 83 (highlighting the benefits of truth commissions as they respond to the demand for accounting and meet the international community's insistence that governments take action against those responsible for crimes, and that these benefits are important steps towards reconciliation).

330. One may also assess external justice might also be assessed in terms of the quality of procedural justice, but that issue is set aside for the purposes of this paper. *See* James Meernik & Kimi Lynn King, *The Effectiveness of International Law and the ICTY—Preliminary Results of an Empirical Study*, 1 INT'L CRIM. L. R. 343, 353 (2001) (examining the composition of the ICTY, a court dealing with crimes in the former Yugoslavia but held in the Hague, and concluding that it is ultimately responsible for the outcome of the trials as opposed to the international

considered below. First, however, it is important to identify the advantages of finding justice "elsewhere" when it seems unlikely to be found at home. Where there are legitimate domestic processes in place that will conduct genuine examinations of past atrocities, there is no need for outsiders to intervene and establish judicial proceedings abroad that would supersede local processes. In the absence of such local action, what can external judicial action offer?[331]

1. Bringing Perpetrators to Justice

Perhaps the most obvious virtue of the exercise of universal jurisdiction, and the one most frequently invoked, is that it leaves perpetrators of atrocities with "no place to hide."[332] There is, at a minimum, a certain symbolic effect: former dictators can no longer continue to live off the benefits of despotic rule by travelling abroad to seek expensive medical attention, or even living abroad, thereby staying far from the complaints of their victims. Such global reach serves at least one key normative goal by bringing perpetrators to justice. Additionally, the global reach of universal jurisdiction serves the political goal of acting as a deterrent to other would-be offenders.

a. Retribution

One might argue that past abusers ought to be punished for one simple reason: their actions were reprehensible. There is no concern here with deterrence or bolstering the rule of law, the goal is simply

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community). While the Tribunal relies on other nations for funding, it is not reliant on state compliance for its work. *Id.*

331. I do not, here, address other possible goals of prosecutions or other accountability proceedings, such as rehabilitation, or, where provision is made, reparation, as these are not primary goals of the proceedings I examine here. *But see* George S. Yacoubian, *Sanctioning Alternatives in International Criminal Law: Recommendations for the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, 161 WORLD AFF. 48, 52 (1998) (noting that the establishment of the international tribunals in both the former Yugoslavia and Rwanda should not only impose incarceration on the accused, but should also provide financial restitution for the victims as its primary goals).

332. *See* Roth, *supra* note 289 (suggesting that the limit on courts permitted to exercise universal jurisdiction is the "availability of the defendant" rather than ideological concerns).

to punish wrongdoing. On this account, then, selective prosecutions and domestic amnesties are unacceptable,[333] because any wrongdoing requires punishment.[334] Some putatively retributive approaches may demand punishment not just because of the atrocious nature of the crime, but also because failure to punish invites repetition. This point relates more directly to deterrence,[335] and is not a purely retributive argument.[336]

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333. *See* Nino, *supra* note 300, at 2619-21 (resorting to Dworkin's distinction between "individual rights established by principles and collective goals imposed by policies" and arguing that selective prosecutions must "be done taking into account its use in satisfying the goals sought within the generally permissible criteria").

334. *See* Rychlak, *supra* note 305, at 325-33 (presenting the retributive justification of punishment as "the systematic moral response to wrongdoing" that results from the fact that the criminal deserves punishment); *see also* Neier, *supra* note 313, at 83-84 (offering the retributive argument that in order to restore equilibrium to a society, punishment must be proportionate to the crime); Carlos S. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289, 297-98 (1983) (arguing that an offender assumes a sort of liability to punishment when she performs a voluntary act knowing that loss of legal immunity is a consequence).

335. *See* Benomar, *supra* note 301, at 4 (presenting arguments that a failure to punish perpetrators basically condones the crime and that on the other hand, punishment of perpetrators symbolizes a commitment to new democratic values); *see also* Neier, *supra* note 313, at 222 (arguing the importance of trials, even a small number of exemplary ones, as they constitute an acknowledgment of the suffering and a demonstration that all individuals must follow the rule of law). I would contend that these arguments that point to such effects rather than the nature of the crime or offender ought to be separate from pure retributivist arguments. *See* Alfonsin, *supra* note 305 (treating retribution and deterrence motivations as opposed and arguing that the intention in Argentina centered more around prevention than punishment); *see also* J. L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982) (suggesting that individuals who perceive certain crimes as inexcusable consequently see them requiring a penalty because deterrence alone does not morally justify the right to inflict deprivation on the criminal).

336. *See* Mackie, *supra* note 335, at 4-6 (arguing that attempts to rely on retributivism as its own principle with its own moral authority fail); *see also* Jeffrie Murphy, *The Retributive Emotions, and Forgiveness and Resentment*, *in* FORGIVENESS AND MERCY 1, 1-27 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (contemplating the ability to both absolve someone from guilt while believing that the person's actions were wrong and unacceptable and concluding that forgiveness may not be appropriate). *But see* Jean Hampton, *Forgiveness, Resentment, and Hatred*, in FORGIVENESS AND MERCY, *supra*, at 35, 36-40 (arguing that condoning and forgiveness are two distinct concepts and that condoning implies an acceptance of the moral wrongs while forgiveness does not).

b. Deterrence

Prosecution at home might deter potential individual violators and strengthen societal respect for the rule of law and new democratic institutions. Failure to punish perpetrators will weaken the new state by raising serious doubts about the legitimacy and efficacy of the judicial system.[337] Successful punishment might not only enhance the credibility of the new regime, but also aid its consolidation and reform efforts.[338] While not every crime must be punished, at least some exemplary punishments are necessary for deterrent purposes.[339]

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337. *See* Orentlicher, *supra* note 301, at 2542-43 (arguing that failure to enforce the laws dissipates the authority and effectiveness of the law and that nations can "foster respect for democratic institutions" by proving that no sector can escape the law); Jamie Malamud-Goti, *Remarks: Transition to Democracy and the Rule of Law*, 5 AM. U. J. INT'L L. & POL'Y 965, 1040 (1990) [hereinafter Malamud-Goti *Remarks*] (providing Argentina as an example where the nation put members of the military on trial to enforce the concept that no institution should rise above the law and that the rule of law must be applied equally to all members of society); *see also* Jamie Malamud-Goti, *Punishment and a Rights-Based Democracy*, 10 CRIM. JUST. ETHICS 3, 6 (1991) [hereinafter *Punishment and a Rights-Based Democracy*] (noting that the failure to punish state criminals properly will "undermine attempts to de-authoritarianize" society because a individuals will continue to sacrifice their personal values and dignities).

338. *See* Malamud-Goti *Remarks*, *supra* note 337, at 1040-41 (using the prosecution of the Argentinean military as an example of adapting the institution to a new, rights-based society that can serve as an example to the rest of the nation that democratic principles will be applied equally throughout the nation).

339. *See* Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 745-47 (1999) (arguing that it is not necessary to punish a large number of perpetrators to achieve deterrence because the "moral propaganda" that results from punishing a single offender sends a message of "social disapproval" and encourages individuals to follow the law); *see also* Payam Akhavan, *Beyond Impunity: Can International Criminal Tribunals Prevent Further Atrocities*, 95 AM. J. INT'L L. 7, 9-11 (2001) (suggesting that public ostracization of criminal leaders will likely use the "power of moral example" to prevent future atrocities); Orentlicher, *supra* note 301, at 2543 (showing deterrence in transitional situations such as Argentina and Greece where a series of prosecutions "with defined limits" is the best option that a transitional government can take rather than prosecuting all who took part in the violations); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals? in* TRANSITIONAL JUSTICE 189, 189-193 (Neil J. Kritz ed., 1995) (discussing the prosecution of military officers in Argentina and determining that the trials made progress towards the protection of individual rights and that the transitional government's decision to not try all of the violators does not breach their moral responsibilities).

When the prosecution cannot take place where the crime occurred, one might hope that the spectre of prosecutions taking place anywhere in the world would serve as a powerful deterrent.

However, there is a practical problem with the hope that prosecution will deter future abuses. Deterrence is based on the assumption that the perpetrator believed or understood that the action was wrong and expected that such wrongdoing would result in negative consequences. Unfortunately, many leaders and active participants in authoritarian and abusive regimes have not believed themselves to be doing something wrong. If this is indeed the case, then such abuses are un-deterrable, since potential abusers will see such punishments as unjustifiable, or simply as punishment of behavior not analogous to their own.[340] Such deterrent effects may be further attenuated where the punishment is carried out far from home. It is likely that other will view punishment as illegitimate, sporadic, and thus unlikely to recur or simply have little impact at all.[341] There is not strong evidence that international trials have a deterrent effect, and some evidence demonstrates the reverse.[342]

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340. *See Naomi Roht-Arriaza, The Legal Setting, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 301, at 13, 14 (stating that deterrence is only effective when the violation is seen as such in the eyes of the perpetrator since some perpetrators misinterpret "society's mixed messages" and believe themselves to be acting on justifiable motives); *see also* Rychlak, *supra* note 305, at 309-10 (arguing that deterrence is more effective with "certainty of punishment" than with a greater "severity of punishment" since deterrence is ineffective if the perpetrator does not think that she will be caught).

341. *See* Sriram, *supra* note 3, at 66 (asserting that while a prosecution may serve as a deterrent, where the prosecution takes place outside of the individual's home country the detterent effect of that prosecution decreases because it is based on the presumption that the perpetrated expected negative consequences to ensue from her actions).

342. *See* David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J. 473, 474-84 (1999) (arguing that the effect of deterrence in international prosecutions is largely untested and rather discouraging). A possible rationale for the ineffectiveness of deterrence is that the tribunals affect too few people to have an impact on the masses and that they lack the frequency of and consistency amongst punishment for similar crimes. *Id.* at 475; *see also* Carrie Gustafson, *International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means*, 21 HOUS. J. INT'L L. 51, 60-63 (1998) (identifying the problem with deterrence as the presupposition of a rational perpetrator when this is not always the case and that individuals are more likely to act on their own values and beliefs than on the "threat of formal sanction by a

There is little reason to believe that prosecutions effected through the exercise of universal jurisdiction would have greater deterrent effects. It is even less likely that prosecutions elsewhere will aid domestic reform efforts.

In many instances, resort to the exercise of universal jurisdiction might well be appropriate where local action is barred. At the moment, the fear that there will be a vast outbreak of politically motivated prosecutions globally appears to be mere speculation. We have not seen frivolous or harassing prosecutions proceed far, and the majority of jurisdictions that have heard, or are likely to hear such cases, have sufficiently embedded standards of rule of law and due process that it seems unlikely that they would allow such actions to proceed. It seems more plausible that in the near term we can expect that prosecutions will continue to be motivated by a genuine desire to defend fundamental human rights norms.[343]

However, it is not clear that doing justice at a distance serves its intended purposes. It is also unclear that well-meaning external actors on the opposite side of the globe, or even in a neighbouring country, will take sufficient account of the balance that may already have been struck locally in coming to terms with the past. Taking action after a society has implemented an agonizing set of choices may upset nascent stability and reconciliation.[344]

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remote institution"); Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals,* 55 INT'L ORG. 655, 683-84 (2001) (claiming that effective deterrence requires "commitment, capability, and credibility" and that these elements are not met by war crimes tribunals).

343. *See* Ruth Wedgwood, et al., *The United States and the Statute of Rome,* 95 AM. J. INT'L. L. 124, 129-30 (2001) (outlining the restraints placed on prosecutors in the treaty to ensure correct enforcement). *But see* Kissinger, *supra* note 277 (arguing that "[t]he danger lies in pushing the effort to extremes that risk substituting the tyranny of judges for that of governments.").

344. *See* Drumbl, *supra* note 285, at 126 (arguing that "[t]rials in Rwanda appear to hinder the emergence of a shared political compact, a departure from the perverse politics of ethnic duality, and the development of a sense of Rwandan commonality and citizenship that supersedes ethnic attachments to Huti and Tutsi.").

D. LEARNING FROM EXPERIENCE

1. Internal and External Proceedings for Rwanda

As it is well known, following the United Kingdom's refusal to extradite Pinochet to Spain, he returned to Chile where domestic legal proceedings began. Despite widespread disappointment that the charges would not be heard in Spain, there was also significant reason for optimism about the impact of universal jurisdiction. Without the proceedings in Spain and the United Kingdom, it seems unlikely that the Chilean legal proceedings would have been advanced. Perhaps actions abroad could be expected to have domestic political ramifications that would force the bringing of perpetrators to justice at home. These developments may be viewed as part of what has been referred to as the "justice cascade" in Latin America, whereby regional norm development and foreign judicial processes have encouraged processes at home.[345] However, the impact of this cascade varies in different contexts, according to, *inter alia*, the degree of democratic consolidation and the degree of publicity and support that the international proceedings have received.[346] The lessons of distant justice from Rwanda are somewhat less heartening.

The experiences of Rwanda starkly illustrate the mixed ramifications of extraterritorial prosecution. The Rwanda prosecutions have gone forward at home, through the international tribunal, and through the use of universal jurisdiction. Several claims have been advanced for the positive impact of the ICTR for Rwanda itself. These effects include the penetration of international legal norms into the national legal system and the pedagogic effect of the Tribunal proceedings.[347] However, much empirical work that has

345. *See* Lutz & Sikkink, *supra* note 32, at 4 (noting the rapid development of human rights awareness in Latin America).

346. *See id.* at 31-32 (articulating six factors that impact the justice cascade, two of which are emphasized here).

347. *See* Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 375-76 (1999) ("Actions like the Rwanda Tribunal's genocide conviction of a former mayor, Jean-Paul Akayesu, and the guilty plea of former Prime Minister Jean Kambanda, feed back into society to reshape how individuals view

been done to date casts doubt upon these effects. In particular, some have raised serious concerns about the relationship of the Tribunal, based in Arusha, Tanzania, and the domestic prosecutions.[348]

The ICTR and domestic courts have concurrent jurisdiction over crimes relating to the genocide of 1994.[349] There are several notable distinctions between the two. The sentences they can impose are different, as Rwandan courts can impose the death penalty while the Tribunal does not. The Tribunal has far greater resources, and far fewer defendants to process, but has been very slow to render judgment.[350] At its current rate, the Tribunal is certainly not capable of handling the vast number of cases that the Rwandan courts are seeking to address. The Rwandan courts hearing cases arising from genocide use a specialized plea-agreement system, which helps to expedite cases and bring out more information, though there is reason to hold concerns about the potential for miscarriage of justice.[351] The internal trials take place in the midst of the society that underwent the genocide, while the ICTR sits outside the nation's borders. Finally, the division of labor may be described as one of stratified concurrent jurisdiction: the Tribunal hears the cases of organizers and leaders, while Rwandan courts handle more ordinary cases.

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governance, the duties of states and citizens, even the meaning of statehood and citizenship.").

348. *See* International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed* (2001) [hereinafter *Justice Delayed*] (giving a detailed discussion of the delays and other difficulties of the tribunal), *available at* http://www.crisisweb.org/home/index.cfm?id=1878&l=1 (last visited Oct. 15, 2003); *see also* International Criminal Tribunal for Rwanda, *General Information About the Tribunal: Introduction* (providing an overview of the Tribunal and its base), *at* http://www.ictr.org/org/ENGLISH/geninfo/intro.htm (last visited Oct. 22, 2003).

349. *See* Bernard Muna et al., *The Rwanda Tribunal and its Relationship to National Trials in Rwanda*, 13 AM. U. INT'L L. REV. 1469, 1473 (1998); *see also* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 362 (1997) (indicating that the ICTR has concurrent jurisdiction with Rwandan courts).

350. *See Justice Delayed*, *supra* note 348 (noting that in the seven years it has existed, the ICTR has only issued nine judgments).

351. *See* Morris, *supra* note 349, at 359-61 (providing that under the system of plea agreements, all perpetrators, other than ones subject to the death penalty, may receive a pre-set, fixed reduction in the penalty).

Critics allege that the key failing of the Tribunal is its inability to truly penetrate Rwandan society, thus limiting its capacity to enable reconciliation, serve pedagogic purposes, or act as a deterrent.[352] The Tribunal has completed several significant cases and has sent a general message against impunity. However, critics have criticized the Tribunal for being isolated from Rwandan society; it is not only physically separated from Rwanda, but this fact limits its capacity to communicate with society. There are few televisions in Rwanda and little radio coverage as well. This means that average Rwandans are not aware of the work of the Tribunal; without such involvement, active or passive, it is unclear that there can be much in the way of pedagogy, reconciliation, or deterrence produced by the Tribunal's work.[353] Conversely, it may be the case that domestic cases, which have been handled in greater volume, and which involve detailed confessions, contribute to the development of an accurate record of the genocide, a necessary component of reconciliation.

a. Other Risks: Competing Mechanisms and Selectivity

The tribunal and Rwandan courts have also competed for defendants, in several instances requesting the same defendants from governments. This generates a significant degree of incompatibility, given the different procedures that each employ, and given the important disparity in sentencing options. The stratified-concurrent jurisdiction approach of the international court also means that those who organized the genocide have a veil of protection from the death penalty, while more "ordinary" offenders do not.[354]

It seems increasingly likely that elsewhere, as in Rwanda, we will see several overlapping proceedings, some of which I discuss in the

352. *See* Uvin & Mironko, *supra* note 322, at 226 (critiquing Tribunal's ability to integrate into Rwandan society); *see also* International Crisis Group, *The International Criminal Tribunal for Rwanda: The Countdown–Executive Summary and Recommendations* (2002) [hereinafter *ICG Countdown*] (supplying a critique of and recommendations for the Tribunal), *available at* http://www.crisisweb.org/home/index.cfm?id=1878&l=1 (last visited Nov. 19, 2003).

353. *See ICG Countdown*, *supra* note 352 (reporting that the Rwanda Tribunal may be failing to meetings it mandate).

354. *See* Morris, *supra* note 349, at 356 (indicating the disparities in the death penalty approach).

next section. East Timor has had a commission of inquiry, prosecutions pursued by the Serious Crimes Unit created by the United Nations, and discussion of a tribunal continues.[355] In Sierra Leone, a commission of inquiry has been set up and a special court has been authorized by the United Nations.[356] The risk remains, with the proliferation of such instruments, that they may be contradictory or competing rather than complementary. Furthermore, so long as most prosecutions are carried out by Western nations against former leaders from the global South who have fallen from favor, there is some significant risk that prosecutions will be selective, and that they may also be viewed as discriminatory.[357]

E. EXTERNALIZATION OF JUSTICE: A CALL FOR ACTION

This is not to suggest that pursuing war criminals and human rights abusers elsewhere is never appropriate and never serves the needs of the societies where the crimes took place. It is, rather, to strike a note of caution. While limitations do not formally exist on the exercise of universal jurisdiction, the use of the principle of complementarity would be most appropriate. That principle is built into the statute of the ICC, which can request that national courts defer to its jurisdiction.[358] There is currently nothing to prevent

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355. *See* Amnesty International, *Still Waiting for Justice in Timor-L'Este*, June-July 2003 (reporting that the serious crimes unit has made considerable progress since its establishment), *available at* http://www.amnesty.org.au/airesources/newsletterJuneJuly03/timor-leste.asp (last visited Dec. 18, 2003).

356. *See U.N. Approves War Crimes Court for Sierra Leone*, REUTERS, Jan. 3, 2002 (stating that the task of the tribunal would be the prosecution of about twenty people accused of being involved in Sierra Leone's decade-long civil war), *available at* http://www.globalpolicy.org/intljustice/tribunals/2002/0401sl.htm (last visited Oct. 15, 2003).

357. *See* Bhuta, *supra* note 12, at 528 (stating that "despite widespread acceptance of the *jus cogens* status of crimes, the consistent enforcement of these principles against individuals whose crimes 'shock the conscience of mankind; has been absent").

358. *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 1, U.N. Doc. A/Conf.183/9, 37 I.L.M. 999 (establishing the intent to have jurisdiction complement Rwanda's legal system); *see also* Statute of the International Criminal Tribunal of Rwanda, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/Res/955 (1994).

external national courts from asserting primacy over local national courts, with the ramifications for the home society detailed above. Courts ought to generate formalized limitations upon the range of assertion of universal jurisdiction.[359] Otherwise, there is a risk that resources will flow to external procedures, which do not address some of the most salient needs of transitional societies.

IV. EXTERNALIZATION REVERSED: MIXED TRIBUNALS

If externalization of justice carries with it the costs and risks articulated thus far, what is to be done? Certainly, it cannot be the case that accountability for past abuses should not be pursued, though caution must be exercised in doing so. There might, however, be an alternative model—internationalized tribunals where prosecution is carried out at home. These "mixed tribunals," which may involve domestic and external judges or a complicated mixture of domestic and international law, have been created for East Timor and for Sierra Leone, and protracted negotiations regarding a Cambodian tribunal continue. However, the experience of East Timor suggests reason for caution. Such "externalization reversed" may not necessarily overcome the problems identified with externalization. These include a sense that the process does not include local citizens, including victims, that it fails to address many crimes, and that it does little to foster national reconciliation or capacity-building. This reason is a dominant reason that, despite the mixed tribunal in East Timor, there continue to be domestic demands for an international tribunal.

359. *See* Kevin R. Gray, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 13 EUR. J. INT'L L. 561, 723-24 (2002) (discussing foreign minister immunity as a limit to the exercise of universal jurisdiction), *available at* http://www.ejil.org/journal/Vol13/No3/sr1.html (last visited Dec. 13, 2003); *see also* PRINCETON PRINCIPLES, *supra* note 6, at 11 (formulating principles in order to clarify and bring order to the area of international law dealing with prosecutions based serious crimes under international law and universal jurisdiction).

A. FACING THE DILEMMA: EAST TIMOR

As it is well known, shortly after the referendum on independence, resulting in the East Timorese vote for independence after more than twenty years of Indonesian occupation, violence erupted across the province.[360] The massacres that resulted have been attributed to militias acting with the support or at the instigation of the Indonesian military command.[361] The U.N. Security Council installed a U.N. transitional authority in East Timor to quell the violence and keep the peace, as well as to initiate institution-building.[362] In the interim, the United Nations has taken over a broad range of governance-related roles in the province, ranging from policing to judicial action.[363] Thus, responsibility for the tough choices regarding whether to prosecute a range of individuals for the violence falls to the United Nations and Indonesia. However, within East Timor, local opinions also matter, and in the long run, these problems will fall to the East Timorese government to address. Not surprisingly, the United Nations has had considerably greater success in the pursuit of accountability than those seeking justice in Indonesia. In East Timor, the United Nations and the Timorese transitional actors exercise significant authority in the face of stiff, but to date manageable, levels of political opposition and violence.[364] In Indonesia, many of the perpetrators of rights abuses are or were members of the military or security sector, and would pose considerable threats to stability

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360. *See generally* Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245 (2003) (providing a background on the crimes of mass atrocity in East Timor).

361. *See id.* at 263 (providing an overview of the Indonesian occupation of East Timor, which lasted until August 1999).

362. *See id.* at 248 (noting that the U.N. Security Council Resolution 1272 established the U.N. Transitional Administration in East Timor, and directed the United Nations to exercise executive and legislative authority in East Timor).

363. *See id.* (noting that that Resolution 1272 marked the first time that the United Nations had exercised all the sovereign functions of a country).

364. *See* SIMON CHESTERMAN, INTERNATIONAL PEACE ACADEMY, *East Timor in Transition: From Conflict Prevention to State-Building* (2001) (supplying an overview of the transitional administration and exploring the types of challenges the United Nations has faced in its administration of East Timor), *available at* http://www.ipacademy.org/Publications/Reports/Research/PublEastTimorPrint.htm (last visited Oct. 15, 2003).

should their punishment be sought; those individuals seeking their punishment are comparatively small in number and weak in strength. In fact, most of the senior level Indonesian army ("TNI") officers who where in command in East Timor during the referendum period were promoted upon their return to Indonesia.[365] The focus of this section will be only on the attempts to address past abuses through the serious crimes panel, not also those attempted in Indonesia.

1. Background: Occupation, Referendum, Violence, and the U.N. Mission

Following Portugal's provision for a transitional government in East Timor in 1975 in preparation for the independence of the province, Indonesia invaded the province, declaring it in 1976 to be the twenty-seventh province of Indonesia.[366] The United Nations condemned this invasion with resolutions by the Security Council and General Assembly to this effect.[367] The Secretary General received a mandate to address the situation by the General Assembly and oversaw negotiations between Indonesia and Portugal beginning

365. *See* IAN MARTIN, INTERNATIONAL PEACE ACADEMY , *Self-Determination in East Timor: The United Nations, the Ballot and International Intervention*(2001) (providing an excellent overview of the history of East Timor from Portuguese rule to Indonesian occupation to United Nations administration), *available at* http://www.un.org/peace/etimor/UntaetB.htm (last visited Oct. 15, 2003).

366. *See id.* (describing the historical events that occurred in 1975-76); *see also Question of East Timor: Progress Report of the Secretary-General*, U.N. GAOR, 54th Sess., Agenda Item 96, U.N. Doc. A/54/654 (1999) (establishing the United Nations mission in East Timor); United Nations, *The United Nations and East Timor: A Chronology* ("The Security Council reiterates its call for Indonesia's withdrawal. The General Assembly reaffirms the right of East Timor's people to self-determination, a principle which it re-states yearly at its annual session."), *available at* http://www.un.org/peace/etimor99/chrono/body.html (last visited Oct. 22, 2003).

367. *See* Martin, *supra* note 366, at 17 (stating that the United Nations adopted two resolutions calling on Indonesia to withdraw from East Timor); *see also* Lynn Fredriksson, *East Timor*, FOREIGN POLICY IN FOCUS, Dec. 2000 (reporting that "[b]etween 1972 and 1982, the United Nations passed two Security Council and eight General Assembly resolutions condemning Indonesia's invasion, calling for its immediate withdrawal, and supporting East Timor's self-determination."), *available at* http://www.foreignpolicy-infocus.org/ (last visited Oct. 22, 2003).

in 1983.[368] Significant progress would not be made, however, until the late 1990s, as the United Nations became increasingly active on the issue and President Suharto of Indonesia fell from power, providing a unique opening.[369] His handpicked successor, B.J. Habibie, proposed a form of autonomy for the Timorese, who demanded independence.[370] The result was an agreement to hold a plebiscite on the status of the territory. Indonesia and Portugal agreed to a U.N. operation in the territory to prepare for the plebiscite, to be held on August 30, 1999.[371] The U.N. Mission in East Timor ("UNAMET") authorized the deployment of up to 280 civilian police officers and fifty military liaison officers as advisors in preparation for the vote.[372] However, violence continued throughout the province, perpetrated largely by anti-independence militias supported by the Indonesian military.[373]

The militia violence in the run-up to the plebiscite sparked international concern, but significant limits were placed on the United Nation's capacity to ensure security. Despite United Nations requests for the disarmament of militias and other security measures, the resulting agreement was weak, failing to seriously restrain the

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368. *See East Timor–U.N.TAET Background* (stating that successive Secretaries-General conducted regular talks with Indonesia in order to resolve the status of the territory), *at* http://www.un.org/peace/etimor/UntaetB.htm (last visited Oct. 22, 2003).

369. *See* Martin, *supra* note 366, at 18-19 (stating that the fall of the president was a political turning point).

370. *See id.* at 19 (stating that the "successor government of President Habibie state that it was prepared to give East Timor a wide-ranging autonomy, with Jakarta retaining only three areas: foreign affairs, external defense, and some aspects of monetary and fiscal policy").

371. *See* U.N. SCOR, 54th Sess., 3988th mtg., U.N. Doc. S/RES/1236 (1999) ("Welcoming the progress made at the last round of talks between the Governments of Portugal and Indonesia, under the auspices of the Secretary General of the United Nations, leading to the conclusion of a series of agreements in New York of 5 May 1999."); U.N. SCOR , 54th Sess., 4013th mtg., U.N. Doc. S/RES/1246 (1999) [hereinafter UNAMET Resolution] (providing for the creation of U.N.AMET).

372. *See* UNAMET Resolution, *supra* note 371 (establishing UNAMET to organize and conduct the consultation).

373. *See* Martin, *supra* note 366, at 20 (chronicling the violence in East Timor during this time).

presence of paramilitary forces and militias and leaving security for the referendum in the hands of Indonesia.[374]

On August 30th, nearly ninety-nine percent of eligible voters went to the polls, and some seventy-eight percent of those voted to reject the autonomy package and instead become independent of Indonesia.[375] When results were announced on September 4th, a wave of violence was unleashed by the militias, resulting in vast destruction across East Timor, countless deaths, the displacement of hundreds of thousands of East Timorese internally and into West Timor, and the withdrawal of most of UNAMET.[376] The international community responded with condemnation and economic reprisals, in particular through the World Bank, and demanded that Indonesia permit a serious international presence. That presence came first in the form of INTERFET, a Security Council-mandated Australian-led international force, established on September 15th to protect UNAMET in carrying out its tasks.[377] That force would turn over its

374. The responsibility is allocated in the Agreements of 5 May signed by Indonesia, Portugal, and the Secretary-General. *See* Agreement Between Indonesia and Portugal on the Question of East Timor, U.N. SCOR, 53rd Sess., at 1 & 3, U.N. Doc. S/1999/513 (1999) (requesting "[t]he Secretary-General to put the attached proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia to the East Timorese people, both inside and outside East Timor, for their consideration and acceptance or rejection through a popular consultation on the basis of a direct, secret and universal ballot."); *see also* Martin, *supra* note 366, at 31 (providing background on the tripartite negotiations).

375. *See Report of the High Commissioner for Human Rights on the Human Rights Situation in East Timor*, U.N. ESCOR, 4th special sess. ¶ 3, U. N. Doc. E/CN.4/S-4/CRP.1 (1999) (noting the in announcing the ballot, the Secretary General "asked all parties to bring an end to the violence, which, for 24 years, had caused untold suffering to East Timor and to begin in earnest a process of dialogue and reconciliation through the East Timor Consultative Commission").

376. *See id.* ¶ 3 (regretting that after the election, different militia groups engaged in violence, which targeting supporters of the independence of East Timor).

377. *See* Martin, *supra* note 366, at 114 (stating that the United Nations adopted a resolution to establish INTERFET on September 15); *see also* Situation of Human Rights in East Timor, U.N. Comm. Human Rts., 4th special sess., U.N. Doc. E/CN.4/RES/1999/S-4/1 (1999) (condemning the role of the militias).

functions over the next few months to UNTAET, completing the handover on February 28, 2000.[378]

The U.N. Security Council established UNTAET on October 25, 1999 under Chapter VII of the U.N. Charter, authorizing significant military and police components.[379] The mandate of the mission was to provide security and maintain law and order throughout East Timor, to establish an effective administration, to assist in the development of civil and social services, to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance, to support capacity-building for self-government, and to assist in the establishment of conditions for sustainable development.[380]

In addition to the broad work of reconstructing a devastated country, the U.N. mission was tasked to develop institutions not previously extant, for example, U.N. CIVPOL was brought in to train cadets for the first civilian police in East Timor.[381] The United Nations has recognized the need to address the violence, creating a commission of inquiry and establishing the Serious Crimes Investigation Unit, a mixed panel, composed of Timorese and

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378. *See* U.S. State Department, *Country Reports on Human Rights Practices—2000* (Feb. 2001) (commenting on the passage of military and later policy functions to the United Nations), *available at* http://www.state.gov/g/drl/rls/hrrpt/eap/index.cfm?docid=688 (last visited Oct. 16, 2003).

379. *See* U.N. S.C. Res., U.N. SCOR, 54th Sess., 4057th mtg. ¶ 1, U.N. Doc.S/RES/1272 (1999) (deciding "to establish, in accordance with the report of the Secretary-General, a united Nations Transitional Administration in East Timor (U.N.TAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice").

380. *See id.* ¶ 4 (authorizing "U.N.TAET to take all necessary measures to fulfill its mandate").

381. *See Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the Period 27 July 2000 to 16 January 2001)*, U.N. SCOR, at 7, U.N. Doc. S/2001/42[hereinafter *Report of the Secretary-General*] (describing the institutions developed by the United Nations). The United Nations created a new East Timor Defense Force, when Falintil, the former armed wing of the most popular political party, was disbanded in early 2001. *Id.* The new Timorese army will be mainly concerned with providing future border protection. *Id.* Courts were set up in the interim to administer justice until a new Timorese regime could establish institutions of justice. *Id.*

international judges to address those accused of crimes in East Timor. UNTAET also established new courts for the period of the transitional administration. It has not set up a process to address those responsible in Indonesia and has indicated that the obligation to pursue those responsible for the violence lies with Indonesia. The United Nations has decided to postpone a decision on setting up an international tribunal after Indonesia reassured the international community that it would serve justice to the perpetrators of the violence. This seems something of a turning point, and also somewhat precedent-setting given the level of U.N. involvement in constructing Timorese institutions from the ground up.

East Timorese leaders are divided on the issue of appropriate accountability mechanisms. While Xanana Gusmao, now president of the new country Timor Leste, has stated that an international tribunal is not what the East Timorese need at this point, Foreign Affairs Minister Jose Ramos-Horta encourages bringing justice to through international tribunals.[382] U.N. member states have clearly stated that they wish to give the Indonesians an opportunity to prosecute those responsible and maintain stability in the country's provinces.[383]

2. The United Nations: Investigations and the Commission of Inquiry

The United Nations began investigations into the post-referendum violence soon after the violence's end. The U.N. Human Rights Commission created a commission of inquiry, and the United Nations also sent a team of human rights investigators, comprised of the special rapporteurs on executions, torture, and violence against

382. *See East Timor: U.N., Indonesia Issue Damning Human Rights Reports*, U.N. WIRE, Feb. 1, 2000 (quoting Jose Ramos Horta as saying, "[i]n this day and age, you cannot kill hundreds of people, destroy a whole country, and then just get fired."); *available at* http://www.unwire.org/UNWire/20000201/6998_story.asp (last visited Dec. 18, 2003).

383. *See* Joe Saunders, *Wheels of Justice: Unfinished Business in Timor*, Aug. 2000 (reporting that "[k]ey member states of the U.N. early on rejected the idea of an international tribunal on both political and logistical grounds."), *available at* http://www.hrw.org/editorials/2000/etimor0830.htm (last visited Dec. 18, 2003).

women, to East Timor in November 1999.[384] These investigations examined acts of violence launched by both pro and anti-independence forces and attributed the killings largely to militia groups supported by TNI and police.[385]

The five-member International Commission of Inquiry arrived in East Timor in November 1999.[386] Indonesia promised to cooperate with the commission, but rejected the resolution creating the Commission, arguing that there were "procedural irregularities" and insisting, therefore, that any findings of the Commission were not binding on Indonesia.[387] The International Commission of Inquiry transmitted its report to the U.N. High Commissioner for Human Rights in January 2000. It found, not surprisingly, that there was a pattern of serious violations of human rights and humanitarian law, linking the TNI and the militias.[388] The Indonesian government

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384. *See U.N. Envoys Investigating Alleged Human Rights Abuses in East Timor*, U.N. NEWS, Nov. 8 1999 (reporting that three U.N. experts had begun human rights abuse investigations in East Timor), *available at* http://www.un.org/peace/etimor/news/081199.htm (last visited Oct. 9, 2003). The U.N. High Commission on Human Rights requested the investigation. *See Situation of Human Rights in East Timor,* U.N. High Commissioner for Human Rights, 4th Special Sess., §§ 6-7, U.N. Doc. E/CN.4/RES/1999/s-4/1 (1999). The U.N. Economic and Social Council also supported the inquiry. *See Report of the Commission on Human Rights on its Fourth Special Session*, U.N. High Commissioner for Human Rights, 4th Special Sess., at ch. 1, U.N. Doc. E/CN.4/1999.167/Add.1 (1999). ECOSOC voted twenty-seven to ten, with eleven abstentions, in support of sending human rights investigators to East Timor. *U.N. Economic and Social Council Endorses Rights Inquiry for East Timor*, U.N. NEWS, Nov. 15, 1999, *available at* http://www.un.org/peace/etimor/news/151199.htm (last visited Oct. 22, 2003).

385. *See* U.N. GAOR, 54th Sess., Agenda Item 116(c), ¶¶ 59-65, U.N. Doc. A/54/660 (1999) (detailing the rapporteurs' conclusions on Indonesia's responsibility for human rights violations in East Timor).

386. *U.N. Panel Set to Visit East Timor to Probe Atrocities*, U.N. NEWS, Nov. 19, 1999 (detailing U.N. investigators' plan to visit sites and interview witnesses where people reported rights violations), *available at* http://www.un.org/peace/etimor/news/191199.htm (last visited Oct. 22, 2003).

387. *See Question of East Timor*, U.N. GAOR, 54th Sess., Annex 1, Agenda Item 96, at 1, U.N. Doc. A/54/727 (2000) (describing Indonesia's justification for its belief that the establishment of the International Commission did not have the requisite support of the international community).

388. *See* U.N. GAOR, 54th Sess., Annex 2, Agenda Item 96, ¶¶ 135-141, U.N. Doc. A/54/726 (2000) [hereinafter Agenda Item 96] (discussing findings of direct

rejected what it claimed was an undue emphasis on these violations and a failure to recognize the responsibility of pro-independence actors for similar violations.[389] While rejecting findings that the army and police were seriously involved, the government promised to bring individual perpetrators to justice.[390] Indonesia also insisted that only Indonesian jurisdiction was appropriate.[391] The report called for further investigation, prosecution, and reparations. It indicated that the United Nations had a special responsibility in its trusteeship relations with the territory, and advocated an independent international investigative and prosecutorial body.[392]

In early 2001, a special U.N. investigator drafted another report that the United Nations classified as an "internal working document" to serve as a reference document for the Serious Crimes Unit.[393] However, this document leaked to the public in April 2001. It clearly implicated the TNI and several of its generals as the perpetrators of the post-referendum violence.[394] The Indonesian government responded by stating that its human rights commission would investigate all suspects who committed crimes in East Timor and would bring the suspects before trial soon.

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links between the TNI and the militia groups that were responsible for the wave of violence and human rights abuse).

389. *See Question of East Timor*, *supra* note 387, at 2 (detailing evidence that pro-independence militia had conducted campaigns of terror and intimidation).

390. *See id.* at 3 (expressing Indonesia's willingness to prosecute human rights violators through Indonesia's judicial system).

391. *See id.* (arguing that since the human rights violations occurred while East Timor was still part of Indonesia, the Indonesian judicial mechanism was the exclusive mechanism for trying the perpetrators).

392. *See* Agenda Item 96, *supra* note 388, ¶¶ 145-156 (summarizing the rapporteurs recommendations for U.N. action).

393. *See Timor Report to Be Used in Trials*, THE AGE, Apr. 21, 2001 (reporting on the United Nation's plans to use U.N. special investigator James Dunn's report), *available at* http://www.etan.org/et2001b/april/15-21/21treport.htm (last visited Dec. 18, 2003).

394. *See* James Dunn, *Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes*, 35-45, Feb. 14, 2001 (identifying key Indonesian army generals and commanders and detailing their role in encouraging human rights violations), *available at* http://www.etan.org/news/2001a/dunn1.htm (last visited Oct. 9, 2003).

UNTAET established a transitional court system, setting up a Transitional Judicial Service Commission to vet judges and prosecutors and to create a code of ethics.[395] The Commission had the authority to interview candidates and make recommendations to the Transitional Administrator, who determined the final decision.[396] The United Nations set up a series of district courts and established their jurisdiction. Only the Dili District court would have jurisdiction over serious crimes such as genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture.[397]

The courts were to apply the Indonesian penal code, the law that was applicable in East Timor prior to October 25, 1999, until UNTAET or a subsequent legislation enacted new regulations.[398] However, these laws could not conflict with internationally recognized standards, the mandate of UNTAET, or other regulations. Courts could not apply certain laws, such as those of anti-subversion, national security, etc.[399] Courts in East Timor may also apply all

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395. *See Regulation No. 1999/3 on the Establishment of a Transitional Judicial Service Commission, U.N. Transitional Administration in East Timor*, U.N. Doc. U.N.TAET/REG/1999/3 (1999) (establishing a Transitional Judicial Service Commission to recommend judges to the Transitional Administrator and to prepare a code of ethics for judges and prosecutors), *available at* http://www.un.org/peace/etimor/untaetR/etreg3.htm (last visited Oct. 9, 2003).

396. *See id.* art. 11 (disclosing that the Transitional Administrator had the final authority to appoint candidates to judicial or prosecutorial office).

397. *See Regulation No. 2000/11 On the Organization of Courts in East Timor, U.N. Transitional Administration in East Timor*, at 4, U.N. Doc. U.N.TAET/REG/2000/11 (2000) (detailing the District Court in Dili's exclusive jurisdiction over certain serious criminal offenses), *available at* http://www.un.org/peace/etimor/untaetR/Reg11.pdf (last visited Oct. 9, 2003).

398. *See Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor*, § 3.1, U.N. TAET/REG/1999/1 (1999) (discussing the applicable law in East Timor).

> Until replaced by UNTAET regulations or subsequent legislation of democratically established institution of East Timor, the law applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfillment of the mandate givent to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the transitional administer. *Id.*

399. *See id.* § 3 (determining that courts in East Timor would not apply previous anti-subversion and national security regulations).

international human rights treaties in relevant cases.[400] If necessary, the Transitional Administrator may sign an executive order in order to amend the Indonesian penal code.[401] Once the UNTAET mandate expired on January 31, 2002, the Indonesian penal code, with the amendments made by UNTAET, would remain the applicable law, subject to changes the government of East Timor would make.[402]

3. The Serious Crimes Unit and the Special Panel for Serious Crimes

The Serious Crimes Unit[403] began receiving information about crimes for indictment from the Civilian Police and local prosecutors in June 2000.[404] The National Consultative Council created the Special Panel for Serious Crimes, comprised of two international judges and one Timorese judge, under the regulations for the general organization of the East Timor court system.[405] It was competent to hear cases of genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture; the regulations explicitly

400. *See id.* § 2 (listing international documents, such as the Universal Declaration on Human Rights, that reflect internationally recognized human rights standards).

401. *See id.* § 6.1 (providing the Transitional Administrator with the power to issue administrative directives).

402. *See id.* § 4 (detailing that UNTAET regulations will remain in force until superseded in the future by legislation from democratic institutions of East Timor).

403. *See Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses*, U.N. Transitional Administration in East Timor, § 1, U.N. Doc U.N.TAET/REG/2000/15 (2000) [hereinafter *Regulation No. 2000/15*] (establishing special crimes unit panels to deal with serious crimes offenses), *available at* http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf (last visited Oct. 9, 2003); *see also Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World*, U.N. High Commissioner for Human Rights, 56th Sess., Agenda Item 9, at 6, U.N. Doc. E/CN.4/2000/27(2000) (disclosing that UNTAET created a single coordinating agency to concentrate on investigating the 1999 violence).

404. *See "Serious Crime" Files Handed Over to U.N. Mission in East Timor for Trial*, U.N. NEWS, June 26, 2000 (reporting that local prosecutors and police handed over criminal files concerning serious crimes to the U.N.TAET), *available at* http://www.un.org/peace/etimor/news/N260600.htm (last visited Oct. 9, 2003).

405. *See Question of the Violation of Human Rights and Fundamental Freedoms*, *supra* note 403, at 7 (explaining that the special panel would consist of both international and East Timorese judges).

provided for universal jurisdiction.[406] The court could try perpetrators under this regulation if the act in question was a crime under international law or the laws of East Timor. The regulations also provide that official privileges and immunities shall not constitute a bar to prosecution that commanders were responsible for actions subordinates commit, and that superior orders do not constitute a bar to punishment.[407] UNTAET also established detailed rules of criminal procedure for the transitional courts in September 2000.[408]

Indonesia and UNTAET signed a legal memorandum of understanding ("MOU") regarding exchange of evidence and other evidentiary and procedural matters.[409] However, the Unit has been unable to collect "witness" statements and other evidence from the Indonesian government.[410] The Office of the Prosecutor General of the UNTAET indicted its first suspect for crimes against humanity in

406. *See Regulation No. 2000/15*, *supra* note 403, § 2 (agreeing to the existence of universal jurisdiction under customary international law). However, universal jurisdiction under customary international laws has only recently risen in profile and usage in international law. *See* Chandra Lekha Sriram, *Exercising Universal Jurisdiction: Contemporary Disparate Practice*, 6 INT'L J. HUM. RTS. 49, 49-76 (2002).

407. *See Regulation No. 2000/15*, *supra* note 403, §§ 12, 14-16, 21 (detailing when the special panel may hold a person responsible for serious crimes).

408. *See Regulation No. 2000/30, On Transitional Rules of Criminal Procedure*, U.N. Transitional Administration in East Timor, U.N. Doc. U.N.TAET/REG/2000/30 (2000) [hereinafter *Regulation No. 2000/30*] (creating rules of procedure for due process, jurisdiction, investigations, arrest and detention, indictment, and trial); *see also* Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor*, 95 Am. J. Int'l L. 952, 952-66 (2001) (discussing the U.N. Truth Commission in East Timor and its creation by the legal act of United Nations rather than on the basis of parliamentary law).

409. *See Question of the Violation of Human Rights and Fundamental Freedoms*, *supra* note 403, at 7 (noting the signing of documents between Indonesia and UNTAET to enable the exchange of documents and eventually the extraditing of suspects).

410. Interview by Karen Resnick with Barry Gibson, Deputy Chief of Investigations, Serious Crimes Investigations Unit (Nov. 8, 2000) (noting that Mr. Gibson informed Ms. Resnick that the Indonesian government was very slow in providing very little information about the suspects, which they termed as "witnesses") (interview notes on file with American University International Law Review).

East Timor in December 2000.[411] The first hearing took place in January 2001. The Unit began investigating crimes under the Indonesian penal code as well as for crimes against humanity.[412] The Special Panel for Serious Crimes handed down its first sentence in late January.[413] It handed down additional sentences, the maximum available, in December 2001.[414]

Problems related to understaffing and limited resources have plagued the Unit's ability to carry out its investigative tasks.[415] Some

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411. *See U.N. Prosecutor in East Timor Files First Indictment for Crimes Against Humanity*, U.N. NEWS, Dec. 11, 2000 (reporting that the indictment accused eleven people, including the first Indonesian Officer Lt. Sayful Anwar, of committing crimes against humanity), *available at* http://www.un.org/peace/etimor/news/N111200.htm (last visited Oct. 22, 2003).

412. *See East Timor: First Hearings Held On Serious Crimes Committed During 1999 Violence*, U.N. NEWS, Jan. 10, 2001 (observing that the preliminary hearing consisted of two separate hearings), *available at* http://www.un.org/peace/etimor/news/01jan10.htm (last visited Oct. 9, 2003); *see also Report of the Secretary-General, supra* note 381, at 4-5 (noting that prosecutors had issued the first indictments for crimes against humanity).

413. *See East Timor Court Hands Down First Sentence for Post-referendum Violence*, U.N. NEWS, Jan. 25, 2001 (revealing that the court sentenced a former militia member to twelve years imprisonment), *available at* http://www.un.org/peace/etimor/news/01jan25.htm (last visited Oct. 9, 2003); *see also East Timor: U.N. Mission Files Second War Crimes Indictment for 1999 Violence*, U.N. NEWS, Feb. 6, 2001 (noting that the Prosecutor filed the second indictment in February), *available at* http://www.un.org/peace/etimor/news (last visited Oct. 9, 2003). *See generally* U.N. Transitional Administration in East Timor, *East Timor Update March 2000*, at 7 (providing an overview of the rule of law), *available at* http://www.un.org/peace/etimor/untaetPU/ETupdateME.pdf (last visited Oct. 22, 2003); U.N. Transitional Administration in East Timor, *East Timor Update April 2000*, at 7 (containing further updates on the activities of the Special Panel), *available at* http://www.un.org/peace/etimor/untaetPU/ETupdateAE.pdf (last visited Oct. 22, 2003).

414. *See East Timor: Dili Tribunal Gives Maximum Sentences in First Convictions*, U.N. WIRE, Dec. 11, 2001 (reporting that three suspects received the maximum sentence of thirty-three years and four months), *available at* http://www.unfoundation.org/unwire/20011211/22511_story.asp (last visited Oct. 9, 2003).

415. *See* Mark Dodd, *Call to Support or Scrap Crimes Unit*, SYDNEY MORNING HERALD, May 25, 2001 (observing that non-governmental organizations in East Timor asked that the United Nations to either increase its support for the serious crimes unit or abandon it and form an international war crimes tribunal), *available at* http://old.smh.com.au/news/0105/25/world/world8.html (last visited Oct. 9, 2003).

of the investigators have caseloads of more than 300 murders. Additionally, there was no available forensic pathologist for months, even though thirty sets of human remains were gathered for examination.[416]

Because of limited resources and poor management for two years, the Unit was not viewed as successful, and predictions of its demise were frequent. The Unit competed for resources with the ordinary court system, which also had to be built from the ground up. There was a lack of continuity in investigation, which was compounded by a lack of resources. Additionally, there was further concern that there was a failure to properly reach out to the Timorese, and to involve the population and Timorese legal experts specifically, in the process.[417] Similarly, where local capacity-building efforts have begun, there is a sense that foreign experts simply direct rather than mentor and engage.[418] Victims' groups, in particular, became very critical of the Unit and have made strong calls for a truly international process.

The image of the Unit improved somewhat after it indicted a significant number of suspects, some highly placed, in early 2003. The Unit indicted forty-eight individuals, including Indonesian General Wiranto, the former Timorese police chief Timbul Silaen, and Eurico Guterres. Surprisingly, President Gusmao issued a statement indicating he considered the indictment of Wiranto to be a mistake, and called on the international community to take over full responsibility for the prosecutions of the crimes of 1999. He added, "I consider it to not be in the national interest to realize a judicial process of this nature in East Timor."[419]

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416. *See* Mark Dodd, *Massacres Go Unpunished as U.N. Crimes Unit Heads For Collapse*, SYDNEY MORNING HERALD, May 1, 2001 (discussing concerns that chronic lack of resources would force the serious crimes unit to collapse), *available at* http://old.smh.com.au/news/0105/01/pageone/pageone6.html (last visited Oct. 9, 2003).

417. *See* Katzenstein, *supra* note 360, at 256 (explaining that East Timorese jurists were frustrated that U.N.TAET did not consult them in determining the regulation governing the establishment of the Special Panels for Serious Crimes).

418. *See id.* at 265-68 (lamenting the lack of U.N. concern with capacity-building and effective communication between mentors and mentees).

419. *East Timor: Serious Crimes Unit Indicts 48 More Suspects*, U.N. WIRE, Feb. 28, 2003, *available at*

4. The East Timor Commission for Truth, Reception, and Reconciliation

Beyond the prosecutions carried out by the Serious Crimes Unit, there were also attempts at non-judicial responses to crimes. The East Timor Transitional Cabinet created a truth commission to focus on repatriating refugees, documenting human rights abuses, and creating human rights safeguards for the future.[420] This commission consists of five to seven national commissioners, appointed by the transitional administrator. The commission is empowered to examine violations in the context of the political strife in East Timor between April 25, 1974 and October 25, 1999. The commission will have powers of inquiry and search and seizure, but lacks more formal judicial powers; it may also facilitate community reconciliation processes.[421] The key to a successful reintegration process could lie in the regional commissions, which would work closely with traditional justice practices and would lessen the already heavy burden of caseloads on conventional courts. Rwanda, similarly, has

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http://www.unwire.org/U.N.Wire/20030228/32304_story.asp (last visited Oct. 9, 2003).

420. *See Report of the Secretary-General*, *supra* note 412, at 5 (indicating that the Transitional Administration approved the formation of regulation for the Truth, Reception, ad Reconciliation Commission); *see also East Timor Cabinet Backs Creation of Truth Commission to Record Rights Abuses*, U.N. NEWS, Feb., 28 2001 (detailing that the East Timorese cabinet endorsed a draft regulation creating a truth commission), *available at* http://www.un.org/peace/etimor/news/01feb28.htm (last visited Oct. 22, 2003); *East Timor Reconciliation Efforts Gain Momentum, U.N. Mission Says*, U.N. NEWS, Aug., 23 2001 (discussing the UNTAET's hopes that the Truth Commission can resolve tensions between refugees and pro-autonomy communities), *available at* http://www.un.org/peace/etimor/news/01aug23.htm (last visited Oct. 9, 2003). *But see* Paolo Gorjao, *The East Timorese Commission for Reception, Truth, and Reconciliation: Chronicle of a Foretold Failure?* 4 CIV. WARS 142, 142-62 (2001) (analyzing the likelihood of success of the East Timorese Commission for Reception, Truth, and Reconciliation).

421. *See Regulation No. 2001/10, On the Establishment of a Commission for Reception, Truth, and Reconciliation*, U.N. Transitional Administration in East Timor, § 3, U.N. Doc. U.N.TAET/REG/2001/10 (July 2001) [hereinafter *Regulation No. 2001/10*] (discussing the powers and function of the Truth Commission).

instituted the use of *gacaca*, a traditional form of justice, in an attempt to alleviate the backlog of cases in the regular courts.[422]

a. Reconciliation meetings

The issue of reconciliation arises in many transitional situations, and East Timor is no exception. The United Nations addressed this issue, in part through approaches that are not necessarily consistent with more "traditional justice" mechanisms. Such "traditional justice" approaches enable villagers themselves to address crimes rather than using a formal judicial mechanism, and have led to the return of some former militia members without the involvement of the United Nations.[423] In such approaches, militia members confess their actions to village elders and must promise never to commit a crime again.[424]

Since traditional structures such as traditional justice are oral rather than written, the extent to which local communities practice and carry out such methods is not transparent to the international community. Communities practice traditional justice widely, however, and the type of sentencing a perpetrator may receive varies not only from district to district, but also from village to village. The fact that traditional justice practices can conflict with a formal justice system is a recognized problem in the international community.

Efforts have been made by the U.N. Office of Communications and Public Information, as well as the Civic Education Department,

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422. *See Rwanda to Use Traditional Justice in '94 Killings*, N.Y. TIMES, Oct. 6, 2001, at A1 (describing Rwanda's practice of traditional justice). *But see* Drumbl, *supra* note 344, at 124-40 (analyzing the achievements of the criminal trials in Rwanda and their applicability elsewhere).

423. *See* Interview by Karen Resnick with Judge Egonda-Ntende Frederik, Court of Appeals, and Judicial Affairs, U.N.TAET (Nov. 7, 2000) (finding that the precise mechanisms of "traditional justice" and the number of individuals returned to villages as a result of traditional justice have proven rather hard to ascertain) (interview notes on file with American University International Law Review); *supra* Interview with Barry Gibson, note 410; Interview by Karen Resnick with Oyvind Olson, Chief Investigator, Serious Crimes Unit (noting that villages do report all issues resolved by traditional justice to the authorities).

424. Interview by Karen Resnick with Dionisio de Soares, Chairman, East Timorese Jurist Association (Nov.. 21, 2000) (discussing the process of traditional justice and the role of confessions and promises within the system) (interview notes on file with American University International Law Review).

the Department of Peacekeeping Operations and UNHCR to inform the population about steps taken toward the structuring of a national justice system. These include television and radio broadcasts, articles, posters, and brochures containing information about returning refugees.

UNTAET staff from the Civic Education Department, Department of Peacekeeping Operations and local District Field Officers inform local leaders and civic groups about policy changes through meetings. UNTAET expects local leaders to provide this information to their community. Unfortunately, information about local practices from leaders and civic groups is not as forthcoming, and knowledge about traditional justice remains limited.

There have been some changes made in the traditional structures, as they are adapting to an evolving national judicial structure. Customarily, traditional justice practices in villages in East Timor have not dealt with mass murderers or militia crimes. Prior to the referendum violence of 1999, outsiders perpetrated serious crimes. Communities faced "ordinary crimes" such as theft, assault, and murder. Crimes were dealt with on different levels. Whereas murder and rape were handled at the village level, domestic violence and theft were mostly handled between families, as would be the case in marriages and divorce. Because the of the United Nations' judicial reforms, murder and rape are now dealt with in the formal justice structure, in so far as victims report these crimes.

Because East Timor is a largely poor and agricultural society, crimes are underreported and the interagency process of investigating and prosecuting crimes lacks cooperation. It is not in the economic interest of communities to expel or lock up their citizens, and the formal justice system can seem inadequate or inappropriate. Traditional practices have been crucial to negotiating ways in which to integrate the perpetrator back into the community, so that he or she can once again contribute to the productivity of the village. Village leaders raised concerns that the apprehension of a perpetrator may not address the economic and social suffering of those concerned. Hence, the perpetrator faces an additional punishment by local villagers upon his or her return.

Despite some of the problems in coordinating the national and local judicial practices, the reintegration of returnees in East Timor is

an ongoing process. As part of the District Returns Committees, UNTAET works in cooperation with UNHCR and District Human Rights Officers to prepare communities for the returns. In contrast, peacekeepers and CivPol officers assist in the safety aspect of the returnees, in order to ensure that they are not victims of retaliatory actions. CivPol detains a returnee when it becomes clear in any step of the process of reintegration that the returnee has committed a serious crime. In all other cases, the Committees determine whether returnees will be accepted back into the communities without the danger of violent retribution.

The United Nations has also held reconciliation meetings between villagers and former militia leaders seeking to return.[425] The East Timor Transitional Cabinet also created a Community Reconciliation Process for dealing with less serious offenses that were the judicial system does not process.[426] In late May 2001, a major reconciliation meeting between pro and anti-independence leaders took place, but for security reasons militia leaders were excluded from the talks.[427]

The question of creating an international tribunal to address the post-referendum violence has been a politically sensitive one, and one that has been deferred repeatedly. While the Secretary-General of Komnas HAM stated that he would support the creation of such a tribunal, President Wahid and others do not apparently share his preferences. Rather, this is an outcome that the Indonesian government would prefer to avoid, and the few attempts at prosecutions and the creation of an "ad hoc" tribunal appear to be

425. *See East Timor: U.N. Holds Reconciliation Meeting Between Militia and Villagers*, U.N. NEWS, Feb. 2, 2000 (reporting the United Nations' efforts to reconciliation gatherings), *available at* http://www.un.org/peace/etimor/news/01feb02.htm (last visited Oct. 9, 2003).

426. *See East Timor Cabinet Backs Creation of Truth Commission to Record Rights Abuses*, *supra* note 420 (discussing the Cabinet's willingness to create a Reconciliation Commission).

427. *See* Joanna Jolly, *East Timorese Anti and Pro-Independence Leaders Hold Landmark Talks*, ASSOCIATED PRESS, May 24, 2001 (revealing reconciliation talks between East Timorese leaders); *available at* http://www.globalpolicy.org/security/issues/etimor/2001/0524reco.htm (last visited Dec. 18, 2003).

measures used to placate the international community and prevent the setting up of such a tribunal.[428]

b. Lessons from East Timor: Problems of Mixed Tribunals

Clearly, some progress has been made in East Timor in addressing the crimes perpetrated either during annexation or during the post-referendum wave of violence.[429] However, many issues remain. While approximately seventy individuals are being held in East Timor, courts there have had, and will continue to have, great difficulty in reaching the higher levels of those responsible. In addition, the Indonesian public and the Indonesian political and judicial systems do not seem prepared or eager to pursue these crimes.[430] There is no perfect solution to this dilemma. It is likely that many concerned parties will be unsatisfied with a solution limited to East Timor.

The Special Panel has been plagued by financial and staffing difficulties, the repercussions of which should not be minimized.[431] However, even in the absence of these difficulties, its functioning would still have been problematic. In Indonesia, many perpetrators continue to remain at large, with little possibility of their future

428. *See East Timor: Indonesian Parliament Endoress ad hoc Human Rights Courts*, ASIA HUMAN RIGHTS NEWS, Mar. 23, 2003 (reporting that Asmara Nababan stated that the lower house of parliament agreed to establish two ad hoc tribunals to hear cases on human rights violations); *available at* http://www.ahrchk.net/news/mainfile.php/ahrnews_200103/1742/ (last visited Dec. 18, 2003).

429. *See* Suzannah Linton, *Rising From The Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 176 (2001) (concluding that while remarkable achievements have been made in the creation of a viable judicial system, the management of this system still has a long way to go).

430. *See* Barbara Cochrane Alexander, *East Timor: Will There be Justice?*, 8 HUM. RTS. BRIEF 5, 6 (2000) (explaining that the primary reason that an international tribunal is opposed within the country is that international law would be used instead of the Indonesian Criminal Code).

431. *See* Katzenstein, *supra* note 360, 257-58 (proposing that the U.N. administration severely underestimated the costs involved in building and sustaining the civil and judicial institutions).

apprehension.[432] Prosecutions have been sporadic at best, and there have been serious concerns about due process.[433] As a result, this appears to have seriously harmed the credibility of the Special Panel as an institution appears. Although the Timorese call for an international tribunal, they remain skeptical of the international community's interest in accountability.[434] Some, but not all, of the needs of the society and the victims of the crimes may be served by formal inquires and reconciliations.[435] As one commentator suggested, while mixed tribunals were a novel response intended to remedy the shortcomings of domestic or international proceedings or international, the risk remains that these institutions might incorporate the worst aspects of domestic and international systems, rather than the best.[436] Thus, prospects for mixed tribunals in Sierra Leone or Cambodia should be cautious at best.

B. SIERRA LEONE

As in East Timor, a complex system of a commission of inquiry and a mixed tribunal has been created in Sierra Leone to address

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432. *See id.* at 271 (suggesting that by June 2003 a very large number of killings that would have fit the category of crimes against humanity will be left unexamined).

433. *See id.* at 253 (stating that no defense witnesses were called for the first fourteen cases prosecuted, accused are routinely detained beyond the seventy-two hour limit without a preliminary hearing, some accused have been left in prisons for months and even years while awaiting trial, cases have been delayed for lack of translators or judges, for the past year the Special Court of Appeals has not operated, judges neglected to apply international law or applied it incorrectly in cases that have been prosecuted, handing down harsh sentences for low-level perpetrators).

434. *See id.* at 251-52 (expressing that nearly three years after its establishment, "many have expressed disappointment with the tribunal's shortcomings," and "even in cases it adjudicated, the tribunal's process has been criticized").

435. *See id.* at 252 (quoting a public defender as saying "the fact that the situation has improved for the prosecution is irrelevant when the other two organs of the court – the judges and defense – are not functioning").

436. *See* Katzenstein, *supra* note 360, at 246 (asserting that to date the tribunal has been criticized for its inefficiency, minimization of local participation, and failure to uphold due process standards).

accountability for past abuses.[437] While both institutions are too new to assess properly, it is worth examining their features briefly, and considering the prospects for success. Certainly, the relevance of proceedings in the tribunal is of concern to many in the international community who seek to support it. This would suggest that the international community has recognized key concerns from the Timorese experience. Whether a mixed tribunal can surmount problems, such as the disconnect between international and local processes, and a lack of understanding by, or inclusion of, the local population, remains to be seen. Sierra Leone may well prove an interesting test case.

The United Nations created the Special Court pursuant to U.N. Security Council Resolution 1315 in August 2000.[438] The court's statute, completed on January 16, 2002, gives it the power to prosecute persons who bear the greatest responsibility for serious violations of national and international humanitarian law since November 30, 1996.[439] The crimes within the ambit of the court include crimes against humanity, violations of common article 3 of the Geneva Conventions and additional protocol II, other serious violations of international humanitarian law, and crimes under

437. *See* Special Court Agreement, 2002, Ratification Act, 2002 Supplement to Sierra Leone Gazette, vol. CXXX, No. II (Mar. 7, 2002) [hereinafter Ratification Act 2002] (outlining the administration of the Special Court).

438. *See* S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/Res/1315 (2000) ("Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.").

439. *See* Statute for the Special Court, Office of the Attorney General and Ministry of Justice, Special Court Task Force, art. 1 (Jan. 16, 2002) [hereinafter Special Court Statute] (stating that in "the event the sending States is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons"), *available at* http://www.specialcourt.org/documents/Statute.html (last visited Oct. 22, 2003).

national law.[440] In March 2002, the agreement for the court was formally ratified.[441]

Eight to eleven judges of mixed international backgrounds sit on the court.[442] Following the agreement between the United Nations and the government of Sierra Leone, the Trial Chamber is to contain of three judges, one appointed by the government and two by the U.N. Secretary-General, based on nominations from member states.[443] Any additional Trial Chambers would be similarly composed. Five judges are to serve on the appeals chamber, of whom two will be selected by the government, and three by the Secretary-General.[444]

1. Relation to the Truth and Reconciliation Commission

The establishment of the Special Court is contemporaneous with the creation of the Truth and Reconciliation Commission.[445] In principle, their responsibilities do not overlap and there ought not be

440. *See id.* art. 2 (stating that "[t]he Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or system attack against any civilian population," such as murder, extermination, enslavement, deportation, imprisonment, torture, and rape).

441. *See* Ratification Act 2002, *supra* note 437 (providing that the President and Members of Parliament enacted the agreement).

442. *See* Special Court Statute, *supra* note 439, art. 12 (providing that three judges shall service on the Trial Chamber and five judges shall serve in the Appeals Chamber).

443. *See id.* (providing further that "[i]f, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting").

444. *See id.* (stating that "[e]ach judge shall serve only in the Chamber to which he or she has been appointed").

445. *See* Peace Agreement Between the Government of Sierra Leone and The Revolutionary United Front of Sierra Leone, art. VI (July 7, 1999) (creating a Commission for the Consolidation of Peace to ensure "reconciliation and the welfare of all parties to the conflict, especially the victims of war), *available at* http://www.sierra-leone.org/lomeaccord.htm (last visited Oct. 22, 2003).

any conflicts between the two institutions.[446] The Commission, as is common for commissions of inquiry, is of course not to punish, but rather to investigate the causes, nature, and extent of the violence, and also to make recommendations regarding reparations and legal, political, and administrative reform.[447] However, concerns remain about the handling of evidence and witnesses, in particular.[448] There is a possibility that evidence disclosed to the Commission, which has a different remit and evidentiary requirements, could also be brought before the court.[449] Care must be taken to ensure that the introduction of such evidence does not violate due process, and that those who provide evidence are not at risk.

2. Relation to the Judiciary and National Legal Authorities

The Special Court is an exceptional institution, meaning that it is not part of the regular judiciary of the country.[450] Offenses prosecuted before it are not, as the ratification act explicitly states, prosecuted in the name of the country.[451] The court can request assistance from the Attorney-General, to identify and locate persons, serve documents, arrest or detain, or transfer persons to the court.[452]

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446. *See* The Truth and Reconciliation Act 2000, ¶ 6 (Feb. 2000) (noting that the "object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone"), *available at* http://www.sierra-leone.org/trcact2000.html (last visited Oct. 22, 2003).

447. *See id.* (stating further that the object of the Commissions including addressing impunity, responding to the needs of the victims, promoting healing and reconciliation, and preventing a repetition of the violations and abuses that occurred).

448. *See* Celina Schocken, *The Special Court For Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L. L. 436, 452-53 (2002) (indicating that some witnesses do not speak English do not have access to translators).

449. *See id.* at 456 (stating "there is nothing in the TRC Act preventing testimony given at the TRC from being used in a prosecution by the SCSL or a national court.").

450. *See* Ratification Act 2002, *supra* note 437, part III, art. 11(2) (stating that "[t]he Special Court shall not form part of the Judiciary of Sierra Leone").

451. *See id.* part III, art. 13 ("Offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone.").

452. *See id.* part IV, art. 15 (stating that a "request for assistance made by the Special Court may include, but shall not be limited to – (a) identification and

Conversely, the Minster of Justice and the Attorney-General can make requests to the court for assistance in transmitting statements and other evidence, and questioning persons detained by the court.[453]

The court is formally separate from the judicial system of Sierra Leone.[454] This separation has created concerns among the members of the court that they must ensure that they leave a "legacy" for the country beyond the specific trials. External actors, such as donors and the United Nations, are also concerned that activities of the court serve to benefit and strengthen the domestic legal and judicial system. This is particularly important in Sierra Leone, where the court system lacks even the most basic elements, including law reports from past decisions. The system is rife with funding and morale problems, corruption, and challenges to independence.

Members of the court have attempted to engage in outreach to domestic legal authorities, members of civil-society groups, and the law school in Freetown. This outreach effort is intended to build basic legal capacity, to explain role of the prosecutions, and the procedure, and include the rationale for due process and the need for defense attorneys.[455] The relationship of the court to national justice mechanisms has not been consistently positive. The court has necessarily lured many talented legal experts away from current or potential roles in the national legal system. It has also taken land from the Prison Service, including land intended for a new training school.

At least superficially, actors involved in the functions of the special courts, whether from United Nations Development Programme, bilateral donors and the World Bank, or the judges

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location of persons; (b) service of documents; (c) arrest or detention of persons; and (d) transfer of an indictee to the Special Court").

453. *See id.* part IV, art. 19 ("The Attorney-General may make a request for assistance to the Special Court for the purposes of any investigation into or trial in respect of any act or omission that may constitute a crime within the jurisdiction of the Special Court.").

454. *See id.* part III, art. 11(2) (stating that the "Special Court shall not form part of the Judiciary of Sierra Leone").

455. *See* Jess Bravin, *Peace vs. Justice: A Prosecutor Vows No Deals For Thugs In Sierra Leone War*, WALL ST. J., July 28, 2003, at A1 (indicating that "the special court has trained local attorneys and sent teams to explain legal concepts to villagers, soldiers and students").

themselves, are far more concerned with the impact of the court on victims, the wider community, and national legal capacity than has been the case in other externalized, or mixed tribunal, experiences.[456] This is certainly a positive development. However, there have been negative effects on local capacity, and outreach is as yet limited.[457] The court, correctly, is not designed to be a mechanism to build national legal capacity. Concerns should remain, however, if the court diverts attention and resources from other domestic needs as it appears likely to do. It may be the case that the experience of the court will be better than that in East Timor. If so, it might help guide the practice of the proposed tribunal for Cambodia, if it ever comes into being.

C. CAMBODIA

Responses to the genocide in Cambodia has not directly addressed with the principle of universal jurisdiction as they did in East Timor. Instead, much of the debate has focused on the nature of a potential tribunal or court institution.[458] Key questions in the debate include: would there be an international tribunal like those for Rwanda and Yugoslavia? Would there merely be domestic prosecutions? Would there be a U.N. tribunal operating within Cambodia's borders?[459] While a few former members of the Khmer Rouge have been arrested on charges of murder and genocide under a 1994 law that banned the Khmer Rouge, the real dispute has been over the composition and control of any tribunal. Not surprisingly, the

456. *See* Schocken, *supra* note 448, at 437 (stating that a goal of the Special Court is to make it "more relevant to the lives of ordinary Sierra Leone citizens trying to put their lives back together after the war than the ICTR and ICTY have proven to be for victims in Rwanda and Yugoslavia").

457. *See* Douglas Farah, *Sierra Leone Court May Offer Model for War Crimes Cases; Hybrid Tribunal, with Limited Lifespan, Focuses on Higher-Ups*, WASH. POST, Apr. 15, 2003, at A21 (acknowledging that "horrible people will walk away" but there is only the capacity to try those with the greatest responsibility).

458. *See* Daniel Kemper Donovan, *Joint U.N. – Cambodia Efforts To Establish A Khmer Rouge Tribunal*, 44 HARV. INT'L L. J. 551, 551-64 (2003) (summarizing the history of discussions over the establishment of a Khmer Rouge Tribunal).

459. *See* Yale University Cambodian Genocide Program, *Chronology of a Khmer Rouge Tribunal, 1994-2003* (2002) [hereinafter *Chronology*] (providing a useful overview of the long road to the proposed tribunal), *available at* http://www.yale.edu/cgp/chron_v3.htm (last visited Oct. 22, 2003).

Cambodian government has sought to control any tribunal. By late 1999, Prime Minister Hun Sen proposed that Cambodian judges outnumber U.N.-appointed judges three to two, as negotiations on the draft tribunal law continued.[460] By late April of 2000, the Cambodian government agreed to a proposal by Senator John Kerry that would provide three Cambodian judges and two foreign judges; four judges would have to agree to prevent a case from going forward.[461]

The National Assembly passed legislation for the establishment of extraordinary chambers for prosecutions of these specific crimes on January 2, 2001.[462] These chambers would constitute a tribunal, and would be made up of Cambodian and foreign judges.[463] The Cambodian government approached the United Nations for support for the court. However, talks between the government and the United Nations stalled over the United Nations' concerns that the government would not ensure the independence of the tribunal.[464] The United Nations demanded, specifically, that the government, which includes officials with links to the Khmer Rouge, cede all control over the tribunal. This demand seemed unlikely to be effective.[465] In the absence of a United Nations role, the governments of India and South Africa offered support for the tribunal.[466]

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460. *See id.* (stating that the United States set forth the proposal that Hun Sen endorsed).

461. *See* Bruce Zagaris, *Cambodia and U.N. Agree to Establish International Criminal Court*, 16 INT'L. ENFORCEMENT L. REP. 840, 840 (2000) (explaining that the United Nations will create a pretrial chamber of three Cambodian and two non-Cambodian judges to resolve disputes, and that a "supermajority" vote of four judges would be required to block an indictment).

462. *See* Reach Kram, *Cambodian Genocide Program* (2001) (setting forth the general provisions that provided for the establishment of extraordinary chambers in the courts of Cambodia for the crimes committed during the period of Democratic Kampuchea), *available at* http://www.yale.edu/cgp/cgpintro.html (last visited Oct. 22, 2003).

463. *See id.* art. 9 (outlining the composition of the extraordinary chambers).

464. *See* Donovan, *supra* note 458, at 564 (noting that "the United Nations cited continuing concerns over the independence, impartiality, and objectivity of the tribunal envisioned by Cambodia").

465. *See id.* at 569.

466. *See Cambodia: Talks on Khmer Rouge Tribunal Resume After Year's Hiatus*, U.N. WIRE, Feb. 19, 2003 (reporting that human rights activists were not

However, the impasse was resolved, and in June 2003, the United Nations and the Cambodian government signed an agreement to set up a mixed tribunal, a move human rights groups have criticized out of fear that the government will have excessive control.[467]

Procedures in East Timor and Sierra Leone, and perhaps Cambodia, would not be novel in their use of foreign judges in internal trials. A few countries regularly do so, though concerns are raised in those contexts as well as to the sensitivity of foreign judges to local contexts. Mixed tribunals can be designed to avoid some of the difficulties that arise when trials take place at a distance. They may engage to a greater degree with the local communities and authorities. However, as the experience in East Timor suggests, they may not do so to a sufficient degree, and may lead to disillusionment.[468] At the same time, there remains a risk that outsiders as judges, even when part of an institution that also includes local judges, will be less aware of local needs and customs.

CONCLUSION

In this essay, I examined the phenomenon of globalized, or what I have termed externalized, justice, looking largely at the exercise of universal jurisdiction, but also at the shortcomings of the international criminal tribunal for Rwanda. I have also looked at externalization reversed, or the use of mixed tribunals with foreign and national judges, as a possible solution to some of the flaws of externalization. I find that while the move towards global justice is in many ways heartening, we ought not to believe that it is a panacea.

Trials for mass atrocities and gross human rights violations are increasing. Whether in the international war crimes tribunals for the

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optimistic about the prospects for the speedy establishment of the tribunal), *available at* http://www.unwire.org/U.N.Wire/20030219/32105_story.asp (last visited Oct. 22, 2003).

467. *See* G.A. Res. 57/228, U.N. GAOR, 57th Sess., Supp. No. 49, U.N. Doc. A/RES/57/228B (2003) (noting "[t]he purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of the Democratic Kampuchea.").

468. *See* Katzenstein, *supra* note 360, at 246 (noting that "many criticized the tribunal for its inefficiency, for minimizing local participation, and for failing to uphold due process standards").

former Yugoslavia and Rwanda, in regional human rights courts, or through the exercise of universal jurisdiction in domestic courts, ex-dictators, and others who imposed terror upon civilians, are being held accountable. There is good reason for human rights advocates, and indeed the international community, to celebrate. There is, however, reason for caution, particularly with respect to the exercise of universal jurisdiction.

While the Belgian government has scaled back legislation, examining its recent practice in the exercise of universal jurisdiction, as well as that of other states, offers us an opportunity to reflect upon the virtues, but also the vices, of pursuing criminals far from the site of their crimes.[469] Heralding the global reach of the rule of law may obscure the flaws of external trials—specifically, that such trials may fail to achieve many of the goods often ascribed to trials at home, and might even provoke a backlash. To the degree that global justice is sporadic and pursued in only a handful of cases, it is also likely to appear to be unfair and illegitimate to many.

Prosecutions are thought to serve a myriad of goals, among them deterrence of future abuses, contribution to stability and the rule of law where it was previously lacking, vindication for the victims, and social reconciliation and education. Debates are rife as to whether these goals are served by domestic trials or trials pursued through the exercise of universal jurisdiction. In Europe, crimes committed in Africa and Latin America seem particularly unlikely to achieve any of these goals.

Deterrence, always a difficult effect to demonstrate, seems particularly unlikely where only a handful of cases are pursued very far from home. A potential tyrant will simply estimate that there is very little likelihood that he or she will be indicted, particularly if he or she avoids countries with active judiciaries. Such trials are also unlikely to serve stability and the rule of law. While the prospect for serious upheaval in a country in reaction to its leader being brought to book is not great, it is not out of the question. Certainly, Slobodan

469. *See generally* Mark A. Summers, *The International Court of Justice's Decision in Congo v. Belgium: How It Affected the Development of a Principle of Universal Jurisdiction that Would Oblige All States to Prosecute War Criminals*, 21 B.U. INT'L L. J. 63 (2003) (providing an overview of the use of universal jurisdiction since Congo v. Belgium).

Milosevic has not missed an opportunity to grandstand for nationalists at home while on trial in The Hague.[470] At the same time cases pursued abroad may deprive the country's judiciary of an opportunity to build its own capacity; there is increasing concern that the trend towards pursuing Turkish human rights cases at the European Court of Human Rights is doing just that.[471]

At the same, time vindication for victims, a critical concern, may not be achieved, or may be achieved very poorlym precisely because of the distance from the society where the crimes occurred and from the victims themselves. Victims are unlikely in many instances to have the opportunity to take part in proceedings far away; they and their communities may even be unaware that such proceedings are taking place. In many instances limited media coverage and access exacerbates this problem. This is a common complaint with regard to the tribunal for Rwanda; as trials occur in neighboring Tanzania, which is in close proximity to victims in comparison to Belgium or Spain, many Rwandans do not have the opportunity to follow or understand the proceedings. This not only leaves many victims without information, but also means that such trials may not really penetrate society and contribute to reconciliation.

We should also be concerned about the uneven fashion in which state practice has developed in this area. The expected revisions to the Belgian legislation would take the significant step of allowing trials *in absentia*, which would allow Belgian courts to potentially address a great many more cases. But Belgian courts alone have limited capacity, and the courts of most states, even where they are willing to exercise universal jurisdiction, are far more cautious. This

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470. *See* Marc Champion, *Sympathy for Milosevic Grows among the Serbs as his Trial Continues; Even those who Opposed him Admire his Courtroom Performance; Feeling that Serbia is in the Dock*, WALL ST. J. EUR., Jan. 10, 2003, at A1 (remarking that Milosevic uses court time to promote his politics).

471. *See* Paul J. Magnarella, *The Legal, Political, and Cultural Structures of Human Rights Protections and Abuses in Turkey*, 3 D. C. L. J. INT'L. L. & PRAC. 439, 465 (1994) (discussing that in response to the 300 individual petitions by Turkish citizens against Turkey before the European Human Rights Commission, and thirty cases against Turkey in the European Court of Human Rights in July 1994, Turkey's foreign minister stated that it was a result of "the poor quality of justice in the state of emergency region" and warned that "if the quality of justice does not improve, 'the European Court of Human Rights will take the place of Turkish judicial organs'").

leaves potentially wide holes in the net of global justice. Why are the crimes of leaders in the Democratic Republic of Congo more heinous than those who massacred villagers in Guatemala? They are not. But when forced to make choices about which cases to pursue, some perpetrators will be prosecuted over others. This disparity will seem unfair to victims and perpetrators alike.

One possible response to the flaws identified here with external justice, and with its uneven application, is the use of reverse externalized procedures such as mixed tribunals. These "mixed tribunals"—which may involve domestic and external judges and/or a complicated mixture of domestic and international law, have been created for East Timor and for Sierra Leone, and protracted negotiations regarding one for Cambodia continue. However, the experience of East Timor suggests reason for caution—such "externalization reversed" may not necessarily overcome the problems identified with externalization, such as gaps and inconsistency in practice that may lead to concerns about legitimacy, deterrence, and inability to effectively "do justice."[472] There may also be a risk that external actors, and the law from external sources, may not be sufficiently attentive to local needs and customs.

This does not mean that use of externalized justice mechanisms is never appropriate or effective. One fundamental goal of law, whether international or domestic, is to ensure that individuals responsible for serious crimes are duly punished, or at the very least constrained from repeating them. Here progress made in the externalization of justice has allowed a great many individuals responsible for war crimes, torture, crimes against humanity, and genocide to be brought to book where they otherwise might never have been. This is a momentous development, but we should be prepared to look past rhetoric to ask whether there are not also costs.

472. *See* Katzenstein, *supra* note 360, at 246 (noting that the initial problems with the hybrid tribunals are that they are inefficient, minimize local participation, and fail to uphold due process standards).