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De-Jeopardizing Justice: Domestic Prosecutions for International Crimes and the Need for Transnational Convergence

Keywords

Crimes, Criminal Law, International Law: History, International Relations, Jurisdiction, Labor

**“DE-JEOPARDIZING JUSTICE”:
DOMESTIC PROSECUTIONS FOR INTERNATIONAL CRIMES
AND THE NEED FOR TRANSNATIONAL CONVERGENCE**

*Brent Wible**

INTRODUCTION

How should we feel about prosecuting Pinochet in Spain, Habre in Senegal, or Sharon in Belgium? Ambivalent. Even those who look most favorably on international criminal law and its potentially positive impact on human rights suffer conflicting responses to universal jurisdiction. The idea that some acts are so terrible as to compel international attention and an international solution satisfies our sense of justice. At the same time, something seems amiss when a defendant stands trial in country X for acts committed thousands of miles away. Victims in the home country often resent that their history is put on trial abroad,¹ and citizens of prosecuting states question why they should meddle in another country's affairs.

These tensions subject national prosecutions for international crimes to great scrutiny, opening the proceedings' legitimacy to question. The fact that these national proceedings are often idiosyncratic raises even more questions. Many international crimes are inadequately defined, leaving domestic courts leeway to fill in details, and it is rarely clear which procedural rules apply. Which punishments apply—those pertaining in the trial state or those of the state where the crime was committed—also remains a contested issue.

Universal jurisdiction will never be perfect; neither will people ever feel completely at ease with a borderless system of international criminal law. The sense of inequity resulting from courts in the north sitting in judgment on leaders from the south is most likely insurmountable in a world of asymmetrical power.²

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1. For example, after Pinochet was indicted in Spain, Chile experienced a resurgence in nationalism as a response to perceived recolonization. See Anthony Faiola, *Spanish Firms Revive Latin America Conquest*, WASH. POST, Feb. 14, 2000, at A1; Sinikka Tarvainen, *Straw Releases Spain from Tight Straits*, DEUTSCHE PRESSE-AGENTUR, Mar. 2, 2000.

2. Whatever one may think of this imbalance as a political or moral matter, the relative quality of

The potential for states to use universal jurisdiction prosecutions as a political tool of interstate conflict will remain.³ Likewise, those who believe that “trials from without” miss the point, by speaking to the wrong audience and failing to respond sensitively to a country’s political reality, will never be content with universal jurisdiction.⁴

Despite these endemic concerns, work can be done, insofar as prosecutions under universal jurisdiction suffer from a lack of authoritative legitimacy and integrity as a legal matter. International mechanisms need to be put into place so that its exercise will be firmly grounded in international process. Domestic courts should incorporate as much international law, including both substantive and procedural standards, as possible into prosecutions for international crimes. They must engage in a structured international judicial dialogue along both vertical and horizontal dimensions to insure the development of consistent practices. While universal jurisdiction will never be perfect, it will be substantially better if informed by well-developed international standards.

Some scholars suggest that since few states are willing to prosecute non-nationals for atrocities committed abroad, a universal jurisdiction subject to prudential concerns will over-deter prosecutions under international law.⁵ If it appears legitimate and has integrity, however, states may be more likely to exercise universal jurisdiction. As a step toward this goal, it is important to narrow the gap between the theoretical application of *universal* norms and the variation across jurisdictions that exists in practice. National prosecutions for international crimes will have greater integrity and legitimacy, and the authority of international criminal law will benefit from transnational convergence. The resultant growth of international norms should increase accountability for terrible acts, deter the kind of atrocities that marked the twentieth century, and contribute to a greater degree of human dignity.

Part I of this article explores the difficulties that arise from application of universal norms in domestic courts without a harmonizing structure. Part II argues that the informal mechanisms that could influence exercise of universal jurisdiction and deter the most divergent practices are ineffective. Part III examines some of the costs of universal jurisdiction. The article concludes by suggesting some approaches for structuring an international criminal system that would allow domestic courts to play a central role without divesting universal norms of their

courts and judges in, for example, Spain as opposed to the Sudan suggests that there may be reason to prefer this “sense of inequity” to the alternative. See Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law*, 35 NEW ENG. L. REV. 399, 417 (2001). States that have the power to use universal jurisdiction generally have the most independent judiciaries that ensure due process and respect the rule of law. Lack of abuse to date, however, may only be a reflection of the fact that universal jurisdiction is only nascent. Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 354 & 357 (2001).

3. Morris, *supra* note 2, at 356.

4. See Jaime Malamud Goti, *The Moral Dilemmas about Trying Pinochet in Spain*, 32 U. MIAMI INTER-AM. L. REV. 1 (2001).

5. Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 256 (2001).

international character.

I. The Peculiar Difficulties of Prosecuting International Crimes in Domestic Courts

Many international crimes are loosely defined. Even where a convention has been adopted, as in the case of genocide and torture, many of the details are left to national jurisdictions.⁶ The applicable procedural rules are not mentioned in these instruments, and the non-hierarchical assembly of international tribunals and national courts applying this body of law reach different conclusions operating under different procedures.⁷ While some divergence among the jurisdictions prosecuting these crimes is inevitable, is it desirable that states be allowed to define procedures, and in large part, the crimes themselves? Is such proliferation pathologic in a system based on international norms? The difficulty arriving at a particularized set of rules in international criminal law became clear during the Treaty of Rome negotiations.⁸

This section seeks to determine some limitations on the divergence of substantive prohibitions and procedural rules across jurisdictions. In the extreme, different procedural rules and judicial interpretations of definitions could so stretch the substance of the law as to raise the *ex post facto* issue. Precision in criminal prohibitions, like retroactivity, is a window onto the fairness and integrity of international criminal proceedings. National divergence must be adequately constrained so that prosecutions do not amount to and are not perceived as "victors' justice."

Some scholars hint that the lack of precision in international criminal law was

6. The Genocide Convention broadly defines genocide as any of several enumerated acts committed "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group." Convention on the Prevention and Punishment of the Crime Genocide, September 12, 1948, art. 2. The burden of proof, defenses, evidentiary and procedural rules, and applicable penalties are left entirely to the states parties. *Id.* at art. 5. The Convention Against Torture likewise enumerates acts amounting to torture, but Article 4 leaves it to the contracting parties to "ensure that all acts of torture are offences under its criminal law." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, art. 4. Thus, even in the documents where international criminal law is most clearly expressed, all but the most general elements of the crimes are to be defined by national legislatures. See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 717 (1996) (arguing that the main problem with international crimes is their lack of precision and the failure of international instruments to mention penalties, *mens rea*, or defenses).

7. Wexler, *supra* note 6, at 717-718.

8. Some have criticized the ICC Statute for deliberately leaving the definitions of crimes to national legislatures, a gap that could lead to prosecutorial abuse and make any ICC prosecution the equivalent of a common law crime. See Alfred P. Rubin, *The International Criminal Court: Possibilities for Prosecutorial Abuse*, 64 LAW & CONTEMP. PROBS. 153, 158-59 (2001); Wexler, *supra* note 7, at 717. (arguing that one of the most serious criticisms of international criminal justice is the absence of a well-defined body of international criminal law); International Law Association, Report of the Thirty-Fourth Conference (1927) 179-80 (comments of Dr. Emil de Nagy, M.P. (Hungary) (questioning whether an international criminal code should precede the institution of an international criminal court or whether the ICC should function as a common law court)).

consciously intended to deter a whole category of behavior rather than encouraging actors to legalistically tailor their actions in compliance with the law.⁹ Regardless, the argument does not go to the question of *procedural* protections and the divergence of procedural rules that might lead to *substantively* different crimes across jurisdictions.

A. Specificity in International Criminal Law: Analogy to the Common Law

Scholars argue that international criminal law cannot be precise.¹⁰ Rather, it develops necessarily like the common law, gradually applying the principles of previous decisions to new situations.¹¹

The expectations of specificity in international criminal law cannot, however, be the same as in national criminal legislation. . . . International law, like common law, develops gradually on the basis of states' practices, conventions, and other manifestations of customary law, which in some cases also include "general principles of law."¹²

Analogizing international criminal law to the common law poses a number of problems. The specificity question cannot be swept away by analogizing to a highly contested category—the common law crime. Nonetheless, the analogy to the common law raises interesting issues relating to precision that are unique to international law.

Since international criminal law develops largely through conventions, which tend to lack specificity, and cases, as the recent history of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹³ and International Criminal Tribunal of Rwanda (ICTR)¹⁴ indicate, does the non-hierarchical structure of courts considering international criminal law pose any difficulties? Given a range of prior decisions from different courts and tribunals, is it easy for a court to disregard, distinguish, or rely only on cases it wants to?¹⁵ The notion of *stare decisis* has historically been foreign to international law.¹⁶ In the traditional

9. M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 473 (1994).

10. *Id.* at 470-471.

11. *Id.* at 470.

12. *Id.* at 470.

13. M. CHERIF BASSIOUNI, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 202 (Transnational Publishers, Inc. 1996).

14. Statute of the International Criminal Tribunal for Rwanda, Annex, available at <http://www.icttr.org/wwwroot/ENGLISH/basicdocs/statute.html> (last visited October 25, 2002).

15. The International Court of Justice [hereinafter "ICJ"], confronts divergent rulings in some areas of its work, and its current president has expressed the need to impose harmonization. Gilbert Guillaume, *Speech by his Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations* (October 2000), at <http://www.lawschool.cornell.edu/library/cijwww/icjwww/ipresscom/> (last visited October 25, 2002).

16. Article 38(1)(d) of the ICJ Statute indicates that although ICJ decisions are not binding precedent, the ICJ may use past decisions when determining current disputes. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d); see also RESTATEMENT (THIRD) OF

positivist framework, there could be no binding precedent because parties had to submit to an international court's jurisdiction to hear a particular case.¹⁷ While the positivist understanding of international law is no longer as dominant as it once was, international criminal law presents some novel problems in terms of precedent.

With so many criminal tribunals, separated by space, time, and historical context, precedent poses greater difficulties than at the ICJ, which has institutional continuity at least. The potential for divergence increases when domestic courts try defendants under universal jurisdiction. Limited attempts to impose hierarchy on the international criminal system have been made. For example, the ICTY and the ICTR share a common appeals chamber and theoretically apply consistent law.¹⁸ Moreover, the ad hoc tribunal in Sierra Leone is required to follow ICTY and ICTR precedent.¹⁹ There will be no common appeals chamber, however, and no formal mechanism to ensure consistency.²⁰

Harmonization could be imposed with common law crimes in a hierarchical judicial system, but no such overarching authority exists in international law. The provisions to encourage uniformity among the ad hoc tribunals will not effect domestic prosecutions under universal jurisdiction. With domestic courts, the informal mechanism of *judicial globalization*²¹ is the only thing akin to precedent that currently encourages harmonization of international criminal procedure and interpretations of the substantive law. At least one scholar considers the trend toward harmonization of procedural and evidentiary rules to be robust.²² Leaving

THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 103 cmt. b (1987) (noting the "traditional view that there is no stare decisis in international law," but that decisions of international tribunals adjudicating questions of international law are persuasive evidence of what the law is).

17. Alfred P. Rubin & Alison L. Forbes, *Ethics and Authority in International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 335 (1998).

18. Statute of the International Tribunal for Rwanda, art. 24, S.C. Res. 935, available at <http://www.ictr.org/wwwroot/ENGLISH/basicdocs/statute.html> (last visited October 25, 2002); Statute of the International Tribunal for the Former Yugoslavia, art. 25, S.C. Res. 1411, U.N. SCOR, U.N. Doc. S/RES/1411 (2002) available at <http://www.un.org/icty/legaldoc/index.htm> (last visited October 25, 2002).

19. Article 20(3) of the Statute of the Special Court directs the judges of the Special Court's Appeals Chamber to be guided by the decisions of the Appeals Chamber of the Yugoslav and Rwandan Tribunals. Statute of the Special Court for Sierra Leone, art. 20(3) (2002), available at <http://sierra-leone.org/specialcourtstatute.html>. Article 14(1) of the Statute adopts the Rwanda Tribunal's rules of procedure and evidence "*mutatis mutandis*." *Id.* at art. 14(1).

20. The U.N. Secretary General explicitly rejected a proposal to share the common Appeals Chamber for the Rwandan and Yugoslav Tribunals with the Special Court for Sierra Leone. See *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, at 8, U.N. Doc. S/2000/915 (2000) (rejecting a joint appeals chamber as "legally unsound and practically not feasible"), available at <http://www.daccess-ods.un.org/doc/UNDOC/GEN/N00/661/77/PDF/N0066177.pdf?OpenElement> (last visited October 25, 2002).

21. The term describes the phenomenon whereby judges from different jurisdictions cite and follow each others' reasoning.

22. Theodor Meron, *War Crimes Law Comes of Age*, 92 AM.J.INT'L L. 462, 463 (1998) (stating that "the rules of procedure and evidence each Tribunal has adopted now form the vital core of an international code of criminal procedure and evidence that will doubtless have an important impact on the rules of the future international criminal court"). Others find evidence of increasing harmonization

aside the question of whether or not a convention creating a system of binding precedents is politically feasible, such a system would remain unenforceable in the absence of a supranational adjudicative body with appellate criminal jurisdiction.

B. Dealing with Imprecision: Fair Trial Standards and Judicial Integrity

International law recognizes a number of fair trial standards.²³ These standards set a baseline of procedural fairness without confronting the subtler questions of the specificity of international criminal law or the distinct nature of prosecutions under it. Some scholars insist that international prosecutions require a different set of governing principles than criminal proceedings in a municipal setting.²⁴ Between these two poles—guaranteeing defendants certain rights in every trial and recognizing the peculiarities of international criminal prosecutions—the clarity and details of the crimes at issue keep slipping through the cracks.²⁵ This important issue must be more fully explored. Five guidelines are proposed below to introduce harmonization into domestic enforcement of international criminal law and to encourage an international criminal system with integrity.

First, a mechanism is required to ensure that domestic statutes that expand on customary international law are not applied retroactively. While the war crimes acts of most states are under-inclusive, failing to implement all of the Geneva Conventions and their protocols, the statutes in some states go beyond the parameters of those instruments.²⁶ The question is not simply whether the

at the supranational level, largely resulting from the regional human rights systems. Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 810 (2000).

23. These fair trial standards have been expressed in Article 14 the ICCPR, the ICC Statute, the Geneva Conventions, and a number of other international covenants. WARREN FREEDMAN, *THE INTERNATIONAL RIGHT TO TRAVEL* 342 (William S. Hein & Co., Inc. 1993); Rome Statute of the International Criminal Court, art. 67-68, U.N. Doc. A/CONF.183/9 (1998); Geneva Convention (III) Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, art. 99-108, 6 U.S.T. 3316, 75 U.N.T.S. 134.

24. While in absentia trials are unthinkable domestically, the rationales for that position may not hold in the international context. Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267, 268-69 (1994). Likewise, while anonymous witness testimony in domestic prosecutions would violate the defendant's right to a fair trial, such testimony may be appropriate in international trials, both because witnesses have more to fear and because protection measures would be ineffectual. Arguing that the reasonable doubt burden is designed to ensure that erroneous judgments will more often set guilty defendants free than send innocent ones to prison, and judging that the social disutility of acquitting a guilty *genocidaire* is much greater than of convicting an innocent defendant on false charges of genocide, some find that, in human rights lawsuits, the prosecutor's burden of persuasion should be considerably less. *Developments in the Law—International Criminal Law, Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982, 1989 (2001) [hereinafter *Fair Trials and the Role of International Criminal Defense*].

25. *Fair Trials and the Role of International Criminal Defense*, *supra* note 24, at 1991.

26. For example, the Belgian statute takes the notion of war crimes beyond the traditional grave breaches of the 1949 conventions. See Jacques Verhaegen et al., *Commentaire de la loi du 16 juin 1993 relative à la repression des infractions graves au droit international humanitaire*, REVUE DE DROIT

development is positive.²⁷ Rather, the question is whether the particular domestic institution has an international mandate to make innovations in international criminal law. Domestic courts should refrain from judicial lawmaking in the international criminal context. In the absence of an appellate court that could harmonize divergent national decisions, that work is better left to international tribunals, whose decisions will form part of the universal precedent upon which domestic jurisdictions can draw.²⁸ International tribunals take into account a broader horizon of perspectives than would a domestic court, and their jurisprudence has the advantage of being informed by a non-parochial set of considerations. The International Court of Justice has adopted a similar position, approving the prioritization of international tribunals over domestic exercise of universal jurisdiction.²⁹

Second, statutes of limitations should not apply for serious abuses of human rights.³⁰ In most jurisdictions, statutory limitations do not exist for murder and

PENAL ET DE CRIMINOLOGIE 1114-1184 (1994); The Belgian statute extends the notion of war crimes beyond international conflict to civil wars and allows for individual criminal liability for acts that were “forbidden” but not explicitly criminal under the Geneva Conventions’ common article 3. E. David, *La loi belge sur les crimes de guerre*, REVUE BELGE DE DROIT INTERNATIONAL 668-684 (1995/2). The ICTR and the ICTY later found acts falling under that article to be prosecutable violations of customary international law.

27. Wedgwood, *supra* note 24, at 272-73 (arguing that “grave breaches” should be interpreted to include all the prohibited acts of common article 3, thus allowing universal jurisdiction, because these acts are just as profoundly disturbing as others that are prosecutable under international law).

28. National courts must be able to make some innovations, since the international community has proved willing in only limited circumstances to create ad hoc tribunals. M.O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT’L L. 1069, 1148 (1999) (“if the international community of jurists is to create an enduring jurisprudence of international human rights law, it will be because those norms converge from adjudications in multiple jurisdictions each reflecting the socio-political structures of its constitution, while seeking to conform local practices to evolving international standards.”). Without a structured international judicial dialogue or authoritative hierarchy that can impose harmonization, however, domestic innovations may permanently unsettle the content of international criminal law and render prosecutions under it open to doubt.

29. Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) 441 I.L.M. 536 (2002) [hereinafter “Congo v. Belgium”] (holding that, while heads of state are immune from prosecution in domestic courts, those same officials may be prosecuted at an international criminal tribunal having jurisdiction).

30. Stephen Macedo, The Princeton Principles on Universal Jurisdiction, Principal 6, at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited October 25, 2002) [hereinafter PRINCETON PRINCIPLES], states that “[s]tatutes of limitations or other forms of prescription shall not apply to serious crimes under international law. . . .” In 1968, the *United Nations Convention on the Non-Applicability of Statute of Limitation to War Crimes and Crimes against Humanity* was drafted, and in 1974, the Council of Europe concluded a corresponding convention. Adopted by Resolution 2391 (XXIII) of the United Nations General Assembly on Nov. 26, 1968, INTERNATIONAL LEGAL MATERIALS 68 (1969); European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes, Jan. 25, 1974, E.T.S. No. 82, *reprinted in* 13 I.L.M. 540 (1974). Relatively few states, however, have signed and ratified these conventions. Even if the states’ motivations for not ratifying these instruments does not affect the principle of the imprescriptibility of war crimes, the nonapplicability of statutory limitations does not emerge as a generally accepted principle of international criminal law.

other serious crimes.³¹ Such limitations should likewise not apply to acts that violate international criminal law.³² Although prosecutions often take place long after the fact, increasing the risk that international fair trial rights will be violated and raising issues about the availability of witnesses and evidence, among other things,³³ these problems do not warrant the conclusion that prosecutions for acts that took place many years ago are *per se* unfair. Determining whether a fair trial is possible should remain the task of the prosecutor and the judge.³⁴ In a well-functioning domestic judiciary, there is no reason to believe that courts are unable to perform this task. Domestic prosecutions under universal jurisdiction need not apply statutes of limitations in order to protect the integrity of their judicial proceedings.

Third, a threshold of similarity across jurisdictions as to the definition of crimes and the *mens rea* required for conviction would be a positive development.³⁵ Although genocide has been little prosecuted, its legal contours were settled after the ratification of the Genocide Convention of 1948.³⁶ The concept of crimes against humanity, on the other hand, has developed primarily through custom and adjudication, and its elements are consequently less certain.³⁷

31. See generally CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY (Christine Van den Wyngaert, *et al* eds., 1993).

32. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 155, art. 2. As long as the non-application of statutory limitations applies only to acts that were considered criminal at the time committed, there is no retroactivity concern here. The Council of Europe Convention was designed to overcome this hurdle by stipulating that it would only be applicable to offences committed after its entry into force. *Id.* This rule, however, seems over-inclusive. It is not clear why acts committed before its entry into force that were clearly criminal when committed should be subject to a statute of limitations since there is no foreseeability issue in this context.

33. See A.T. Richardson, *War Crimes Act 1991*, MOD. L. REV. 73, 74 (1992).

34. Leila Sadat Wexler, *The French Experience*, in INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 284 (2d ed., M. Cherif Bassiouni, ed. 1999).

35. Uncertainty as to the definitions of some international crimes remains. The most blatant example is the "crime of aggression" in the ICC statute. Even more settled crimes, however, have proved to be elastic. The Rome Statute's drafters intended, through the language of Article 10, to encourage states to modify the Statute's definitions through domestic legislation. The framers foresaw states adding to the list of protected groups under the Genocide Convention and expanding the definition of crimes against humanity. Sadat, *supra* note 5, at 256-57. While these drafters seem to have supported states' conflicting views of the content of international law out of something like federalism concerns, this position is controversial. As states feel increasingly empowered to prosecute under universal jurisdiction, if a prosecuting state applies idiosyncratic interpretations of international law, that prosecution could violate the due process requirements of the criminal law and undermine international criminal law in general. Morris, *supra* note 2, at 352.

36. The Genocide Convention requires the intentional destruction of a "national, ethnic, racial or religious group." Convention on the Prevention and Punishment of the Crime Genocide, September 12, 1948, art. 2. Recent cases have challenged this definition in an effort to include systematic attacks on political or cultural groups. William A. Schabas, *Problems of International Codification—Were the Atrocities in Cambodia and Kosovo Genocide?*, 35 NEW ENG. L. REV. 287 (2001); Harvard Law Review, *Defining Protected Groups under the Genocide Convention*, 114 HARV. L. REV. 2007 (2001).

37. These crimes were defined differently in Article 6(c) of the IMT Charter, in art. 5 of the ICTY Statute, and art. 3 of the ICTR Statute. See CONST. OF THE INT'L MIL. TRIB. Art. 6(c) [hereinafter "IMT"]; see Statute of the International Tribunal for the Former Yugoslavia, art. 5, S.C. Res. 1411, U.N. SCOR, U.N. Doc. S/RES/1411 (2002) available at <http://www.un.org/icty/legaldoc/index.htm>

When international criminal law is enforced at the domestic level, a more rigorous definition is required than in an international tribunal. Due to their international character and particular historical contexts, the various international tribunals have operated with differing definitions without great harm. In the absence of a strict definition, however, national courts and prosecutors have interpreted international prohibitions in peculiar ways, undermining the notion that international criminal law is a coherent body of universal norms.³⁸ For domestic prosecutions of international crimes, it is important that a clear, internationally accepted definition of those crimes be applied. Domestic prosecutions are not the proper fora for judicial innovation. The innovation will likely be questioned by the international community and the integrity of the proceedings thrown into question.

Fourth, it is not self-evident which source of law should designate the punishment to be applied. The punishment could be provided by the trial state's law, the law of the state where the crime was committed, the law of the victim's home state, or the court could choose to apply the least severe penalty. According to the ICTY Statute, the Yugoslav Tribunal should follow the practice of the former Yugoslavia regarding sentences.³⁹ The rule was established to avoid retroactive sentencing in violation of the maxim *nullum crimen nulla poena sine lege*.⁴⁰ Ultimately, because Yugoslavia had imposed the death penalty, the ICTY decided that it would review the legal practices of the former Yugoslavia but

(last visited October 25, 2002); see Statute of the International Tribunal for Rwanda, art. 3, S.C. Res. 935, available at <http://www.ictt.org/wwwroot/ENGLISH/basicdocs/statute.html> (last visited October 25, 2002).; see Bassiouni, *supra* note 9 (arguing that, because of this ambiguity, crimes against humanity should be codified in an international treaty); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 427 (2000) (examining the definitions); see also Beth von Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 792 (1999) ("Since its inception, the definition of crimes against humanity has been plagued by incoherence."); Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000).

38. Wexler, *supra* note 6, at 710. Finding that a national, ethnic, racial, or religious group was not targeted as a group for eradication, but rather a number of political opponents from different countries, the French courts did not find Pinochet's acts to amount to genocide. Brigitte Stern, *French Tribunal de Grande Instance (Paris)*, 93 AM.J.INT'L L. 696, 697-98 (1999). By contrast, Spanish courts found that the definition of genocide under international law was inadequate and failed to capture the concept. Thus, the genocide charges for persecution of political opponents stood. Morris, *supra* note 2, at 353. In the French prosecution of Klaus Barbie for crimes against humanity, the Court of Cassation added an element to the crime. The Court found that the perpetrator of a crime against humanity must have carried out his crime on behalf of a "state practicing a hegemonic political ideology." This definition remains unique to France, and the decision, which strikes at the universal nature of international criminal law, undermines the integrity of national prosecutions of international crimes. See Wexler, *supra* note 34, at 284.

39. Statute of the International Tribunal, Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, Annex, U.N. GAOR, 48th Sess., 3175th mtg., U.N. Doc. S/25704 (1993) Rule 101.

40. The Tribunal encountered difficulties, however, because the former Yugoslavia allowed for the death penalty but not life imprisonment, while the ICTY may impose life imprisonment but not the death penalty. See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 462 (1997).

would not be bound by them.⁴¹ If determining the source of punishments to be applied by international tribunals is a delicate matter, the stakes are even higher with national prosecutions. If trial states apply their own punishment, they encourage forum-shopping, since those interested in prosecuting the crime would seek the most favorable forum. From the standpoint of safeguarding the integrity of the proceedings, it would be best to discourage a system where a defendant could face the death penalty in one jurisdiction and life imprisonment in another. Such divergence would seem arbitrary and undermine the notion of universality.⁴²

As for applying the punishment of the state where the crime occurred, forum-shopping would not be an issue. Although adequate Notice would exist and sentencing would seem less arbitrary, this regime would present substantial enforcement problems. European states would be reticent to apply another state's death penalty in a universal jurisdiction case. The third proposition, that the punishment of the victim's home state be applied, also might require imposition of the death penalty. The punishment could raise *ex post facto* and notice issues as well.

Although problematic, the "least severe penalty" rule—judging between the trial state's law and the law of the state where the crime occurred—surpasses the others.⁴³ While it avoids both the notice and enforcement issues, it introduces others. The Rwandan Tribunal confronted its difficulties.⁴⁴ Those in leadership positions who devised and organized genocide have escaped capital punishment, while lower-ranking perpetrators appearing before Rwandan courts have been subjected to the death sentence.⁴⁵ This problem of "vertical inequity" is a serious political and theoretical issue. In most cases of widespread violence, however, the state's judiciary would be in disrepair and the state would be unwilling or unable to carry out prosecutions at all, making the issue purely theoretical. Even where the

41. Prosecutor v. Drazen Erdemovic, Case No. IT-96-22-T, Int'l Crim. Trib. For the Former Yugo., Trial Chamber, Sentencing Judgment (Nov. 29, 1996), at <http://www.un.org/icty/erdemovic/trialc/judgment/erd-tsj961129e.pdf> (last visited October 25, 2002). Many of the cases before the Human Rights Committee under Art. 15 of the ICCPR have concerned the retroactive imposition of punishments, i.e., punishments that are more severe than those on the books when the crime was committed. The ICTY approach comports with the standard enunciated in that instrument.

42. *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965). A comparison to federal systems is useful. While allowing states to develop and apply their own procedural rules for state crimes is inherent to the federal system of government, so is giving federal courts and legislatures exclusive power over the substantive and procedural laws relating to federal crimes.

43. Essentially, this rule would be a choice of law provision. The U.S. Supreme Court has suggested that the purpose of the Erie doctrine is to avoid "forum shopping" and the "inequitable administration of the laws." *Id.* at 460. At the international level, that purpose is best achieved by the least severe penalty rule. As an example, the European Court of Justice, concerned by the divergent application of EU law in national courts, requires that a national court's application of procedural rules to an EU cause of action may not vitiate the substantive right nor render it impossible to exercise in practice. See PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 214-15 (Oxford University Press Inc. 1998).

44. Rwandans party to the debates preceding the establishment of the ICTR expressed concern that the Statute "establishes a disparity in sentences since it rules out capital punishment, which is nevertheless provided for in the Rwandese penal code." U.N. Doc. S/PV.3453, at 16 (1994).

45. *Id.*

problem exists concretely, the "least severe penalty" rule is arguably justified if it increases the integrity of prosecutions under international criminal law, has a deterrent effect, and results in a general shift away from capital punishment in domestic courts.

The subtext is that no significant group of states would approve an international tribunal today with the power to impose capital punishment.⁴⁶ Thus, it would be odd for a national prosecution of an international crime to result in the death penalty. On a case-by-case basis, the "extradition impact" may resolve this problem, with many states refusing to comply with extradition requests from states that plan to seek the death penalty.⁴⁷ This informal regime is not perfect, however, and it will not lend national prosecutions the same integrity as the "least severe penalty" rule. States should reach an international agreement governing the imposition of sentences in universal jurisdiction cases.

Finally, the accused require adequate procedural protections. While it has been noted that the particular circumstances surrounding international criminal trials militate against having the same procedural protections that municipal criminal trials require,⁴⁸ certain fundamental procedural protections like probative standards, the burden of proof, and available defenses must not be compromised.⁴⁹ Also, peculiar double jeopardy problems arise from national prosecutions under international law, and efforts must be made to protect defendants from unfairness through multiple domestic prosecutions.⁵⁰ As for amnesties and immunities, domestic courts prosecuting under universal jurisdiction have no authority to grant them.⁵¹ Considerable international consensus indicates that amnesties for serious abuses of human rights are improper.⁵² A foreign court—distanced from the social

46. See PRINCETON PRINCIPLES, *supra* note 30, Principle 10, states that a state may refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face the death penalty, to be subject to torture, or if international due process norms are likely to be violated. Stephen Macedo, *The Princeton Principles on Universal Jurisdiction*, Principal 10, at http://www.princeton.edu/~lapa/unive_jur.pdf (last visited October 25, 2002); See generally Ved P. Nanda, *Bases for Refusing International Extradition Requests—Capital Punishment and Torture*, 23 *FORDHAM INT'L L.J.* 1369 (2000).

47. The United States has entered into several bilateral treaties containing clauses assuring the partner country that the death penalty will not be sought. See Extradition Treaty, June 8, 1972, U.S.-U.K., art. 4, 28 U.S.T. 227, 230; Extradition Treaty, Oct. 13, 1983, U.S.-Italy, art. 9, 35 U.S.T. 3023, 3031; U.S.-Canada Extradition Treaty, Dec. 3, 1971, art. 6, 27 U.S.T. 983, 989. See *infra* discussion Section II(a).

48. See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 103 cmt. b (1987).

49. Anthony D'Amato, *National Prosecution for International Crimes*, INTERNATIONAL CRIMINAL LAW: ENFORCEMENT (2d ed., M. Cherif Bassiouni, ed. 1999).

50. *Id.*

51. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2543-44 (1991) (finding that amnesties for human rights abuses are *per se* illegitimate); Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 *N.Y. INT'L L. REV.* 1, 53-54 (1999) (arguing that amnesties are improper except in the context of a transition to democracy).

52. See PRINCETON PRINCIPLES, *supra* note 30, Principle 7, at 31 (stating that amnesties are

and political context of the state where the crimes occurred—especially has no authority to grant amnesties or immunities, enforcement difficulties aside.⁵³

The proliferation of jurisdictions available to prosecute international crimes presents new and interesting problems in criminal procedure.⁵⁴ The Lotus paradigm continues to dominate this area of international law.⁵⁵ Under that doctrine, each sovereign may apply its own law in a case unless there is a rule prohibiting it from doing so, and international law has not yet developed a system of conflict of laws to resolve the problem.⁵⁶ Hardly enough attention has been paid to which body of procedural law the forum state should refer when exercising universal jurisdiction. At Nuremberg and in the first days of the ad hoc tribunals, procedural rules received scant attention.⁵⁷ The international tribunals have their own rules of procedure that, while largely judge made, at least resulted from international debate, taking into consideration the needs of international criminal law.⁵⁸ Domestically, many nations have passed laws enabling local prosecution of criminals from the Yugoslav or Rwandan conflicts found in their territories.⁵⁹ In some cases, a difference in procedural rules between the domestic system and the international tribunal would be outcome determinative. The question then arises, which rule of procedure should apply? Deferring to the national rule could lead to war crime forum-shopping from a prosecutorial standpoint, with the prosecutor at the international tribunal relinquishing jurisdiction and victims bringing cases as

inconsistent with the duty to punish serious abuses of human rights); *Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, Prelim. Rept. By Louis Joinet, Special Rapporteur*, U.N. ESCOR, Commission on Human Rights, 38th Session, Provisional Agenda Item 9(a), at 15, U.N. Doc. E/CN.4/Sub.2/1985/16; General Comment No. 20(44) (art. 7), General Comment Adopted by the Human Rights Committee under Article 40, para. 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.3, Oct. 3, 1992; *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Case 4, Inter-Am. C.H.R. (Ser. C) (1988) (holding that states have a duty to investigate and punish serious abuses of human rights) available at http://www.corteidh.or.cr/seriecing/serie_c_4_ing.doc (last visited Oct. 22, 2002); Orentlicher, *supra* note 51, at 2543; Schabacker, *supra* note 51, at 53.

53. For serious abuses of human rights, courts' power is asymmetrical. Universal jurisdiction is meant to ensure that the victims will have justice. Courts vested with universal jurisdiction, while having the authority to prosecute, do not have the power to grant amnesties or immunities.

54. Domestic procedural regimes to enforce international criminal law vary considerably from state to state. A number of aspects of criminal procedure, including statutes of limitations, immunities, pardons, penalties, and the rights of the defendant are local in character. As of yet, there is scant relationship between national and international proceedings and virtually no integration of procedural rules. Sadat, *supra* note 5, at 257-58.

55. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7).

56. Sadat, *supra* note 5, at 257-58.

57. See, e.g., Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 729-30 (1999).

58. See, e.g., *Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia*, reprinted in VIRGINIA MORRIS & MICHAEL SCHARF, 2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 41-86 (1995) available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html> (last visited Oct. 22, 2002); Cristian DeFrancia, *Due Process in International Criminal Courts: Why Procedure Matters*, 87 VA. L. REV. 1381, 1390 (2001).

59. Many states enacted laws to incorporate the obligations imposed by Security Council Resolution 827 establishing the international tribunal in Yugoslavia to prosecute accused persons discovered on their soil.

*parties civiles*⁶⁰ in jurisdictions with procedural rules more favorable to their case. A possible solution is that the international tribunal's rule would override domestic rules. To assure integrity, however, adopting the rule most favorable to the defendant would be the best choice.⁶¹ Since no equivalent to the international debate producing the tribunals' procedural rules exists at the domestic level, adopting the rule most favorable to the defendant, judging between the rules of an international tribunal and a domestic court, would cast the best light on national prosecutions for international crimes.

Situations inevitably will arise where international law provides no rule on a problem and municipal law must apply. Some scholars suggest that municipal rules should be modified in consideration of the crime's international nature, drawing on the principles of private international law to inform criminal procedures.⁶² For the moment, however, when prosecutions under universal jurisdiction are regarded with great skepticism, relying on even these modified national procedures in international prosecutions will result in a loss of integrity and will undermine their universality. Judged against the procedural rules arrived at after painstaking international debate, whether those from Yugoslavia, Rwanda, or the ICC, the rule most favorable to the defendant should be applied. While this solution may not be exact, and international law still might not provide any clear answers, it is imperative that international standards set the baseline against which domestic prosecutions for international crimes are judged.

II. The "Invisible Hand" Encouraging Transnational Harmonization

The possibility for variation among the laws of jurisdictions hearing international criminal cases is vast. Procedural rules and sentences proliferate, as do interpretations of the definitions and elements of crimes. In the absence of a formal unifying structure, are there informal "checks and balances" in the international system that introduce, at best, an element of harmonization or, at least, some standards militating against the most divergent practices? Four informal mechanisms have the potential to serve this function. First, the rules on extradition could influence the fairness of national prosecutions for international

60. As explained by Judge Claude Jorda:

According to French law, any private individual or group of individuals may trigger a criminal prosecution by introducing a claim in court. This is referred to as "la constitution de parties-civiles" ("the formation of civil parties"). If anyone "se constitue partie-civile" against somebody else, the court must prosecute that individual.

See CODE DE PROCEDURE PENALE [CPP] art. 721 (Fr.). Claude Jorda, *The International Criminal Tribunal for the Former Yugoslavia: Its Functioning and Future Prospects*, 3 HOFSTRA L. & POL'Y SYMP. 167, 202, n.53 (1999).

61. This rule would be consistent with the spirit of Article 15 of the ICCPR, which provides that a heavier penalty may not be imposed if a lighter penalty was statutorily required at the time the act was committed. International Covenant on Civil and Political Rights, December 19, 1966, art. 15. France has adopted a similar rule for handling domestic prosecutions arising out of the Yugoslav conflict. See Wexler, *supra* note 34, at 298 n.157.

62. Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 363-66 (1994).

crimes. Second, the fact that prosecuting states must rely on other states' cooperation to gather evidence introduces the possibility of some checks. Third, the emergence of a transnational judicial dialogue whereby decisions in one jurisdiction gain authority by drawing on precedents from international tribunals and foreign courts is promising. Fourth, world opinion could substantially impact these prosecutions, although it is not clear whether the world's gaze is more likely to encourage fair prosecutions, deter exercise of universal jurisdiction altogether, or turn prosecutors into celebrities. An examination of these issues will reveal whether the central problems of domestic prosecutions of international crimes can be addressed through informal checks currently present in the international system.

Put differently, this section analyzes the possible affects of a "free market" of jurisdictions for international criminal prosecutions. Might this jurisdictional competition lead to a convergence of definitions and procedural rules, greater divergence, or no change at all?⁶³ Others have argued that forum-shopping can materially benefit human rights law, leading to both greater vindication of victim's rights and a clearer exposition of the law.⁶⁴ The multiplicity of fora might even encourage horizontal dialogue among jurists in different jurisdictions to both elucidate and harmonize the legal norms of international criminal law.⁶⁵ For the moment, these predictions remain aspirational. Rather than heralding the growth of national prosecutions as unambiguously positive, this section will explore whether there is an "invisible hand" encouraging harmonization for national prosecutions under international criminal law.

A. The "Extradition Impact"

A custodial state receiving an extradition request for an indicted suspect is not required to comply.⁶⁶ If it finds that the proceedings in the requesting state would be unfair or that the punishment would be overly severe, it can refuse to extradite.⁶⁷ While such dialogue could influence the fairness of criminal proceedings, there is little indication that states scrutinize requesting states' procedures.⁶⁸ Extradition treaties, negotiated with law enforcement in mind,

63. Theodor Meron has argued that the evolving rules of procedure and evidence in the ad hoc tribunals will coalesce into a well-defined body of rules of international criminal procedure. Meron, *supra* note 22, at 463.

64. Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 289-97 (1999) (arguing, in the context of treaty, regional, and international bodies, that forum-shopping encourages development of human rights law that benefits victims and ensures adequate protections for defendants).

65. *Id.* at 293.

66. See Michael S. Topiel, *The Doctrine of Non-Inquiry and the Preservation of Human Rights: Is There Room for Reconciliation?*, 9 CARDOZO J. INT'L & COMP. L. 389, 406-8 (2001).

67. *Id.*

68. As a general rule, countries require only that the conduct is criminal in both the requesting and sending states for an extradition to go forward. M. Cherif Bassiouni, *Extradition: The United States Model*, 2 INTERNATIONAL CRIMINAL LAW 405 (M. Cherif Bassiouni ed., 1986). Little attention is given to procedural details, and, under the rule of non-inquiry, the existence of an extradition treaty with the U.S. prevents courts from reviewing whether or not the trial would be fair in the requesting

provide a presumption that the extradition should go forward. In practice, refusals to extradite are made largely by European states opposed to the death penalty.⁶⁹ Thus, extradition has limited impact on the application of international criminal law.⁷⁰

The broad powers of enforcement jurisdiction in American law further debilitate the extradition regime as a check on international criminal proceedings. After *Alvarez-Machain*, American law enforcement officials may contemplate kidnapping as an alternative to requesting extradition even from a state with which the U.S. has an extradition treaty.⁷¹ While the cost in political capital may deter extra-territorial enforcement in most cases, the *Alvarez-Machain* rule militates against a robust extradition principle as an international check on the substantive, procedural, and penal aspects of national prosecutions for international crimes.⁷²

The "extradition impact" as a tool for encouraging international dialogue in national prosecutions for international crimes is further weakened because, in many cases, extradition is not an issue. If the defendant arrives on the soil of the country that then seeks prosecution, the potential for transnational checks and balances through extradition is irrelevant.

Finally, as former dictators and human rights abusers learn the great lesson of the twentieth century, to forego travel or to travel only to those states where they are assured refuge, the likelihood of extradition decreases.⁷³ Extradition from rogue states is unlikely. Even if extradition were granted, it is unlikely that such states would provide checks on the fairness of criminal proceedings in the requesting state. The prospect of human rights abusers receiving refuge in rogue states also raises the likelihood of *Alvarez-Machain* solutions. The U.S. would be most likely to resort to kidnapping in cases where extradition would be justified but impossible for geopolitical reasons. In practice, this result could bear little positive for the development of a robust system of checks and balances through extradition rules.

country. *Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1971); see Lynn Sellers Bickley, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213, 248 (2000). Of course, this rule depends on the treaty's approval, where the procedural protections would presumably, though not necessarily, be analyzed at the negotiation stage.

69. Generally, when the U.S. seeks to extradite a criminal from Europe, it undergoes formal negotiations to assure that the criminal will not face the death penalty once extradited. Despite these guarantees, European states remain ambivalent about extraditing to the U.S. In the wake of the events of September 11, several European states have refused extradition. See Sam Dillon and Donald G. McNeil, Jr., *A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions*, N.Y. TIMES, Nov. 24, 2001, at A1. States also negotiate treaties stating that any suspect extradited to a requesting state will not face the death penalty. See Topiel *supra* note 66, at 396-97.

70. Pinochet showed the world that extradition proceedings can be drawn out and political without touching on the substantive legal issues. Broomhall, *supra* note 2, at 415.

71. *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992).

72. *Id.* at 666-67.

73. Broomhall, *supra* note 2, at 415.

B. Mutual Legal Assistance

Because states prosecuting international crimes rely on mutual legal assistance to gather evidence,⁷⁴ officials in the country where the evidence is located have a profound influence on the trial's shape. In this context, two problems arise. First, evidence may be located in a state unwilling to cooperate with the prosecuting state. That state may impede visits to sites and witnesses and may prevent investigators from locating key documents. Second, where investigators have access to documents, the court may have difficulty determining their authenticity. Under the treaties governing mutual legal assistance, requested states generally have broad discretion to refuse assistance on a number of grounds.⁷⁵

Experience at the ad hoc tribunals indicates that refusals to cooperate have had a large practical impact on the proceedings.⁷⁶ While refusal to grant mutual legal assistance could perform a regulatory function on the proceedings in the requesting state, its exercise depends largely on the character of the state that is requested to cooperate. In many cases, a despotic regime will simply refuse to cooperate whether or not the proceeding is just.⁷⁷ The most likely result is a rhetorical battle, where the prosecuting state seeks to discredit the requested state's position. The proceedings' fairness will not be the focus in friction arising from mutual legal assistance requests, and this form of extraterritorial influence is unlikely to be a strong tool regulating national prosecutions for international crimes.

C. Transjudicialism: The International Judicial Dialogue

The "international judicial dialogue," whereby domestic courts look to international tribunals and foreign courts to inform their decisions, has aroused scholarly interest.⁷⁸ Some scholars see the ad hoc international tribunals, where judges on one court often cite decisions from the other, as a harbinger of a more wide-ranging judicial conversation about international criminal law.⁷⁹ To date, however, this dialogue has primarily influenced the law of capital punishment,⁸⁰ and a limited number of courts have opted to engage in the conversation.⁸¹ Not

74. Broomhall, *supra* note 2, at 412.

75. *Id.*

76. James Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 441 (2001).

77. *Id.* at 441.

78. *Developments in the Law: International Criminal Law-The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2049-50 (2001) [hereinafter *International Judicial Dialogue*]; see also Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104-05 (2000).

79. *International Judicial Dialogue*, *supra* note 78 at 2049-50.

80. *Id.*

81. In the death penalty context, the Canadian and Jamaican Supreme Courts considered the European Court of Human Rights' decision in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). See *Kindler v. Canada*, 2 S.C.R. 779 (1991); *Pratt v. Attorney-Gen. for Jam.*, 2 A.C. 1 (P.C.

surprisingly, U.S. courts have been particularly unwilling to consider international and foreign standards.

The possibilities for a fully international dialogue are narrow in the context of national prosecutions for international crimes, given the rarity of such prosecutions. Time will tell to what extent ICTY and ICTR precedents will impact domestic decision-making. The fact remains that most states of the South, which have been most receptive to judicial globalization, will not prosecute international crimes in their national courts.⁸² These countries would face substantial costs in terms of diplomatic and political capital, as well as the threat of informal economic sanctions, if they exercised universal jurisdiction to try anyone but their own former dictators.

This analysis suggests that the international judicial dialogue is a positive development but a weak means of harmonizing criminal standards across jurisdictions. Without a more formal mechanism encouraging transnational judicial interdependence that engages the most prosecutorial states, there is little evidence to suggest that the dialogue will prove to be robust. Some courts may find it in their interest to invoke the decisions of international tribunals and foreign jurisdictions as a means of legitimating their own rulings. Even courts sympathetic to that rationale would be reticent to recognize a systematic dialogue contributing to the development of a law that should, in order to maintain its integrity, retain its essentially international characteristics when enforced in domestic courts. Thus, in the absence of a more formal mechanism introducing a hierarchy of decision in international criminal law, the international judicial dialogue will remain a weak tool. It will not encourage the rigor and convergence that is needed if national prosecutions for international crimes are to become fully legitimate in the eyes of the international community.

D. World Opinion

Given the geopolitical context of national prosecutions for domestic crimes, one might suppose that world opinion in general and the potential for costly payouts of diplomatic capital⁸³ might encourage responsible prosecutions for international crimes that fall closely in line with international standards of fairness.⁸⁴ While this may be true to some degree, the impact of world opinion will most likely simply influence the number of prosecutions, leaving national

1993). The Indian Supreme Court considered foreign practice and scholarship in *Bachan Singh v. Punjab*, 2 S.C.J. 475 (1980), as did the South African Constitutional Court in *State v. Makwanyane*, 1995 (3) SALR 391 (CC) reprinted in 16 HUMAN RIGHTS LAW JOURNAL 154 (1995).

82. See Goti, *supra* note 4.

83. See, e.g., *The Barcelona Traction, Light, and Power Company (Belgium v. Spain)* 1970 ICJ 3, 31.

84. NGOs could critically examine national prosecutions for international crimes. To date, however, NGOs have tended to overlook the flaws in favor of developing a robust international criminal system. See Amnesty International, *News Release: Amnesty International Urges Investigation of Ariel Sharon*, Oct. 3, 2001, at <http://www.amnestyusa.org/news/2001/belgium10032001.html> (last visited October 22, 2002).

procedural rules and interpretations of international criminal prohibitions intact.⁸⁵ Whether this international gaze will encourage too many prosecutions or deter national prosecutions for international crimes altogether is the crux of the problem. Whether there are too few or too many prosecutions depends on the legal rules determining who may prosecute and be prosecuted.

In a national jurisdiction where all criminal prosecutions must be brought by the sovereign, we expect few prosecutions for international crimes.⁸⁶ Few prosecutors will expend judicial resources to prosecute defendants for crimes committed on foreign soil, and the world has seen few zealous prosecutors of international crimes. Baltasar Garzon is the exception that proves the rule.⁸⁷ Garzon's actions have led to serious national debate in Spain about whether states should become involved in such cases.⁸⁸ The exception aside, evidence indicates that prosecutions by the sovereign will tend toward too few national prosecutions for international crimes.

Civil law systems often allow alternative means of bringing criminal prosecutions. These states allow "civil parties" to institute proceedings,⁸⁹ where the civil party acts as a private prosecutor to plead cases that the state may otherwise overlook. While this system provides a forum for plaintiffs to bring suits against human rights abusers, a state could pay a high political price for divesting itself of the sole authority to choose which defendants may be criminally prosecuted in its courts.⁹⁰ While the civil party mechanism will increase the

85. Professor Harold Koh's transnational legal process could be characterized as the force of world opinion changing the trajectory of the law or inducing compliance among states. As his examination of the Alvarez-Machain case and its aftermath indicates, however, the transnational legal process often does not reach holistic solutions. The United States now prohibits transborder kidnappings in Mexico but not as a general tool of law enforcement. While in a particular case, world opinion may achieve its goals, its ability to change the law in a systematic manner is unlikely. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 195-96 (1996).

86. David Scheffer, the former U.S. Ambassador at Large for War Crimes Issues, has noted that governments are almost universally determined not to use universal jurisdiction. David Scheffer, *Universal Jurisdiction: Myths, Realities and Prospects*, Opening Address Before the Universal Jurisdiction Conference at the New England School of Law (Nov. 3, 2000), 35 NEW. ENG. L. REV. 233 (2001).

87. See *Judge Garzon: Spain's Most Famous Investigator*, BBC NEWS, Sept. 13, 2000 (examining Judge Garzon's extraordinary political career as a prosecutor and the international notoriety that Garzon gained from his role in the Pinochet affair) at <http://news.bbc.co.uk/hi/english/world/europe/923083.stm> (last visited October 22, 2002).

88. See Tervainen, *supra* note 1 (finding that Spain did not want to engage in international human rights enforcement, but that "it was unexpectedly forced into that role when 'star judge' Baltasar Garzon issued an arrest warrant against Pinochet in October 1998.").

89. See generally J.A. Jolowicz, *Procedural Questions*, 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pt. II, ch. 13, at 3-15 (André Tunc ed., 1986) (examining the operation of the civil party system in civil law countries); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 613 (1990) (explaining the relationship between the French prosecutor's discretion and the rights of victims who file criminal charges directly).

90. Under the Belgian universal jurisdiction statute, a number of criminal cases have been instigated by civil parties against defendants like Fidel Castro, Saddam Hussein, Ariel Sharon, Yasser Arafat, Pal Kagame, and Hissene Habre. The Sharon case has caused diplomatic stress, resulting in

number of national prosecutions for international crimes, it might be so politically problematic as to result in a rejection of such prosecutions altogether.⁹¹

No mechanism exists to encourage the optimal number of national prosecutions. In the absence of a nexus between the prosecuting state and the criminal, the victim, or the crime, such prosecutions will seem random, and no clear standard for adjudicating cases has yet emerged that satisfies both human rights and due process concerns. Perhaps the emergence of an international criminal prosecution and defense bar,⁹² as well as growth in the number of judges with experience in the field, will help solve some of these problems. In the meantime, it is unclear what steps may be taken to balance human rights concerns with procedural fairness and perceived judicial integrity. The force of world opinion is not a strong check on the procedural and fairness characteristics of national prosecutions for international crimes. On the contrary, world opinion is more likely to impact the number of such cases that are brought, and it is not a strong element of the "invisible hand" that could regulate international prosecutions.

E. Concluding Thoughts

Each of the informal mechanisms that could encourage transnational convergence of international criminal substantive and procedural law is unlikely to have much impact. A more formal means of harmonizing international criminal law is necessary to ensure that universal jurisdiction is not altogether undermined by idiosyncratic national prosecutions. The following section will highlight some of the political costs that universal jurisdiction poses and discuss the impact of the ICJ's recent decision in *Congo v. Belgium*—reviewing a prosecution under Belgium's universal jurisdiction statute—on national prosecutions. The concluding section will present some suggestions that should lend greater integrity to international criminal prosecutions.

charges of Belgian anti-Semitism. See *News Release: Amnesty International Urges Investigation of Ariel Sharon*, Oct. 3, 2001, at <http://www.amnestyusa.org/news/2001/belgium10032001/html> (last visited October 22, 2002); *Exiles Seek Castro's Indictment in Belgium*, WASH. POST, Oct. 4, 2001, at A32; *Israeli Group to File Suit in Belgium against Arafat*, Aug. 9, 2001, at <http://www.arabia.com/news/article/english/0,11827,61260,00.html> (last visited October 22, 2002). The political cost of opening its criminal system to private prosecutors has pushed some Belgians to seek repeal of the universal jurisdiction statute. The Sharon case in particular has led the Belgian parliament to consider amending its law, including temporary head of state immunity. *Belgium's Legal Trap for World Leaders*, CNN.COM, Jan. 23, 2002, at <http://europe.cnn.com/2001/WORLD/europe/07/05/belgium.sharon> (last visited October 22, 2002); *Tyrants Fear Long Arm of Belgian Law*, SUNDAY TIMES, Aug. 5, 2001 at <http://www.is.lk/times/010805/specrpt.html> (last visited October 22, 2002).

91. Morris, *supra* note 2, at 357 (arguing that the power to prosecute under universal jurisdiction, when not adequately controlled by government actors mindful of international relations, could bring about quite harmful results).

92. See *Fair Trials and the Role of International Criminal Defense*, *supra* note 24, at 1992.

III. Some Costs of Universal Jurisdiction

While this article has assumed that universal jurisdiction will occupy an increasingly prevalent space in international decision-making, it has not considered explicitly the costs inherent in decisions that will have political implications. The article has generally suggested that one way to limit these costs is by harmonizing the procedural and substantive norms of international criminal law to minimize the possibility of aberrant decisions. This section seeks to point out more concretely some of the costs of universal jurisdiction. If universal jurisdiction is to become a productive addition to the toolbox of human rights and international politics, the costs acknowledged here must be taken into account.

A. Discounting Diplomacy and Interstate Relations

It would be imprudent to discuss universal jurisdiction without considering its potential use as a political tool of interstate conflict.⁹³ Every prosecution using universal jurisdiction is certain to have an “irreducible element of controversy.”⁹⁴ One need not conjure hypotheticals presupposing destructive intent to recognize the potential havoc aggressive prosecution could wreak on international order. Those who pursue prosecutions because they believe it is the just thing to do could jeopardize political negotiations that might lead to less human suffering. Pundits and scholars alike have opined that the former ICTY Chief Prosecutor’s efforts to indict Slobodan Milosevic made political negotiation impossible.⁹⁵ Faced with the threat of indictment, Milosevic opted to continue the fighting that led to many more deaths.⁹⁶

While Milosevic’s indictment may have been a poor exercise of prosecutorial discretion, this example should not be offered to justify jettisoning universal jurisdiction altogether. Although successful negotiations may reduce suffering more than criminal prosecutions in some instances, we should not prematurely limit non-violent solutions to international problems. What would be the advantage in restricting the toolbox so that, if negotiations fail, military engagement is the next best option? Other practical concerns reinforce the argument that universal jurisdiction, combined with a strong dose of prosecutorial discretion and institutional checks, should remain an option. First, negotiations are often used as a stalling tactic.⁹⁷ Negotiations can send the wrong signal to those on

93. As Madeline Morris notes, “states may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflicts by prosecuting nationals of those opponent states. . . .” Morris, *supra* note 2, at 354.

94. Broomhall, *supra* note 2, at 419.

95. See, e.g., Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned From It*, 25 *FORDHAM INT’L L.J.* 95, 95-7 (2001).

96. See, e.g., Mandel, *supra* note 95, at 95-97; Mirko Klarin, *Arbour’s Pre-Emptive Strike*, *MOJO WIRE*, June 1, 1999, at http://www.motherjones.com/total_coverage/kosovo/arbour.html (last visited October 22, 2002).

97. Samantha Power, *A Problem from Hell: America and the Age of Genocide*, Address Before the Human Rights Workshop, Yale Law School (March 1, 2002).

the ground who may continue to participate in genocide, torture, or other inhumane acts of violence. Without an affirmative signal—a condemnation that the acts are contrary to law—violence may continue as negotiations proceed.⁹⁸ Moreover, the history of American and international responses to genocide, widespread torture, and war crimes indicates that negotiations will likely have little impact until after the fact.⁹⁹ In many cases, there have been simply no negotiations at all until after the damage was already done. Against this background, removing prosecution as an option seems premature. Prosecutorial discretion and institutional checks are not sufficient to minimize the costs of universal jurisdiction, however. Doctrines like “head of state immunity” must be clearly conceived in order to avoid counter-productive consequences arising from national prosecutions.

i. Head of State and Ministerial Immunity

A number of doctrines, most importantly head of state immunity (a term which this article will use loosely to cover other sovereign, ministerial immunities), have historically been employed so that international political processes are not subjected to proceedings in national courts. The doctrine is rooted in the notion that one sovereign, of equal stature with all others, cannot sit in judgment of another.¹⁰⁰ Today, the strongest rationale for head of state immunity is comity. Each state should respect the immunity of foreign heads of states so that its leaders will be granted similar protection while abroad.¹⁰¹

The scope of head of state immunity, once absolute, has contracted over time, and its contours have not yet settled.¹⁰² In recent years, courts have carved an exemption such that commercial transactions and other acts of a purely private character are no longer covered by immunity.¹⁰³ Following this development, courts have begun to recognize a distinction between a head of state’s official and unofficial conduct.¹⁰⁴ The distinction remains unclear, however, and this jurisprudential ambiguity has been expanded by recent cases questioning whether any act in violation of international law can ever be official.¹⁰⁵

The *Pinochet* case, in which the British Law Lords held that Augusto Pinochet was not immune from prosecution as a *former* head of state for acts of

98. Power, *supra* note 97; see also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001).

99. Power, *supra* note 97.

100. See Arthur Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 RECUEIL DES COURS 19, 52 (1994).

101. See Shobha Varughese George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1061 (1995).

102. See Jarrold L. Mallory, *Resolving the Confusion Over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1986).

103. In Britain, for example, the State Immunity Act of 1978 curtailed the immunity of heads of state with respect to proceedings dealing with private commercial transactions and torts. State Immunity Act 1978, July 20, 1978, 17 I.L.M. 1123.

104. Watts, *supra* note 100, at 55.

105. Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L.Q. 1583, 1588 (2000).

torture committed under his authority, suggests that “official conduct” may not include acts criminal under international law.¹⁰⁶ While that case is susceptible to both broad and narrow readings,¹⁰⁷ its sister Chilean case¹⁰⁸ and other international developments¹⁰⁹ suggest that head of state immunity is not absolute in the international criminal context.¹¹⁰ Professor Wedgwood sees a familiar distinction in the division between official and unofficial acts.¹¹¹ Analogizing to the difference between a soldier who kills in the course of combat and a soldier who commits a war crime, she discerns the parameters of what actions may fall within the “permissible portfolio” of a head of state, suggesting that acts violating international law do not constitute official conduct.¹¹²

In the recent case between Belgium and the Congo before the International Court of Justice,¹¹³ the distinction between official and unofficial acts again came to the fore. The Congo contested the legality of a warrant issued under the Belgian universal jurisdiction statute in April 2000 against its incumbent Foreign Minister.¹¹⁴ The DRC originally challenged Belgium’s claim to jurisdiction, but in its final pleadings before the court it dropped those arguments, focusing instead on obtaining “a finding by the Court that it has been the victim of an internationally wrongful act,” the basis of which was the violation of the Foreign Minister’s sovereign immunity.¹¹⁵ Belgium acquiesced in this tactical shift. Both countries, it seemed, feared losing on the universal jurisdiction issue.

Addressing the head of state immunity issue, the Court’s opinion employed three primary analytical foci, distinguishing among incumbent ministers, former ministers, and the special rules applying in international tribunals as opposed to

106. Mary Margaret Penrose, *It’s Good to be the King!: Prosecuting Heads of State and Former Heads of State Under International Law*, 39 COLUM. J. TRANSNAT’L L. 193, 203 (2000).

107. While a broad reading of the decision would classify acts criminal at international law as unofficial acts for which immunity is not available, the decision could be narrowly interpreted to apply only to the terms of the Torture Convention. Sison, *supra* note 105, at 1601; *see also* Ruth Wedgwood, *International Criminal Law and Augusto Pinochet*, 40 VA. J. INT’L L. 829, 841 (2000) (arguing that “[t]he reliance on the Torture Convention to parry official acts immunity narrows the reach of the Pinochet opinion. . .”).

108. In August of 2000, the Chilean Supreme Court seconded the *Pinochet* precedent by holding that Pinochet’s senatorial “immunity for life” did not protect him from prosecution for human rights violations. *Pinochet Loses Immunity in Chile Ruling*, Reuters, Aug. 8, 2000.

109. Wedgwood, *supra* note 107, at 844 (pointing out that the Rome Treaty expressly proscribes official status as a head of state as a defense against criminal liability, but that the issue has not been briefed to many signatory governments for fear that many would refuse to sign).

110. Lord Steyn, one of the Law Lords in *Pinochet*, left his imprint on this area of the law: [S]ome acts of a Head of State may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a Head of State. . . . The normative principles of international law do not require that such high crimes should be classified as acts performed in the exercise of the functions of a Head of State.

Ex parte Pinochet [1998] 3 W.L.R. 1456 (H.L.) (25 November 1998), *reprinted in* 37 I.L.M. at 1337, 1338.

111. Wedgwood, *supra* note 107, at 839.

112. Wedgwood, *supra* note 107, at 841.

113. *Congo v. Belgium*, *supra* note 29.

114. *Id.* at para. 1.

115. *Id.* at para. 42.

national courts.¹¹⁶ As for incumbent foreign ministers, the Court held that they have absolute immunity from criminal, and by implication, civil suits while in office.¹¹⁷ The Court offered a functional argument for disregarding any distinction between acts taken in "official" capacity and in a "private" capacity.¹¹⁸ Allowing anything less than absolute immunity would deter ministers from traveling and have other, negative chilling effects on the performance of their official functions.¹¹⁹ Making the point about absolute immunity perfectly clear, the court noted that:

[i]t has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.¹²⁰

Under the Court's holding, former ministers benefit from a more limited immunity.

Provided that it has jurisdiction under international law, a court of one State may try a former Minister of Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.¹²¹

The decision is unclear as to the distinction between official and private acts, or what can be classified as a "portfolio duty." The Court left open the possibility, however, that national courts, provided that they have jurisdiction, could pursue cases against former ministers for violations of international human rights law committed during term of office.

In these rulings, the Court largely restated pre-existing jurisprudence.¹²² The Court made a new and important distinction, however, between national courts and international criminal tribunals. Finding that an incumbent or former minister may be subject to criminal proceedings before an international criminal court having jurisdiction,¹²³ the Court noted that the exceptions to absolute immunity in those international tribunals has no bearing on the existence of such an exception in national courts.¹²⁴

116. *Congo v. Belgium*, *supra* note 29, at para. 42.

117. *Id.* at para. 51.

118. *Id.* at para. 55.

119. *Id.* at para. 55.

120. *Id.* at para. 58.

121. *Id.* at para. 61.

122. Courts had frequently interpreted head of state immunity to be absolute with respect to proceedings initiated in foreign courts and former heads of state to be immune for official acts performed in the head of state's public capacity. See *Watts*, *supra* note 100, at 54; see also *Re Honecker*, 80 I.L.R. 365 (F.R.G. Fed. Sup. Ct. (Second Criminal Chamber (1984))); *Duke of Brunswick v. King of Hanover*, 2 H.L.C. 1 (1848).

123. *Congo v. Belgium*, *supra* note 29, at para. 61.

124. *Id.* at para. 58.

Perhaps reflecting the functional concern that political negotiations should not be threatened by national prosecutions and the belief that prosecutors in international courts would be more sensitive to international political conditions, the Court managed to state a strong limitation on the exercise of national universal jurisdiction without directly addressing the issue.¹²⁵ At the very least, the Court expressed concern that national courts may act opportunistically and that their ability to prosecute ministers should be limited to prevent interference in international political processes.¹²⁶ As noted, with regard to former ministers, the decision does not differentiate between prosecutions in national courts and international tribunals.¹²⁷ This facet of the decision comports with the functional concerns outlined earlier—former heads of state no longer serve as “a plenipotentiary of the state in its negotiations.”¹²⁸

The ICJ opinion has immediate consequences. Its deference to international tribunals effectively limits the use of judicial prosecutions of incumbent ministers to those disputes where the international community has intervened to establish a criminal tribunal. The decision could be read simply as defining different roles for international tribunals and national courts in the context of international criminal law by concentrating prosecutorial discretion in ongoing political conflicts while permitting greater decentralization concerning former leaders.

While the decision seems formalistic and straightforward, it fails to crystallize recent developments in the doctrine of head of state immunity. It overlooks international instruments—not the customary international law that the Court invoked—that arguably or explicitly forbid immunity for crimes under international law.¹²⁹ To the extent that the judgment cuts against these instruments, rather than interpreting them to apply only in international tribunals, the Court has left an issue for future cases. Thus, the opinion may have injected more confusion into the head of state immunity doctrine than is evident at first. This lack of clarity, rather than limiting the costs of universal jurisdiction, may well exacerbate them.

More immediately, Belgian courts have eagerly awaited the ICJ's decision in

125. *Congo v. Belgium*, *supra* note 29, at para. 58. The separate opinions discussed Belgium's universal jurisdiction statute in detail. Nine of the justices would allow universal jurisdiction in some form. President Guillaume expressed a strong distrust of national courts, however, positing that international criminal courts have been developed in response to the deficiencies of national proceedings. *Id.* (separate opinion of President Guillaume, at para. 11). He found no justification for exercise of universal jurisdiction *in absentia*. *Id.* (separate opinion of President Guillaume, at para. 13). Judge Koroma, by contrast, lamented the damage that this case may have done to national universal jurisdiction. *Id.* (separate opinion of Judge Koroma at para. 5). He applauded Belgium's willingness to prosecute international crimes and cautioned against interpreting the Judgment as a rejection of universal jurisdiction. *Id.* (separate opinion of Judge Koroma, at para. 6).

126. *Congo v. Belgium*, *supra* note 29, at para. 71.

127. *Congo v. Belgium*, *supra* note 29, at para. 59.

128. Wedgwood, *supra* note 107, at 841.

129. *Id.* (arguing that the Torture Convention was explicitly directed at officials and that it is plausible to read the Convention to exclude immunity for sitting heads of state); *see also*, Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, art. 4 (allows for a head of state's criminal liability).

order to determine how its universal jurisdiction statute will be received internationally. The most notable of the ongoing universal jurisdiction cases in Belgian courts is the prosecution of Ariel Sharon and co-defendants for their roles in the incidents at Sabra and Shatilla.¹³⁰ The ICJ decision has obvious consequences for the case against Sharon, an incumbent head of state. In a press release issued shortly after the *Congo* decision, the private prosecutors in *Sharon* expressed their intent to pursue their case against those defendants who have no immunity and argued that the decision poses "no obstacle to the issuance of an arrest warrant against Mr. Sharon as soon as he stops exercising his present functions."¹³¹

The ICJ case left a number of questions unanswered. While Belgium's exercise of universal jurisdiction *in absentia* provoked controversy, it is not clear what further limitations the Court would seek to apply in a future case.¹³² What is the line between official and unofficial acts? How does the Court view universal jurisdiction statutes? How would the Court treat national prosecutions of incumbent ministers for torture and genocide, acts for which immunity may well be prohibited? In the immediate aftermath of this case, the Belgian Foreign Minister recognized that the law must be amended, but he insisted that "the basic principles—the punishment of severe breaches of international humanitarian law—remain applicable."¹³³ Before the statute could be amended, however, Belgium's highest court decided the *Sharon* case, holding that Sharon could face war crimes charges in Belgium after he leaves office.¹³⁴ The Belgian high court thus adopted a liberal interpretation of the ICJ's decision, respecting immunity for sitting heads of state while finding that former heads of state can be prosecuted for certain acts taken during their term of office.¹³⁵

Rather than backing away from its progressive approach to universal

130. See the *Complaint against Ariel Sharon*, BADIL RESOURCE CENTER, June 18, 2001, available at <http://www.lawsociety.org/sharon/complaint.htm> (last visited October 22, 2002).

131. Chibli Mallat, Luc Walley, and Michael Verhaeghe, *Press Statement by the Lawyers Representing the Victims of the Sabra and Shatilla Massacres*, BADIL RESOURCE CENTER, Feb. 14, 2002. The prosecuting attorneys plan to make two arguments that the ICJ did not consider. First, the decision only considered illegal the issuance of an international arrest warrant. In the *Sharon* case, there is no warrant, only a criminal investigation. The Court's decision gave no indication that an investigation alone is a violation of international law. Second, the warrant for Foreign Minister Yeroda was not based on acts of genocide. The pleadings in the *Sharon* case, following the General Assembly's characterization of the incidents at Sabra and Shatilla, allege genocide. The Genocide Convention does not provide for immunity. Article IV states that "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." ICJ jurisprudence has confirmed the universal character of the convention. BADIL RESOURCE CENTER, *Belgian Appeals Court Agrees to New Hearing, Re-Opening of Arguments, in War Crimes Case Against Ariel Sharon and Other Israelis and Lebanese*, Mar. 7, 2002.

132. Douglass Cassel, *World Court and Jurisdiction*, CHICAGO DAILY LAW BULLETIN, Feb. 21, 2002.

133. *Id.*

134. *Belgium Rules Sharon Can Be Tried*, BBC.COM, Feb. 12, 2003, at http://news.bbc.co.uk/1/hi/world/middle_east/2754877.stm (last visited June 15, 2003).

135. See *supra* note 121 and accompanying text.

jurisdiction in response to *Congo v. Belgium*, Belgium amended its universal jurisdiction statute in April 2003, limiting its breadth while maintaining its fundamental characteristics. Under the recent amendments, victims may file suits directly only if they can establish a link between Belgium and the crime. The new jurisdictional “nexus” requirement will be satisfied if the suspect is present in Belgium, the crime occurred in Belgium, or the victim is Belgian or has lived in Belgium for at least three years.¹³⁶ The amendments also authorize the government to refer certain cases out of Belgium.¹³⁷ Finally, the amendments harmonize the Belgian definitions of crimes with those in the ICC statute and adopt the international law standard on sovereign immunity.¹³⁸

While the ICJ’s ruling left a number of issues unresolved, it nevertheless has served as a catalyst, causing Belgium to institute a set of legislative reforms that should both minimize the costs of universal jurisdiction and serve as a model for other states adopting universal jurisdiction statutes. The next significant challenge to the Belgian statute may raise what is potentially the case’s most consequential effect—Belgium’s explicit rejection of immunity for former ministers who violated international human rights or humanitarian law while in office. No longer permitting prosecutions of incumbent ministers *in absentia*, the amended statute strikes a more appropriate balance between human rights concerns and minimizing the costs of universal jurisdiction.

ii. The Special Challenge of Private Prosecutions

If extraterritoriality poses the danger of politicized prosecutions, one might suppose that an independent prosecution, in addition to doctrines like head of state immunity, would be an appropriate response. On the other hand, a prosecutorial system that is not subject to adequate checks and the veto power of political actors charged with foreign policy can lead to negative results. The risks of unrestrained prosecutorial discretion are exacerbated in many civil law systems where private parties can institute criminal proceedings.¹³⁹ When a state divests itself of the sole authority to prosecute politically sensitive international cases, and where private individuals who are not subject to adequate governmental control may institute such cases, the consequences may be undesirable. The ICJ’s recent decision may well have been a response to the dangers of private prosecutors pursuing international cases.

The typical response to such worries is faith in prosecutorial discretion. At the international level, limited faith in prosecutors’ judgment may be warranted.¹⁴⁰

136. Human Rights Watch, *Belgium: Questions and Answers on the “Anti-Atrocity” Law*, June 2003, available at <http://www.hrw.org/campaigns/icc/belgium-qna.pdf> (last visited June 15, 2003).

137. *Id.*

138. *Id.*

139. International Encyclopedia of Comparative Law, Vol. 11 Part 2, ed. Andre Tunc. The Spanish legal system, for example, provides for an *accion popular*, whereby the victim of a crime may institute a proceeding and pursue the case. Likewise, Belgian law allows for universal jurisdiction cases brought by *parties civiles*. *Id.* See notes 68, 69 & text.

140. Former ICTY Chief Prosecutor Louise Arbour’s indictment of Slobodan Milosevic suggests

When prosecutors are part of the executive framework, their actions may be adequately constrained by political actors so as not to upset political settlements that would be more productive than a judicial proceeding. A similar review or veto power is necessary to limit the potentially destructive consequences of private prosecutions. States must develop standards to balance the competing interests. Guidelines outlining the factors to be considered and requiring judicial review of political discretion may be one response.¹⁴¹ Just as universal jurisdiction is an important tool in cases where negotiations are not forthcoming, are used as stalling mechanisms, or simply send the wrong message to the combatants, private prosecutions can also play an important role in international criminal law.

After the ICJ decision in *Congo v. Belgium*, the Belgian government amended its universal jurisdiction statute to place a set of constraints on private prosecutors requiring a "nexus" between Belgium and the alleged crime.¹⁴² The amendments also authorize courts to send certain pending cases to the accused's home state or the state in which the accused is present if that state upholds fair trial rights and actually pursues the case.¹⁴³ These amendments should minimize some of the potential political risks that private prosecutors create, providing a check on unrestrained prosecutorial discretion. If adequately constrained so as not to jeopardize political solutions to international problems, private prosecutions may serve an important function on the international level—prosecuting cases that would otherwise receive little diplomatic or prosecutorial attention. With the rapid development of universal jurisdiction, this subject deserves continuing consideration. Creative solutions will be necessary to ensure that overly aggressive private prosecutions do not lead to a rejection of universal jurisdiction altogether.

B. "Bad States" and the Threat of Universal Jurisdiction

Advocates characterize universal jurisdiction as a tool with which those responsible for heinous crimes can be prosecuted, deterring future mass crimes. Exercise of universal jurisdiction has dangers, however, extending extraterritorial adjudicative power to procedurally deficient and otherwise flawed judiciaries as well as to those that respect the rule of law.¹⁴⁴

As universal jurisdiction becomes more common, some states may exercise it as a political weapon. Of course, not all courts are equal. States refuse extraditions to other states that are procedurally infirm, and a number of

that prosecutorial discretion may lead to adverse results. Evidence indicates that she indicted Milosevic just when a political settlement was on the horizon, prolonging the conflict in the Balkans. See, e.g., Mirko Klarin, *Arbour's Pre-Emptive Strike*, MOJO WIRE, June 1, 1999, at http://www.motherjones.com/total_coverage/kosovo/arbour.html (last visited October 22, 2002).

141. Broomhall, *supra* note 2, at 418.

142. See *supra* note 136 and accompanying text.

143. See *supra* note 137 and accompanying text.

144. Morris, *supra* note 2, at 354 ("In evaluating universal jurisdiction, careful consideration must be given to whether it is wise to augment the power and extraterritorial reach of all the judiciaries of the world, and to do so in a category of cases particularly prone to politicization.").

organizations dedicate their efforts toward exposing unjust judicial systems. Thus, it is not clear that exercise of universal jurisdiction by a "bad state" will be taken seriously. Moreover, a minor public relations campaign could discount the seriousness of an international criminal trial undertaken in a country like Iraq or North Korea. Nonetheless, universal jurisdiction could become a tool of interstate conflict.

In the final analysis, the question must be posed whether universal jurisdiction's benefits outweigh its costs.¹⁴⁵ The potential for interstate conflict arising from prosecutions under universal jurisdiction could be minimized by an emphasis on uniform international standards. For a verdict to be legitimate, the procedural and substantive law applied would have to meet international standards. One might argue that this approach would open all prosecutions under universal jurisdiction to challenge in other national courts, undermining the authority of any single proceeding. An international mechanism could militate against this possibility. For example, an international body like the United Nations could institute a certification process, differentiating judiciaries that have adequate procedural protections to undertake prosecutions under universal jurisdiction from those that do not. Implementing an appellate system might also dampen the possibility for politically vexatious prosecutions.

If universal jurisdiction is to become a vital component of the international legal and political landscape, the possibility of the "bad state" prosecuting defendants under universal jurisdiction must be anticipated. The alternative is not only that universal jurisdiction may lose integrity, but that it could actually lead to international conflict. While this article has largely assumed that universal jurisdiction will continue to be a fact of international life, it must be fashioned in a way that acknowledges the risks and can manage the possibility that "bad states" will seek to manipulate this jurisdictional mechanism for opportunistic reasons.

C. The Tension between the ICC and Universal Jurisdiction

While this article has assumed that the International Criminal Court and universal jurisdiction could complement each other,¹⁴⁶ the two may be in tension. The complementarity provision in Article 1 of the Rome Statute gives the ICC jurisdiction only when national courts prove unable or unwilling to prosecute.¹⁴⁷ Some scholars have suggested that national prosecutions under universal jurisdiction could prevent cases from going before the ICC, divesting the new court of jurisdiction.¹⁴⁸

145. Morris, *supra* note 2, at 359.

146. See *infra* discussion in Conclusion (suggesting that the ICC's jurisdiction could be expanded to include appellate review of national prosecutions for international crimes).

147. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998).

148. Douglass Cassel, *Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court*, 35 NEW ENG. L. REV. 421 (2001) (arguing that "the United States' ability to prosecute is thus key to avoiding exercise of ICC jurisdiction over U.S. nationals or over other cases where the United States has an interest. . .").

Despite this tension, universal jurisdiction seems deeply consonant with the aim of the ICC—achieving justice for international crimes. The ICC's limited resources will be reserved for the most culpable offenders. Given that it will only prosecute a small number of cases, universal jurisdiction will remain an indispensable complement to it. Thus, it is not impossible to imagine an integrated international system where national prosecutions will not be in conflict with international courts. Rather, the ICC and national courts may engage in a structured dialogue or even appellate review. In this fashion, national courts' decisions would gain authority and have integrity. This optimistic vision will not develop of its own accord, however. Measures will have to be taken to create the institutional arrangements to ensure that the two do not develop at odds with each other. The recent amendments to the Belgian universal jurisdiction statute take an important first step in this direction. By harmonizing the Belgian definitions of crimes with those in the ICC statute, the new law lays the groundwork for future cooperation between national court exercise of universal jurisdiction and prosecutions at the ICC.¹⁴⁹

CONCLUSION

Universal jurisdiction remains a relatively novel basis for prosecution. Nonetheless, the events of recent years indicate that national prosecutions for international crimes will continue to increase. Vigorous prosecution in national courts has the advantage over ad hoc tribunals of being a permanent mechanism that can prosecute atrocities without great delay.¹⁵⁰ Steps must be taken to ensure that these proceedings have integrity and are carried out according to international standards, however. If the peculiarities of national procedural rules and national interpretations of international substantive law begin to disintegrate the international characteristics of the crimes, the project as a whole could collapse. Thus, transnational rules must introduce a measure of harmonization and convergence across jurisdictions. This article concludes by proposing five suggestions that may contribute to this harmonization and lend greater integrity to national prosecutions for international crimes.

First, in the context of national prosecutions for international crimes, an international treaty should provide for a formal judicial dialogue along the lines developed in several African states.¹⁵¹ The details of this dialogue, including the weight to be accorded horizontal as opposed to vertical dialogues with international criminal tribunals, will require careful attention. Instituting such a formal conversation will ensure that national prosecutions do not diverge so much as to delegitimize the project altogether.

Second, as a long-term program, the ICC's jurisdiction could be expanded to

149. Human Rights Watch, *supra* note 136.

150. Wexler, *supra* note 6, at 712.

151. See Andre Stemmet, *The Influence of Recent Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law*, 33 INT'L LAW. 47 (1999) (explaining the new role for international law as a basis for judicial decision-making).

include appellate jurisdiction over cases arising from national courts on jurisdictional, procedural, and interpretive issues of prosecution under international law.¹⁵² The International Law Commission ultimately rejected this proposal in its 1994 draft statute for an international criminal court as too intrusive of state sovereignty.¹⁵³ Nonetheless, having such a supranational appellate body to harmonize interpretations of international criminal law while leaving to national tribunals the function of deciding cases on the merits would both give domestic prosecutions greater integrity and ensure that international criminal law develops in coherent fashion.

Third, the international community could begin negotiations to create a body of procedural rules for domestic prosecutions of international crimes. The rules could be based on the body of procedural rules already tested and modified in the ICTY and ICTR.¹⁵⁴ The uniformity introduced into national prosecutions for international crimes by these rules will give them more legitimacy.

Fourth, a formal international agreement on the punishments, or at least the method of determining the punishment to be applied, would be a timely and useful effort. Much of the chafing against national prosecutions for international crimes could be resolved simply by instituting an international regime of punishments for international crimes.

Finally, prosecutorial discretion, especially the ability of civil parties to bring suit, must be adequately bounded. The recent amendments to the Belgian universal jurisdiction statute constitute an important effort in this direction. The emergence of an international criminal prosecutorial and defense bar, as well as a group of judges with experience trying such cases, also may mitigate this problem by selecting the cases most favorable to the development of international criminal

152. Wexler, *supra* note 6, at 720 (arguing that an international criminal court could unify and construct a coherent body of international criminal law); Ninth Report on the Draft Code of Offenses Against the Peace and Security of Mankind, U.N. Doc. No. A/CN.4/435 and Add.1 (1991), reprinted in [1991] 2 Y.B. Int'l L. Comm'n 37, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 1) (Doudou Thiam, Special Rapporteur) at 59 ("The court could also play a very important role in the unification of international criminal law It could help to remove some uncertainties regarding terminology and the definition of concepts, such as complicity and conspiracy and the attempt to commit such crimes, whose content varies from one country to the next."); *cf.* Report of the International Law Commission on the work of its forty-fourth session, 47 U.N. GAOR Supp. (No. 10), U.N. Doc. No. A/47/10 (1992), reprinted in [1992] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 2) at 37 (concluding that the international criminal court should be a trial court rather than an appellate or review body).

153. Report of the International Law Commission, 49 U.N. GAOR Supp. (No. 10), U.N. Doc. A/49/10 (1994) at 70.

154. Meron, *supra* note 22, at 463 (arguing that the rules used in the ICTY and the ICTR should be useful in all prosecutions under international law); Wexler, *supra* note 36, at 363-66 (arguing that procedural rules employed in international business law could be adapted to international criminal prosecutions); E. M. Wise, I.L.A. Committee on a Permanent International Criminal Court, Report on General Rules of Law, December 27, 1996 draft, at 83 ("[T]here seems to be emerging broad agreement that not only offense definitions and penalties, but also the general rules of liability and exoneration to be applied by the court, cannot be left to national law, or otherwise permitted to vary from case to case, but must be settled in advance.").

law.¹⁵⁵ The development of judicial and attorney expertise will be necessary if universal jurisdiction is to be practical.¹⁵⁶ Private party prosecutions must not be allowed to undermine universal jurisdiction altogether.

While we may always feel ambiguous about prosecutions in domestic courts for international crimes, especially for crimes committed in other parts of the world, universal jurisdiction can be structured in order to provide considerable international oversight. Because the crimes at issue are violations of universal norms, it is essential that national prosecutions maintain an international character and that there be formal mechanisms to prevent divergence from certain core *universal* touchstones.

Harmonizing international criminal law will lead to a more coherent body of law, will better protect defendants from deficient prosecutions, and will act as a restraint on unjust exercise of extraterritoriality. If this body of law becomes more developed through an integrated inter-jurisdictional system, local courts will have the advantage of a strong set of international rules and precedents to draw on. This project must pay careful attention to the costs inherent in universal jurisdiction. Minimizing these costs is at least as important as expanding the power of national courts to prosecute international crimes, and a balance must be struck between the two. If done with requisite care, the development of a truly international and integrated regime for enforcing international criminal law in domestic courts will safeguard human rights, resulting in the greatest aggregate of justice and human dignity.

155. Harvard Law Review, *supra* note 25, at 2002-03.

156. Expertise in national systems will mitigate the danger of peculiar interpretations of international law in national courts. Wexler, *supra* note 6, at 710.

