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Antonio F. Perez

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Keywords

Immigrants, Costs, Cuba, International Law: History, States

THE PERILS OF PINOCHET: PROBLEMS FOR TRANSITIONAL JUSTICE AND A SUPRANATIONAL GOVERNANCE SOLUTION

ANTONIO F. PEREZ*

A HYPOTHETICAL PROBLEM – PRO-DEMOCRATIC TRANSITION AND AMNESTY

Many other situations are possible – involving Milosevic, Hussein, Kabila, and several others – but imagine for now just one scene on a Caribbean stage: Fidel Castro at the dock, joined perhaps by other sinners such as Raul Castro but also perhaps by some “saints” such as Ricardo Alarcon. They are all called upon to defend themselves, to explain away their responsibility for crimes against humanity, including extra-judicial killing, torture, and forced disappearances.¹ At that moment, more than history would be Castro’s judge. Would it be a glorious opportunity for revenge for Cuban exiles, for truth, and finally for justice? Indeed, there is a case for insisting on individual accountability to assure the purging of the bad blood that would otherwise poison any attempt to construct a new order out of the ashes of Cuba’s failed Communist revolution.²

* Associate Professor, Columbus School of Law at The Catholic University of America; J.D. 1985, Columbia Law School; A.B. 1982, Harvard College. I would like to thank Robert Delahunty and Maria Christina Garcia for thoughtful comments on earlier drafts of this paper, as well as Kelley Taglieri (CUA Class of 1999), Reed Russel (CUA Class of 1999) and John Cody (CUA Class of 2000) for excellent research assistance. All errors of mine alone and of course are not, I hope, attributable, if an author may be permitted a personal reflection, to my heritage as a Cuban refugee.

1. See generally *Department Of State: Cuba Country Reports On Human Rights Practices for 1998*, (visited April 5, 1999) <http://www.state.gov/www/global/human_rights/1998_hrp_report/cuba.html>; *Cuba’s Repressive Machinery: Human Rights Forty Years After the Revolution*, HUM. RTS. WATCH, June 1999.

2. See Juan E. Mendez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 1, 8 (A. James McAdams ed., 1997) [hereinafter *RULE OF LAW*] (“The perception of collective guilt only fosters new cycles of retribution, and it is imperative that it be corrected”); see also Lawrence Weschler, *Inventing Peace*, *NEW YORKER*, Nov. 20, 1995, at 56-64 (citing Richard Goldstone, South African judge and first Prosecutor General of the International Criminal Tribunals for the former Yugoslavia and Rwanda).

But there is another, albeit morally more ambiguous, side to this question - a perspective considering the real-world consequences of an absolutist ethic of moral accountability.³ Would some relaxation of the demand for justice through accountability undermine the greater goal of a more just and lasting Cuban government, through a transition that more fully satisfies all the claims of justice connected to Cuba's past and its future? These claims would include rectification of wrongs done to all Cubans, both those still living in Cuba and former Cubans now in exile. Such claims, however, could not be pursued entirely without regard to the task of achieving a just and lasting regime in Cuba now and assuring prospects for its sustainability in the future. In turn, these goals would require constructing a relationship with the United States on terms that would avoid the dysfunctional patterns in Cuban-American relationships that played no small part in driving Cuba toward its current path.⁴

Currently, there is little evidence that a transition is near. It is even questionable whether senior levels of the Cuban government recognize that a transition is inevitable or that it will need to account for reconciliation both within Cuba and some kind of *modus vivendi* with Cuban exiles in the United States and the U.S. Government. The recent crackdown against human rights activists may cause the regime to recognize that the benefits of opening to change epitomized by the Papal visit are simply not worth the risks, even if at the price of the continuation of sanctions.⁵ Over time, the fear of revenge might well pre-

3. See Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 120 (Gerth & Mills eds., 1976) (distinguishing between an "ethic of responsibility" and an "ethic of ultimate ends").

4. See JORGE I. DOMINGUEZ, CUBA: ORDER AND REVOLUTION 139-49 (1978) (examining the role Cuba's failed relationship with the United States played in driving it into the Soviet orbit and domestic socialism).

5. *The Havana Four*, WASH. POST, Mar. 2, 1999, at A16 (editorial arguing that prosecution of human rights activists for holding press conferences with foreign journalist urging, among other things, that Cubans boycott one-party elections in Cuba calls into question constructive engagement policy of states permitting foreign investors in Cuba). Indeed, the May 28, 1999, sacking of Cuban Foreign Minister, Roberto Robaina, may have been connected to Cuban elites' siege mentality. Official Cuban statements concerning the need for a more vigorous foreign policy suggest that Robaina's downfall may have been the price of failure in Cuba's attempt to defeat the U.S. sponsored resolution at the United Nations Human Rights Commission in Geneva on April 23, 1999 condemning Cuba's human rights practices. See Denis Rousseau, *Cuba's Dynamic, Moderate Foreign Minister Fired*, AGENCE FRANCE PRESSE, May 29, 1999, available in LEXIS. See also *Fidel Tales Control of Foreign Policy: Robaina Sacked After Human Rights Setback at U.N.*, LATIN AM. REG'L. REP.: CARIBIAN & CENT. AM., June 15, 1999, available in LEXIS. But another, perhaps related explanation is that Robaina was closely associated with an effort to begin a dialogue with the Cuban exile community. See Alfredo Corchado & Nancy San Martin, *Meeting Called 1st Step in Cuba Dialogue; Dallas Talks Establish Civility*, DALLAS MORNING NEWS, Oct. 6, 1998 at 10 (describing meeting between representatives of the Cuban government and members of the exile community, including lawyer for the National Association of Sugar Mill Owners seeking compensation for the revolu-

clude the initiation of intra-Cuban reconciliation before a transition is fully activated, even if Cuban elites do not believe they have done anything for which they justly could be held accountable. This could ultimately lead to a more violent and unjust transition when one finally does occur. Without assurances, Cuban elites may instead do whatever is necessary to avoid losing political power, even perhaps at all costs, both for themselves and anyone else who would stand in their way.⁶ Even more important, and equally imperiled, would be the opportunity to rebuild the relationship between Cuba and the United States, thereby potentially avoiding a second century of mistrust. Revisionist historians have argued that the United States' intervention in Cuba during the Spanish-American War of 1898 was intended not so much to free Cuba from Spanish oppression, as to prevent Cuba's liberation, unless as a dependent of the United States.⁷ Revisionist historians further argue that perhaps the United States was attempting to avoid the emergence of another, black-ruled Caribbean republic.⁸ Thus, Castro's removal at the hands of United States policy along with the triumphant return of Cuban exiles previously victimized by the Castro regime may well trigger the beginning of yet another pathological cycle in which Cuba plays out the consequences of Cuba's traumatized national birth in national psychology.

Maybe it would be better to give Castro, and at least some of his comrades, a way out before too much damage is done? Even Senator Jesse Helms, a deadly opponent of Fidel Castro, "would gladly trade Fidel Castro a comfortable exile in Spain for his decision to step down and allow Cubans to live in exile."⁹ Indeed, a broader amnesty may be in order to encourage Cuban elites to take steps now to support Cuba's transition toward a democratic, prosperous, and just future. In sum, there is a plausible case that avoiding criminal accountability will be a policy tool of some importance either in stimulating a Cuban transition or facilitating an ongoing transition's orientation toward more construc-

tion-era expropriations; and reporting a subsequent private meeting in New York between Robaina and Eloy Gutierrez Menoyo, president of *Cambio Cubano*, a Cuban exile group calling for dialogue with Castro as well as democracy in Cuba). If so, Robaina's demotion signals a rejection of dialogue with the exile community.

6. As former U.S. Assistant Secretary of State for Human Rights, Elliot Abrams writes: "Having negotiated with several dictators concerning their departure from power, I can vouch for the fact that future safety is indeed one of their major preoccupations. If they are unsure of it, will they not hang on until the last bloody moment?" Elliot Abrams, *Justice for Pinochet?*, 107 COMMENTARY 42, 44 (1999).

7. See generally Louis A. Perez, Jr., *An Ocean of Mischief: Between Meanings and Memories of 1998*, 42 ORBIS 501 (Fall 1998) [hereinafter *Between Meanings*]; LOUIS A. PEREZ, JR., *CUBA AND THE UNITED STATES: TIES OF SINGULAR INTIMACY* (1990).

8. See Perez, *Between Meanings*, *supra* note 7, at 512 (citing President McKinley's Minister to Spain Stewart Woodford's obsession with the predominance of blacks among the leadership of the Cuban insurgency).

9. Jesse Helms, *And After Pinochet*, WASH. POST., Dec. 10, 1998, at A31.

tive directions.

Yet, in the best circumstances, negotiating amnesty would be a gargantuan task, particularly in a rapidly changing situation once a transition is activated. There may be no incentive for status quo elements in Cuba to concede that amnesty may be required, for this would be to acknowledge fundamentally the illegitimacy of the regime. Moreover, as international human rights pressure rises for the new government to satisfy its international obligations to prosecute for past human rights violations, it is debatable whether or not the emerging forces could credibly promise to members of the *ancien regime* that they would be free from domestic prosecution.¹⁰

10. Compare Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 375, 384 (Neil Kritz ed., 1995) [hereinafter *Duty to Prosecute*] (“[A]uthoritative interpretations of [the Covenant on Civil and Political Rights, *inter alia*.] make clear that a State Party fails in its duty to ensure the cluster of rights protecting physical integrity if it does not investigate violations and seek to punish those who are responsible.”), with John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 306 [hereinafter *Reconciliation*] (“[S]tate practice at this time is too unsettled to support a rule of customary international law obliging a successor regime to prosecute those alleged to have committed crimes against humanity in all circumstances . . .”). The difference between Orentlicher and Dugard may be less than appears to be on the surface, however, since both would carve out exceptions from the general thrust of their positions. Compare *Duty to Prosecute*, *supra* at 402-16 (discussing criteria for exceptions from the general rule), with *Reconciliation*, *supra* at 307 (criticizing South African Truth and Reconciliation Commission for missing an “opportunity to show that although there may be an emergent norm in favor of prosecution, it is not absolute, provided that the course followed in lieu of prosecution meets internationally accepted standards”). In sum, both may well call for some minimum level of criminal accountability. See also STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 81 n.16, 301 (1997) [hereinafter ACCOUNTABILITY] (arguing that international law imposes some minimum obligations on states not to grant amnesty and that amnesty does not preclude prosecutions elsewhere for violation of international law); accord Jordan Paust, *Individual Criminal Responsibility for Human Rights Atrocities and Sanction Strategies*, 33 TEX. INT'L L.J. 631, 641 n.95 (reviewing ACCOUNTABILITY). Ratner recognizes, however, that in the special case of transitional societies, subsequent practice as a matter of treaty interpretation and state practice as matter of customary international law suggest that the nature of these minimum obligations may take a less categorical shape and, therefore, accommodate at least some TRCs. See Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law* 87 GEO. L.J. 707, 724-26 (treaty law) and 728-29 (customary international law) (1999) [hereinafter *New Democracies*]. Ratner further acknowledges that the international community’s “unequivocal condemnation” would, in some cases at least, be “ill-advised and unrealistic.” *Id.* at 747. On the other hand, he does not categorically rule out a minimum requirement of criminal accountability even in a transitional context. Even a minimum requirement, however, could radically destabilize the prospects for employing amnesty as a transition-forcing device.

I. INTRODUCTION: PINOCHET, INTERNATIONAL ANARCHY, AND COLLECTIVE ACTION

Now, however, with the advent of the Pinochet precedent, utilizing amnesty as a transitional policy tool may be completely outside the reach of the Cuban factions who, ultimately, must bear the lion's share of responsibility for Cuba's future. Neither could this option be employed by Cuba in cooperation with any manageable group of interested nations who represent the external claimants on Cuba's future. For Cuba, as well as for other states, transition and transitional justice have become infinitely more complicated because of Spain's recent request for Augusto Pinochet's extradition from the United Kingdom, assessed by the House of Lords in *Ex Parte Pinochet*,¹¹ and the adoption of the Rome Statute of the International Criminal Court (ICC Statute).¹² It will be the incalculable risk of foreign or international prosecution, a risk totally outside the control of the most interested parties, which will destabilize negotiating the narrow corridor between the Scylla of violent or impermanent transition and the Charybdis of transitional impunity.

Thus, reclaiming the carrot of amnesty as a policy instrument will now require international governance. It will, no doubt, demand exceptionally nuanced governance as well, because the policy requires a careful balancing of the gains to be derived from constructing an internationalized amnesty power against the potential losses in future deterrence of international human rights violations. There is no doubt that deterrence has increased as a result of *Ex Parte Pinochet* and will be further strengthened by the soon to be established International Criminal Court (ICC). But, unlike earlier international criminal tribunals exercising jurisdiction in cases of transitional justice, such as the Security Council-authorized tribunals for civil wars in the former Yugo-

11. *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 37 I.L.M. 1302 (H.L. 1998) [hereinafter *Ex Parte Pinochet*] (by 3 -2 vote of a panel of the House of Lords, overturning the Divisional Court's quashing of an extradition warrant against Pinochet, finding that he was not entitled to immunity as a former Head of State for the offenses for which Spain had sought his extradition); *Regina v. Bow St. Metro. Stipendiary Magistrate and Others, Ex Parte Pinochet* (No. 2), 1 A11 E.R. 577 (H.L. Jan. 15, 1999) [hereinafter *Ex Parte Pinochet II*] (granting petition to set aside House of Lords's ruling in *Ex Parte Pinochet*, because of the appearance of impropriety raised by the relationship between Lord Hoffman's indirect relationship with intervener Amnesty International); *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others, Ex Parte Pinochet*, 38 I.L.M. 581 (H.L. 1999) [hereinafter *Ex Parte Pinochet III*] (modifying *Ex Parte Pinochet* by holding that Pinochet is extraditable only for extradition crimes that occurred after all relevant states had become parties to the Torture Convention).

12. Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF. 183/9 (1998), 37 I.L.M. 999 [hereinafter ICC Statute].

slavia¹³ and Rwanda,¹⁴ national prosecutions will not necessarily be grounded in a prior political decision by the international community where moral and prudential gains of prosecution exceed the costs of accommodation. Indeed, the ICC Statute recognizes Security Council assessments of these questions only to the extent of deferring to a Security Council "request" that an investigation or prosecution be delayed for a year upon the adoption of a Chapter VII resolution "to that effect."¹⁵ Setting aside whether it is permissible for the ICC Statute to purport to ignore a Chapter VII resolution making a "decision," rather than merely issuing a "request,"¹⁶ surely an ICC prosecution would no more reflect a judgment of the international community of the merits of the particular case than would a purely national prosecution.¹⁷ In any event, the assumption in the ICC Statute that a prosecution may only be delayed for an incremental period¹⁸ leaves open the possibility that

13. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., U.N.Doc. S/RES/827 (1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, Annex (1993), 32 ILM 1192 (1993).

14. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453th mtg., U.N. DOC. S/RES/955 (1994).

15. See ICC Statute, *supra* note 12, 37 I.L.M. at 1012, art. 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

16. See *infra* text accompanying notes 132-43 (discussing the legal basis for Security Council supremacy).

17. In a sense the ICC is no more than a multilateralized extradition treaty combined with a choice of forum clause for prosecution of offenses in which states would ordinarily have jurisdiction to prosecute. Because the exercise of decision-making authority by the ICC Prosecutor and other ICC bodies is de-politicized, its work product cannot possibly reflect the factoring of criteria that might inform, for example, a national prosecutor's decision. See John Bolton, *Courting Danger: What's Wrong with the International Criminal Court*, 54 NAT'L INTEREST 60 (Winter 1988/89) [hereinafter *Courting Danger*] (former Assistant Secretary of State objecting to ICC precisely because there is no international government that makes prosecution through the medium of an international criminal court consistent with fundamental notions of governmental accountability necessary to the exercise of prosecutorial discretion).

18. It may even be in that case that Article 16 could be invoked by the Security Council for an indefinite number of 12-month periods. This is not the necessary interpretation, however. For example, in interpreting the Nuclear Non-Proliferation Treaty (NPT), the United States appears to have taken the position that the right to extend the NPT for an additional 25-year period, after the expiration of the NPT's initial 25-year period, could be exercised only once. See Mary Elizabeth Hoinkes, *Correspondence, Epstein and Szasz Do the NPT No Favor*, 34 VA. J. INT'L L. 247 (1993) (arguing, contrary to noted international arms control experts, that the NPT is unambiguous on this point). However, the relevant language there provides for a conference to "decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods." Treaty on the Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, art. X, para. 2,

there will be no timely resolution in the context of a transition to democracy of a prosecution by a third state seeking to vindicate universal interests regarding human rights.

A proposed solution, in brief, would be to construct and legitimize internationally-authorized and binding amnesty. In the short term, it may be possible to rely on the Security Council's exercise of prosecutorial discretion on behalf of the international community in the cases of former Yugoslavia and Rwanda as precedents for Security Council authorization on a case-by-case basis of Truth and Reconciliation Commissions (TRCs).¹⁹ Although Security Council-authorized TRCs would need to be constructed in accordance with emerging international practice for national amnesty,²⁰ they would benefit from the power of the Council to confer an internationally-binding amnesty based on its power to render decisions under Chapter VII as well as the political legitimacy that would flow from the exercise of supranational authority.²¹ However, because of concerns regarding the Security Council's legitimate exercise of its Chapter VII powers, a long-term solution to this problem may well require the Security Council to delegate this responsibility, perhaps to Secretary-General, as well as a revision of the ICC Statute to harmonize multilaterally-authorized prosecutions with supranationally-authorized prosecutorial discretion and amnesty.

In brief, this article considers the implications of the Pinochet affair for transitional justice and supranational governance. It will describe, first, the changing context in which the case arises, including among other things the adoption of the ICC Statute. Next, it critiques the opinions of the House of Lords in light of their implications for transitional justice, as well as their central tendency toward a synthesis of international law and politics at both the domestic and international levels. Then, the article examines the role the Security Council or its

21 U.S.T. 483, 493, 729 U.N.T.S. 161, 175 (entered into force Mar. 5, 1970).

19. *But see* Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP & INT'L L. 375, 401-02 (1997) [hereinafter *Permanent International Truth Commission*] (proposing a commission either as a stand-alone organization or as an adjunct to the, at that time proposed, ICC); *see infra* text accompanying notes 129-31 (supplying objections to this proposal).

20. Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty*, 20 HUM. RTS Q. 843 (1998) [hereinafter *Developing Jurisprudence*].

21. *See infra* notes 132-43; *see generally* Antonio F. Perez, *On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter*, 31 TEX. INT'L L. J. 353 (1996) (arguing for treating recent UN peace-enforcement and peace-keeping through regional organizations as the exercise of quasi-constitutional supranational authority). This exercise of authority by the Security Council would be consistent with the focus of the leading modern understanding of the characteristics of supranational legal authority because of its direct effects on the rights of individuals. *See, e.g.*, Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 287-90 (1997) (focusing on direct links with sub-national entities).

delegees could play in mediating these syntheses through enabling policy flexibility in this area. Finally, this article will reconsider the problem of Cuban transition as a possible, and arguably hardest, trial case for internationalized amnesty.

II. TWO NEW REALITIES IN INTERNATIONAL LAW

Henceforth, transitions to democracy will take place in a wholly new political and legal international environment for addressing questions of transitional justice. This change now seems irreversible given the international response to the Pinochet case on the heels of the apparent willingness of most states to forge ahead, despite plausible arguments for caution,²² and to create a permanent International Criminal Court, notwithstanding United States objections.²³

A. *Emerging Practice in International Human Rights Enforcement*

The international unwillingness to tolerate impunity for the sins of the past stems from a variety of factors. As a practical matter, the generations that experienced the Holocaust and similar abominations in the post-war years began dimly to perceive the connections between human rights and universal peace.²⁴ The deeper meaning of the Holocaust has been finally internalized by a generation of international lawyers who began their professional training in a world where state sovereignty was no longer a credible answer to the universal and

22. See John R. Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, 78 FOREIGN AFF. 157 (JAN./FEB. 1999) [hereinafter *The Global Prosecutors*] (essay reviewing ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* (1998)), MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); Bolton, *Courting Danger*, *supra* note 17 at 69; Jeremy Rabkin, *International Law vs. The American Constitution: Something's Got to Give*, 55 NAT'L INTEREST 30, 34-35 (Spring 1999) [hereinafter *International Law*].

23. David J. Scheffer, *Deterrence of War Crimes in the 21st Century*, *Speech by Department of State's Ambassador-at-Large for War Crimes Issues at Twelfth Annual Pacific Command International Military Operations and Law Conference, Honolulu, Hawaii* (Feb. 23, 1999), (visited Apr. 5, 1999) <http://www.state.gov/www/policy_remarks/1999/990223_scheffer_hawaii.html> (detailing U.S. objections). Significantly, in relation to the question of immunity, Scheffer noted: "One of our proposals was to exempt from the court's jurisdiction conduct that arises from the official actions of a nonparty state acknowledged as such by that nonparty. This would require a nonparty state to acknowledge responsibility for an atrocity in order to be exempted, an unlikely occurrence for those who usually commit genocide or other serious violations of international humanitarian law. Regrettably, our proposed amendments to Article 12 were rejected on the premise that the proposed take it or leave it draft of the treaty was so fragile that, if any part were reopened, the conference would fall apart." *Id.*

24. For the *locus classicus* of this view, see Immanuel Kant, *Perpetual Peace*, in KANT ON HISTORY 85, 117-35 (Beck ed., 1957); see also FERNANDO TESON, *A THEORY OF INTERNATIONAL LEGAL OBLIGATION* (1998) (espousing a neo-Kantian position).

indivisible claims of the human rights revolution.²⁵ Indeed, the force of human rights even became a tool in the Cold War struggle between the United States and Soviet Union, when the Helsinki Accords and the rise of Charter 77 validated Western claims to demand respect for human rights behind the Iron Curtain.²⁶ Furthermore, these developments gave rise to an institutional expression, whereby networks of international human rights activists in the context of an emerging transnational civil society organized domestic and transnational political processes to enforce international human rights norms, most notably in Latin America.²⁷ These developments led to widespread recognition that human rights have become a concern of the international community in which all members of that community have an interest and, potentially an internationally-recognized right to seek their enforcement.²⁸

But perhaps most important is the realization that toleration of human rights and humanitarian law violations is no longer necessary for the purpose of maintaining Cold War alliances. For example, General Pinochet's role in serving as a bulwark against the spread of socialism in South America may once have constrained Washington's, and even London's, policy options. Setting aside the potential rise of revolutionary populism in Venezuela, Drug Lords have in recent years posed a greater threat to U.S. security interests in the hemisphere than Marxism.²⁹ And for London, gratitude for Chilean support during the Falk-

25. See Richard Bilder, *An Overview of International Human Rights Law*, reprinted in BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 866, 867 (1991) (modern human rights law emerged "with the implications of the holocaust and other Nazi atrocities very much in mind").

26. See, e.g., HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS* 371 (1996) (noting the connection between the Helsinki process and Cold War developments, particularly the contraction of the "domestic jurisdiction" limitation evidenced in 1991 Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, the Helsinki process); cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) (treating paradigm shifts as a function in part of generational succession); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 95-102 (1991) (extending Kuhn's concept to domestic constitutional analysis)

27. See generally MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998) (addressing a range of example, including human rights); Kathryn Sikkink, *Principled Issue-Networks and Sovereignty in Latin America*, 47 *INT'L ORG.* 411 (1993) (discussing case of human rights).

28. See, e.g., MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* (Clarendon Press ed., 1997) [hereinafter *ERGA OMNES*] (analyzing origins, development, and potential applications of concept of rights held and opposable by all members of the international community); see also Juan-Antonio Carrillo-Salcedo, *ERGA OMNES*, 92 *AM. J. INT'L. L.* 791 (1998) (book review) (calling for a more expansive view to take into account the ethical dimension of international law). But see *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 702 cmt. O & Reporters' Note 11 (1987) [hereinafter *RESTATEMENT (THIRD)*] (limiting *erga omnes* obligations to only a few cases that are recognized *jus cogens*).

29. The Mission Statement of the State Department's Bureau for International Nar-

land's crisis may have been necessary so long as Argentine *revanchism* posed a threat, but a series of successful transitions in Buenos Aires now minimizes the risk of renewed efforts to direct Argentine nationalism toward *Las Islas Malvinas*.³⁰ Indeed, it may even be no longer out of the question that the U.S. would find its way to assist Spanish authorities seeking to prosecute Pinochet by providing information in the possession of the U.S. intelligence community concerning the *junta*'s human rights violations, including assassinations arranged by the Chilean intelligence agency in the United States and perhaps elsewhere.³¹ It may be relevant that, for the United States, the Democratic party in power today bears no responsibility for the Chilean crisis in the early 1970s.³² Today it seems clear that the central and bipartisan goal of

cotics and Law Enforcement Affairs leads notably with the following claim: "[N]arcotics control has been an important U.S. foreign policy issue for many years." Bureau for International Narcotics and Law Enforcement Affairs, *Mission Statement* (visited April 5, 1999) <http://www.state.gov/www/global/narcotics_law/mission.html>.

30. See *Jack Straw and General Pinochet*, *ECONOMIST*, Dec. 5, 1998, at 66 (discussing U.K. political cleavages in relation to debt of gratitude felt by those in power in the U.K. during the Falklands War).

31. U.S. Department of State Press Spokesman James Rubin seemed to suggest as much in response to press inquiries:

QUESTION: Has the United States received any requests for documentation or any other sort of assistance from Judge Gar[z]on in Spain who's working on the Pinochet matter?

MR. RUBIN: There has been contact and cooperation between the Spanish judges investigating General Pinochet and the US Department of Justice for over one year. In February and July 1997, the Spanish judges initiated broad, formal requests for US assistance under the 1990 US-Spain Legal Assistance Treaty in connection with their investigation of General Pinochet. The State Department has provided hundreds of documents through the Justice Department to the Spanish court, including pertinent unclassified and declassified documents, and we continue to review our files. The Justice Department is the designated central authority of the United States under the treaty and is, therefore, the US Government agency responsible for handling these requests. Therefore, any specific questions about the details of that ought to be directed at the Justice Department.

U.S. Department of State, Daily Press Briefing, Oct. 26, 1998 (transcript available at Department of State, *Daily Briefing* (visited on April 5, 1999) <<http://secretary.state.gov/www/briefings/9810/981026db.html>>). Governments, even such as the United States, can no longer afford to appear indifferent to international scrutiny. For example, in response to an Amnesty International Report criticizing U.S. failure to comply with international human rights norms, State Department Press Spokesman James Foley stated: "We welcome their scrutiny." *Survey*, *ECONOMIST*, Dec. 5, 1998, at 13.

32. Yet even this factor has not prevented a reversal of U.S. policy of denial in other cases, such as Guatemala, where President Clinton recently apologized for the U.S. role at a time when Democrats were responsible for U.S. foreign policy of propping up a military dictatorship that committed egregious human rights violations. See Douglas Farah, *We've Not Been Honest: '68 Memo Assails U.S. Role in Guatemalan War*, *WASH. POST*, Mar. 12, 1999, at A25 (quoting contemporaneous memorandum by Embassy officer Peter Vaky, asking: "Is it conceivable that we are so obsessed with insurgency that we are prepared to rationalize murder as an acceptable counter-insurgency weapon?"). It may be, however,

U.S. foreign policy is the construction of a peaceful world through respect for international human rights accorded by a community of democratic nations.³³ In sum, the drive toward vindication of human rights has become an overwhelming force in international politics.

B. An Emerging Practice of Domestic Transitional Amnesty

The emerging demand for justice has expressed itself in a recent series of cases dealing with transitional justice, particularly in Latin America. These cases suggest that some accountability for the past is an instrumental part of the transition to democracy, also including some measure of amnesty as a carrot to induce acceptance of the new order by previous elites. For example, in Argentina the release of members of the *junta* (perhaps in the face of the threat of yet another *golpe de estado*), left the sense that full justice was not done.³⁴ And in Uruguay, there may well have been a complete amnesia masquerading as a full amnesty, albeit as the product of the democratically-expressed will of the Uruguayan people in a popular referendum.³⁵ Arguably, both cases failed because they initially treated the question of transitional justice as a binary proposition: either justice was to be done, though the heavens may fall,³⁶ and the guilty would be brought to the bar; or perpetrators and victims alike would dip themselves in Lethe's forgetful waters.³⁷ Certainly, either moral absolutism or moral indifference would

that the U.S. openness today may have been the fruit of the willingness of an earlier Democratic administration headed by President Carter to break with the past. *See id.* at 25 (describing Guatemala's refusal in 1977 to accept U.S. aid conditioned on compliance with human rights norms).

33. *See* WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT 2 (Feb. 1995) ("democracy must be at once the foundation and the purpose of the international structures [the United States builds] through this constructive diplomacy").

34. *See* Roht-Arriaza & Gibson, *supra* note 20, at 858. Nonetheless, the Argentine legislature subsequently repealed the amnesty law, although with arguably little effect since most major offenses had already been addressed under the law. *See id.* at 859. Judge Garzon, who initiated the Pinochet case, has recently stepped into this void as well, issuing an international arrest warrant in Madrid for former Argentine military leaders who escaped justice in Argentina. *See* Anthony Faola, *Spanish Judge Indicts Leaders of Argentina's 'Dirty War'*, WASH. POST, Nov. 3, 1999 at A29; *see also* Maria Del Carmen et al., *Case Note: Spanish National Court Criminal Division (Plenary Session), Case 19/97, November 4, 1998; Case 1/98, November 5, 1998*, AM. J. INT'L. L. 690 (1999) (reporting proceedings under the direction of Judge Garcia-Castellon concerning Argentine human rights violations).

35. *See* Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 616 (1994).

36. *Fiat justitia ruat coelum* is the ancient maxim expressing this idea, attributed to Lucius Calpurnius Piso Caesoninas, *quoted* in JOHN BARTLETT, FAMILIAR QUOTATIONS 133 (15th ed. 1980) [hereinafter BARTLETT'S].

37. The connection between historical denial and perdition's flames runs deep in the Western tradition and certainly precedes the Holocaust: "Far off from there as low and

have been impolitic as well as unjustified, because as opportunity for transitional justice passes, the seeds are sown for private vengeance by the victims or future challenges against democracy by the former perpetrators.³⁸ As Sartre put it, for all these members of transitional societies, hell would indeed be other people,³⁹ meaning the others with whom each side would continue to share their countries, while each side fully believes that justice was not done.

Intermediate precedents are also available, however. Chile followed a different pattern, whereby the successor government respected the self-amnesty proclaimed by the Pinochet regime but avoided most of the moral and prudential perils of historical denial by establishing a TRC that has uncovered much of the horrors of Chile's painful anti-democratic interregnum.⁴⁰ South Africa embarked on another, perhaps more promising course, because the amnesty originated in an agreement among the factions prior to the transition, where the victors embraced the vanquished, holding out the olive branch of amnesty, asking only for the truth in return. Under Archbishop Desmond Tutu's leadership, the South African Truth and Reconciliation Commission offered amnesty in return for truth, not only for the victors but also for the vanquished.⁴¹

Consider the possible implications of the Pinochet case on the

silent stream/ Lethe the River of Oblivion rouls/ Her watrie Labyrinth, whereof who drinks/ Forthwith his former state and being forgets,/ Forgets both joy and grief, pleasure and pain." JOHN MILTON, *PARADISE LOST*, Bk. II, ll. 583-86, reprinted in *THE COMPLETE POETICAL WORKS OF JOHN MILTON* (Shawcross ed., 1971).

38. See Mendez, *supra* note 2, at 8.

39. Jean-Paul Sartre, *Huis-Clos* (In-Camera), sc. v, quoted in BARTLETT'S, *supra* note 36, at 865.

40. See Roht-Arriaza & Gibson, *supra* note 20, at 846-49; see also Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of A Prior Regime: Chile's New Model*, 62 *FORDHAM L. REV.* 905 (1994).

41. See Dugard, *supra* note 10, at 290-301. A measure of the integrity of the South African TRC is its recent decision not to grant amnesty to certain government members of the ANC who refused to apply individually. See *Truth Panel Will Not Pardon ANC Members*, WASH. POST, April 7, 1999, at A15. Another, as yet untested example in Africa following the South African model of general amnesty coupled with a Truth and Reconciliation Commission, is the settlement of the civil war and regional conflict in Sierra Leone, although U.S. Secretary of State Madelaine Albright has left open the possibility that international participation in that settlement may ultimately entail some form of international prosecution. See Karl Vick, *Sierra Leone's Unjust Peace: At Sobering Stop Albright Defends Amnesty for Rebels*, WASH. POST, Oct. 19, 1999 at A12 (Secretary Albright "voiced support for an international tribunal only in principle, however, saying she prefers to 'keep that as something that we might come to.'"). But see Steven Mufson, *U.S. Backs Role for Rebels in W. Africa: Sierra Leone Amnesty Pushed in Peace Talks*, WASH. POST, Oct. 18, 1999 at A13 (quoting David Wippman, a Cornell Law Professor and former National Security Council staff member, as saying "It is appalling that these people are not subject to criminal prosecution but are rewarded with roles in government. It is really a dilemma created by the lack of international will to commit resources and troops needed to restore peace without having to accept the demands of these rebel forces.").

South African solution. In theory, the crime of apartheid may be one for which there is universal jurisdiction, so that any country that gains custody of one of the perpetrators of apartheid in South Africa could plausibly assert authority to prosecute, notwithstanding the amnesty granted under South African law to such offenders.⁴² A similar risk might even obtain for some members of the African National Congress (ANC), who may have committed murder and torture in ANC camps in the Front-line states during the apartheid era, either in violation of the formal law of those states or applicable international law obligations.⁴³ Nonetheless, the TRCs work has opened the door to a new South Africa. It was thought that the Biblical generation would need to pass before the people of Israel could enter the Promised Land.⁴⁴ If the TRC accelerates that process, it will achieve far more than was ever thought possible. By parity of reasoning, partial justice for the victims and the preservation of social peace in an increasingly democratic political system may well be the best that can be expected in Chile. The question arises: what right enables a third state, absent the consent of the state in transition,⁴⁵ to intervene unilaterally to substitute its judgment?

This is not to say that individual states and the world community as a whole do not have an interest in effective deterrence of human rights violations everywhere, since each state's social stability gains from the threat that its own human rights violators will be prosecuted someday. Indeed, the international human rights movement has thus ushered in a new era of deterrence addressing the long-standing problem of under-enforcement of human rights norms, for there is no doubt that tyrants do calculate the risk that they will face the prospect of accountability for their actions.⁴⁶ Moreover, even governments claiming

42. See, e.g., ICC Statute, *supra* note 12, art. 7(1)(j) (including "apartheid" as a crime within the ICC's jurisdiction).

43. See Lynne Duke, *ANC Leaders' Amnesty Bid Blocked: S. African Truth Panel Ruling May Leave Mbeki, 26 Others Open to Charges*, WASH. POST, Mar. 5, 1999, at A28 (reporting TRC rejection of ANC request for amnesty, because applicants refused to "profess guilt for any specific human rights abuses and did not seek amnesty as individuals, as required by law").

44. *Numbers* 14:20 (King James).

45. In the Chilean case, it should be noted that the United States has insisted on the full resolution of the Chilean involvement in the 1976 assassination in Washington of former Chilean Ambassador Orlando Letelier, as well as others. Indeed, Elliot Abrams maintains that the United States would be justified in pursuing Pinochet if he were proved to have directly conspired in this heinous act. See Abrams, *supra* note 6 at 45. Although the United States could rely on the objective territoriality principle as a jurisdictional shield, thereby obviating the concern over use of universal jurisdiction as a jurisdictional sword, it might still be accused of destabilizing the Chilean transition, but for the fact that, at U.S. insistence, this case was specifically excluded from Chilean amnesty. See Roht-Arriaza & Gibson, *supra* note 20 at 849 n.32; cf. 28 U.S.C. § 1605(a) (exempting assassination in the U.S. from foreign sovereign immunity).

46. See Mark Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 1019 n.317 (1998) [hereinafter *Obeying Orders*] (reporting that

altruistic motives make similar calculations. For example, in explaining its decision not to support the new ICC Statute, the U.S. did not object to the general principle that human rights violations should be prosecuted. Rather, the U.S. raised concerns about unfairness in selective and unjustified prosecution of U.S. nationals, particularly in the case of U.S. persons on peacekeeping missions deployed on the territory of a State Party to the ICC Statute, thus arguably satisfying the ICC Statute's jurisdictional preconditions.⁴⁷ The premise of the U.S. legal objection is merely that an international institution may not exercise universal jurisdiction against a national of a non-party, even when a state could exercise jurisdiction under international law.⁴⁸ Whatever the merit of this particular jurisdictional contention,⁴⁹ there appears to be no general danger that the ICC will over-enforce international human rights norms or that the extensive procedural guarantees in the ICC Statute will not work to assure that the truly innocent will have nothing to fear.⁵⁰ Moreover, the general presumption of the legality of international exercise of jurisdiction reflected in the *Lotus Case*⁵¹ makes it difficult to argue that the mere destabilizing effect of asserting universal jurisdiction on a political settlement in the transitioning state amounts to impermissible intervention in that state's internal affairs.⁵²

"Minutes of one meeting of the first Argentine *junta* explicitly refer to the need to avoid an Argentine Nuremberg").

47. ICC statute, *supra* note 12, art. 12(2)(a).

48. Professor John Norton Moore, Address Before the ABA Standing Committee on Law and National Security Conference, Eighth Annual Review of the Field of National Security Law, Washington, DC (Nov. 12-13, 1998). *But see* Michael P. Scharf, *Remarks in Panel: The Rome Treaty: Is the International Criminal Court Viable?*, 21 NAT'L SEC. L. REP. 2 at 25 (June 1999) (arguing that U.S. interests in asserting universal jurisdiction in terrorist cases such as that of Fawaz Yunis would be undermined by arguing that the ICC may not exercise universal jurisdiction on a non-party).

49. *See* Scheffer, *supra* note 25 (presenting State Department defense).

50. *See, e.g.*, ICC statute, *supra* note 12, art. 55 ("Rights of persons during an investigation"), art. 66 ("Presumption of innocence"), art. 67 ("Rights of the accused"), art. 70 ("Offenses against the administration of justice"), art. 101 ("Rule of Speciality"). One author has already considered on the merits possible challenges to U.S. conduct and concluded that U.S. military action in the context of U.N. authorized peacekeeping or enforcement actions would not likely expose U.S. personnel to legal jeopardy. *See generally* David Marcella, *Grotius Repudiated: The American Objections to International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 373-403 (1999).

51. Case of the S.S. "Lotus," 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7) (holding, among other things, that a state is presumed to act lawfully in the absence of a prohibitory rule of international law). *But see* ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, July 8, 1996, 35 I.L.M. 809, 866 (Judge Shahabuddeen, dissenting) (calling this premise into question for fundamental questions regarding the relation of states to the international community).

52. *See generally* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, G.A. Res. 2131(XX) (1965), *reprinted in* LOUIS L. HENKIN ET AL., CASES AND MATERIALS IN INTERNATIONAL LAW 905 (3d ed. 1993); *see also* U.N. CHARTER, art. 2, para. 7 (domestic jurisdiction principle).

Rather, the question is whether states exercising universal jurisdiction, unilaterally or through the ICC as a proxy, should do so in light of its potential consequences for the political stability of the transitioning state. The Pinochet case, regardless of its ultimate resolution, may well make this a question of ever more pressing significance, both for states asserting universal jurisdiction and for states that have yet to achieve the happy circumstances of those states that are sufficiently comfortable in their own stability to be willing to assert universal jurisdiction.

III. THE PERILS OF PINOCHET—A HARD CASE THAT COULD PROMOTE SUPRANATIONAL POLICY-MAKING?

Ex Parte Pinochet may well signal the dawn of a new era in human rights enforcement. But, even if it proves the exception rather than the rule, the calculations of officials responsible for human rights violations can never be the same. At the heart of the matter is that Spain's request did not focus, except initially, on any harm Pinochet may have caused directly to Spain or Spanish nationals. Rather, it was a claim to vindicate the rights of humanity as a whole.

The case did not have to follow such a path, except for the vagaries of British extradition law and practice. In a series of appearances at the House of Lords, British law and the factual posture of the case drove a majority of the Lords on each reviewing panel to refuse to apply Head of State immunity principles to a defined set of crimes within universal jurisdiction, but serendipitously for an increasingly sophisticated set of reasons that ultimately strengthened the precedential value of the House of Lords' final decision. Because the House of Lords in *Ex Parte Pinochet II* granted Pinochet's petition to set aside the ruling of the House of Lords' initial ruling on November 25, 1998 solely on the ground of the appearance of impropriety suggested by the indirect connection between Lord Hoffman, who cast the decisive vote, and intervenor Amnesty International, it may be that the legal reasoning employed in *Ex Parte Pinochet* continues to be relevant and will be relied upon by other states facing the question. In any event, a precise understanding of the conclusions of the larger panel of Lords', which convened in *Ex Parte Pinochet III*, and on March 24, 1999, essentially confirmed the holdings but substantially narrowed the effect of *Ex Parte Pinochet*, requires detailed analysis of the House of Lords' initial reasoning.

In brief, it appears the Lords in *Ex Parte Pinochet III* more thoroughly addressed issues highlighted in the dissenting opinions in *Ex Parte Pinochet* concerning the scope of U.K. extradition law and the need for clarity in constructing a basis for overturning Head of State immunity. By addressing the weaknesses in the earlier set of opinions, the Lords may well have increased the precedential force of their argua-

bly revolutionary legal conclusion stripping Pinochet of former Head of State immunity. More important, by developing better answers to the political-process related objections that surfaced in *Ex Parte Pinochet*, the Lords properly limited the judicial role by inviting legal policy-making from domestic and transnational political actors.

A. *Ex Parte Pinochet* – *Jurisdictional Foundations and Untested Assumptions*

Spain's first request for Pinochet's extradition was grounded on direct Spanish interests in the vindication of rights held by its national. However, Spain did not assert the usual claim that the defendant committed an offense on its territory or, under the objective theory, that the defendant had direct and substantial effects on Spanish territory.⁵³ Instead, Spain's initial request was grounded in the arguably problematic ground of passive personality jurisdiction,⁵⁴ that is to say, the right to prosecute Pinochet for the murder of Spanish nationals anywhere in the world, including Chile.⁵⁵ Arguably, Spain may have avoided the potentially exorbitant character of passive personality-based jurisdiction applied to the general case of "ordinary torts or crimes" against foreign nationals if it had been able to argue that its nationals were singled out as part of a general program of domestic repression.⁵⁶ However, in asserting passive personality in the broader form, Spain unfortunately initially chose a theory that would not have afforded British authorities the right to prosecute in equivalent circumstances under British law.⁵⁷

53. See, e.g., RESTATEMENT (THIRD), *supra* note 28, § 402 (1) (c). The so-called effects principle, although derived from the territoriality principle, is considered applicable by some states even where no actual effects are shown, such as in the case of conspiracy, or a failed attempt, to kill Spanish nationals in Spain. See *id.* § 402 cmt. d ("When the intent to commit the prescribed act is clear and demonstrated by some activity, and the effect to be produced by the activity is substantial and foreseeable the fact that a plan or conspiracy was thwarted does not deprive the target state of jurisdiction to make its law applicable.")

54. See *id.* § 402 cmt. g ("The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.")

55. *Ex Parte Pinochet*, *supra* note 11, at 37 I.L.M. 1302, 1317 (Lord Lloyd of Berwick, dissenting) ("The murder of Spanish citizens in Chile is not an extradition crime under section 2(1)(b) of the Extradition Act for which Senator Pinochet could be extradited, for the simple reason that the murder of a *British* citizen in Chile would not be an offense against *our* law.")

56. Compare RESTATEMENT (THIRD), *supra* note 28, § 402 cmt. g (recognizing the extension of passive to cases in which foreign nationals are targeted because of their nationality).

57. See *id.*

The applicable Extradition Treaty required reciprocity,⁵⁸ or what is sometimes called in the extradition context “double criminality”—that is, that the request is for conduct that would be a prosecutable offense under the laws of both countries.⁵⁹ Thus, the absence in these circumstances of passive personality jurisdiction under U.K. law placed in jeopardy Spain’s efforts to secure British cooperation in the assertion of that basis of jurisdiction.

Accordingly, Spain made a second request for extradition asserting the broader ground of universal jurisdiction based on international treaties to which the U.K. is a party and customary international law, which would be binding on the U.K. and Spain, and therefore, would afford British authorities equivalent jurisdiction under U.K. law.⁶⁰ Thus, Spain’s legal strategy for overcoming the reciprocity objection made *Ex Parte Pinochet* a test case for a much more expansive role by individual states using extradition to enforce international human rights norms. If Pinochet could be extradited to Spain solely to answer for offenses for which Spain could assert only universal jurisdiction, then the usual limitation on the exercise of universal jurisdiction—namely, that the offender be “found” on the territory of the state exercising jurisdiction⁶¹—would be pulled up from the roots. Extradition would then be-

58. See *id.* (“The underlying principle of all extradition agreements between states, including the European Extradition Convention of 1957, is reciprocity.”).

59. It is not clear, however, that this view reflects general international practice, since some states seem to explicitly provide for “dual criminality” in extradition treaties, thereby suggesting that reciprocity of this kind is not a baseline assumption of every extradition arrangement. Compare Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, art. II, para. 1, reprinted in CARTER & TRIMBLE, *supra* note 25, at 813 (“[a]n offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty”), with U.S.-U.K. Treaty of Extradition, art. III, para. 1(b), reprinted in CARTER & TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 337-38 (1995) (providing for an additional criterion for extraditability stating that “the offense is extraditable under the relevant law . . .”). This is because, some states, such as the United States, take “dual criminality” to mean only that the substantive conduct, if undertaken within the jurisdiction of the requested, would be criminal; that is to say, the House of Lords construction of the European Treaty is not a “dual criminality” requirement, but is rather a “dual jurisdiction” provision.

60. See *Ex Parte Pinochet*, Dissenting Opinion of Lord Lloyd of Berwick, *supra* note 11, 37 I.L.M. at 1318 (“Meanwhile the flaw in the first provisional arrest warrant must have become apparent to the Crown Prosecution Service, acting on behalf of the State of Spain. At all events, Judge Garzon in Madrid issued a second international warrant of arrest dated 18 October, alleging crimes of genocide and terrorism.”). In addition to hostage-taking, genocide, and terrorism, the second warrant included torture allegations; thus, Lord Lloyd of Berwick presciently observed that, “unlike murder, torture is an offense under English law wherever the act of torture is committed.” *Id.*

61. It is not clear whether the House of Lords’ opinions here necessarily reach this question, since Lord Slynn of Hadley’s opinion observed that the “sole question is whether [Pinochet] is entitled to immunity as a former Head of State from arrest and extradition

come a vehicle for bootstrapping the exercise of universal jurisdiction into a much more powerful tool of unilateral law enforcement, where each nation on its own,⁶² or perhaps with a slight assist from the rendering state, could become an international policeman.⁶³ The United States has, in many recent cases, asserted such rights, albeit irregularly and not without serious diplomatic costs.⁶⁴ The regularization of this approach, based on the *Pinochet* case, would reduce the attendant diplomatic costs and thus increase the likelihood of its use.

This broadening of universal jurisdiction may well be *Ex Parte Pinochet I's* principal doctrinal achievement. The specific grounds that formed the basis of Spain's second request thus focused on acts committed primarily against non-nationals of Spain outside of Spain's territorial jurisdiction, but would nonetheless constitute specific conduct for which both Spanish and U.K. law, in accordance with international law, arguably would provide universal jurisdiction to prosecute. These grounds included terrorism, genocide, torture, "and not merely in respect of Spanish victims."⁶⁵ Perhaps sensing the revolutionary significance of their findings, however, the Lords left open the issue of whether the specific charges *in toto* amounted to extradition crimes under applicable U.K. law.⁶⁶ Nonetheless, the allegations, and the particu-

proceedings in the United Kingdom in respect of acts alleged to have been committed whilst he was Head of State." *Ex Parte Pinochet*, *supra* note 11, 37 I.L.M. at 1302.

62. See, e.g., *United States v. Yunis*, 681 F. Supp. 896 (D.D.C.), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988) (rejecting Yunis's jurisdictional arguments that, among other things, universal jurisdiction even for hostage-taking did not extend to his capture on the high seas when he was lured out of the jurisdiction of a foreign state by U.S. authorities).

63. See, e.g., *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (capture of torturer of U.S. Drug Enforcement Agency agent in Mexico effected through cooperation with local Mexican police in violation of Mexican and, arguably, customary international law). While U.S. jurisdiction might have been founded on passive personality and protective jurisdictional principles, it might be argued that, although those directly responsible for the torture and murder were sub-state entities, Mexican governmental acquiescence in, and perhaps even support for, the conduct may have been sufficient under principles of attribution to find state responsibility that would implicate customary international law norms against governmental torture and thereby support universal jurisdiction as well.

64. See generally CARTER & TRIMBLE, *supra* note 25, at 808-11 (surveying foreign reaction).

65. *Ex Parte Pinochet*, *supra* note 11, 37 I.L.M. at 1305.

66. As Lord Slynn pointed out, the Divisional Court did not specifically address this question. See *id.* at 1304. Nonetheless, Lord Slynn added: "The Court did not rule at that stage on the respondent's argument that the acts alleged did not constitute crimes in the United Kingdom at the time they were done, but added that it was not necessary that the conduct alleged did constitute a crime here at the time the alleged crime was committed abroad." *Id.* Thus, even Lord Slynn might be read to assume that the double criminality or "reciprocity" criterion would be interpreted under the more relaxed standard of current conceptions of universal jurisdiction than the arguably stricter views that held sway nearly a quarter-century ago when the relevant acts were committed. See *infra* text accompanying notes 100-11 (discussing *Ex Parte Pinochet III's* analysis of this issue).

lar acts they describe,⁶⁷ on their face fell within even the most narrowly-defined concept of *erga omnes* violations of international human rights norms.⁶⁸ While the traditional view of international crimes derived from the historic paradigm of piracy, which did not involve conduct attributable to a state but rather consisted precisely of conduct not sanctioned by states but rather committed by *hostis humanis generis*,⁶⁹ these new crimes focus on conduct that is attributable to the state itself.⁷⁰ This applies notwithstanding the ordinary assumption in municipal law that a principal, here the state, is not responsible for the criminal acts of its agents, here a Head of State.⁷¹

The effects of this conceptual shift are refashioning international

67. See *Ex Parte Pinochet*, *supra* note 11, 37 I.L.M. at 1303 (that Pinochet "conspired with persons unknown to intentionally inflict severe pain or suffering on another," "detained [and] conspired to detain other persons ('the hostages') and in order to compel such persons to do or to abstain from doing any act, threatened to kill, injure or continue to detain the hostages," and "conspired . . . to commit murder in a [Torture] Convention country.").

68. See, e.g., RESTATEMENT (THIRD), *supra* note 28, § 702(a) ("genocide"), (c) ("the murder or causing the disappearance of a person"), (d) ("torture or other cruel, inhuman, or degrading treatment or punishment"), (e) ("prolonged or arbitrary detention").

69. See U.N. Convention on the Law of the Sea (1982), art. 101 (a), UN Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982) (defining piracy, in pertinent part, as: "Any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship"); OPPENHEIM'S INTERNATIONAL LAW 746 (9th ed., Jennings & Watts eds., 1992) (defining piracy in terms of intent to plunder (*animo furandi*) by an outlaw or enemy of mankind (*hostis humanis generis*) in violation of the law of peoples (*jure gentium*)).

70. See generally OPPENHEIM, *supra* note 69, at 533-36 (citing the International Law Commission's Draft Code of Offenses against the Peace and Security of Mankind [the Draft Code] as authority for emerging consensus that, *inter alia*, genocide and apartheid entail criminal state responsibility); cf. *Ex Parte Pinochet III*, Opinion of Lord Hutton, *supra* note 11, 37 I.L.M. at 1306 (citing Article III of the Draft Code as early authority for the absence of Head of State immunity for international crimes as a matter of customary international law).

71. A criminal act by an agent even in the performance of duties owed to the principal is ordinarily considered a breach of the agent's fiduciary duties. See, e.g., FARNSWORTH, CONTRACTS 348 n.4 (3d ed. 1999). Ordinarily, that conduct would not be attributable to the principal. Thus, private conduct of a state official is ordinarily not attributable to the state. See OPPENHEIM, *supra* note 69, at 542. One might therefore take the position that criminal conduct by a Head of State would not be attributable to the state for purposes of state responsibility. In the Head of State case, however, given the close relation between the principal and the agent, both historically in conceptions of sovereignty and practically from the standpoint of state behavior, noted British international law scholars Jennings and Watts take the view that "a State should bear responsibility for internationally injurious acts committed by its Head of State in private life." *Id.* at 541. Presumably, this would include even the form of international injury attached to international crimes for which there is universal jurisdiction, notwithstanding ordinary principles of non-attribution. In sum, criminal responsibility of the Head of State need not be inconsistent with ordinary international civil responsibility for the state for whom the Head of State acted.

criminal law.⁷² For example, the extension of universal crimes into clearly political behavior finds recognition implicitly in the recent practice of narrowing the political offense exception in extradition treaties, to exclude a range of acts that are now regarded as terrorist, so that in certain cases political motivation may no longer serve as a ground for denial of extradition.⁷³ Thus, increased protection of human rights of victims has encouraged and enhanced international law enforcement. At the same time, increased respect for human rights has more recently begun to address the need to assure that strengthened international legal cooperation remains subordinate to what has been coined by John Dugard as a "two-tier system of legal obligation that recognizes the higher status of human rights norms arising from notions of *jus cogens*, and the superiority of multilateral human rights conventions that form part of the *ordre public* of the international community or of a particular region."⁷⁴ If Dugard's principle, analogizing to the political offense exception for so-called terrorist offenses, is to be taken seriously then it may be argued that extradition of even former Heads of State and other state officials guilty of universal crimes would further support enforcement of those rights and cohere with Dugard's conception of the emerging international morality. In sum, the Lords' reasoning with respect to universal jurisdiction may well reflect the underlying premise of an emerging international civil society and the moral basis buttressing its governance.

B. *Ex Parte Pinochet – A Head of State Immunity Advisory Opinion?*

It is largely in the context of claims of universal jurisdiction that the House of Lords opinions in *Ex Parte Pinochet* focus primarily on the

72. See generally PAUST ET AL, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS (1996) (first casebook dedicated wholly to canvassing developments in this recently-expanding field); but see also Steven R. Ratner, *The Schizophrenia of International Criminal Law*, 33 TEX. INT'L L.J. 237 (1998) (describing inconsistencies and apparent manifest injustices in this emerging body of law).

73. See generally Samuel M. Witten, *The International Convention for the Suppression of Terrorist Bombings*, 92 AM. J. INT'L L. 774, 774-75 (1998) (identifying the relevant treaties and locating the most recent international effort to address terrorist bombings in that context).

74. John Dugard, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 195 (1998). Dugard details the rights that may not be violated in the extradition context to include torture and cruel, inhuman or degrading punishment. See *id.* at 197-202. Some authors may have already read the House of Lords opinions to reflect this broader, non-positivist conception of international law. See, e.g., Cristine Chinkin, *Case Note: United Kingdom House of Lords, (Spanish Request for Extradition), REGINA v. BOW, Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte (no. 3) [1999]*, 93 AM. I. INT'L. L. (1999) (the question of former Head of State immunity for "official acts of torture represented a choice between two visions of international law: a horizontal system based upon sovereign equality of states and a vertical system that upholds norms of *jus cogens* such as those guaranteeing fundamental human rights").

important issue of Head of State Immunity. The majority of the panel, taking the view most cogently articulated in Lord Nicholls's opinion, rejected the notion that the functional immunity of a former Head of State, within the meaning of the Vienna Convention on Diplomatic Relations (VCDR) and implementing legislation of the U.K., could encompass torture or hostage-taking.⁷⁵ Specifically, Section 20 of the State Immunity Act of 1978, provides that: "[s]ubject to . . . any necessary modifications, the Diplomatic Privileges Act of 1964 shall apply to —(a) a sovereign or other head of State."⁷⁶ In turn, the U.K. Diplomatic Privileges Act of 1964, incorporates by reference into U.K. domestic law, the provisions of the VCDR,⁷⁷ which define the scope of immunity for current and former diplomats.⁷⁸ Accordingly, the Lords agreed that U.K. law concerning former Head of State immunity required them to apply Article 39(2) of the VCDR, which in turn provides for functional immunity only,⁷⁹ as a "necessary modification" under Section 20 of the State Immunity Act with respect to "former" Heads of State.⁸⁰ This framed the question, as a matter of U.K. law, as whether Pinochet's conduct for which Spain sought to prosecute him should be deemed to be within the scope of the Head of State's functions. More narrowly stated, the question was whether functional immunity should extend to crimes for which there is universal jurisdiction to prosecute.

Thus, *Ex Parte Pinochet* had an abstract quality, since it did not closely analyze the particular crimes alleged to determine whether they fit within the criterion of dual criminality that, as a matter of applicable treaty and domestic law, were assumed to control the Spanish request. Indeed, Lord Lloyd of Berwick's dissent specifically noted that at the Divisional Court "[i]t was argued that torture and hostage-taking only became extradition crimes after 1988 (torture) and 1982 (hostage-taking) since neither section 134 of the Criminal Justice Act of 1988,

75. See *Ex Parte Pinochet*, Opinion of Lord Nicholls of Birkenhead, *supra* note 11, 37 I.L.M. at 1330, 1334; see also *id.* Opinion of Lords Steyn, at 1335, 1338 (finding no statutory immunity whatsoever and rejecting the argument that customary international law might separately provide immunity); *id.* at 1339 (Lord Hoffman concurring with Lord Nicholls). Thus, only Lord Steyn's opinion might be read to reach charges of murder pure and simple. See *id.* at 1338 ("murdering his gardener").

76. *Id.* at 1336 (cited by, among others, Lord Steyn).

77. *Id.* at 1307 (Lord Slynn of Hadley).

78. Vienna Convention on Diplomatic Relations, *done at Vienna on April 18, 1961*, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force April 24, 1964) [hereinafter VCDR].

79. Article 39(2) of the VCDR provides: "When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in a case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." *Id.* at art. 39(2).

80. See, e.g., *Ex Parte Pinochet*, *supra* note 11, at 37 I.L.M. 1307 (Lord Slynn) and 1336 (Lord Steyn).

nor section 1 of the Taking of Hostages Act 1982 [is] retrospective."⁸¹ Although Lord Lloyd himself rejected the argument as a matter of statutory interpretation,⁸² this argument undoubtedly planted the seed for closer attention to U.K. law in *Ex Parte Pinochet III* and, thus, for a more restrained exercise of judicial power to trump Head of State Immunity.⁸³

That said, the precedents set by *Ex Parte Pinochet*, which arguably remain relevant to current Heads of State, including the tyrants who might fear transitional justice, as well as the international lawyers who advise them,⁸⁴ were arguably over-broad in at least two ways. The first relates to persons who could become subject to the effects of the new interpretation. Framed in terms of functional immunity, *Ex Parte Pinochet's* implications may extend beyond the narrow question of former Head of State immunity into a potentially much broader class of cases. This expansive effect may occur because British law domestically implemented the customary law principle of Head of State Immunity through a statute governing the ordinary privileges and immunities of diplomats under the VCDR.⁸⁵ Thus, the Lords' ruling may well shed light on the application in British courts, as well perhaps internationally, of the principle of subsistence of immunity for former diplomats.⁸⁶ The Lords' opinions on this issue might be questionable, as it appears they equate former Head of State immunity with former diplomatic immunity simply because of the idiosyncrasies of U.K. implementing legislation and without reasoned consideration of the potentially differing rationales for the two kinds of immunity.⁸⁷ Yet functional immunity might seem warranted in view of the general perception that Head of State immunity can no longer reasonably be conceived as flowing from

81. *Id.* at 1318 (Dissenting Opinion of Lord Lloyd of Berwick).

82. *See id.*

83. *See infra* text accompanying notes 98-105.

84. *See infra* text accompanying notes 61-65 (explaining the broad holdings of *Ex Parte Pinochet I*).

85. *See supra* text accompanying notes 75-80 (describing statutory analysis).

86. If so, the functional limits of former Head of State Immunity may shed light as well on the functional limits of immunity for former diplomats, a point of relevance to all states which use their diplomats as cover for their espionage activities. *See generally* W. MICHAEL REISMAN & JAMES E. BAKER REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW (1992).

87. If, for example, Head of State immunity is more closely related to the historic doctrine of state immunity, then it may still be that, unlike the case where the historic doctrine of absolute state immunity seems to have been compromised by the development of a commercial activity exception, then the Latin American position that state immunity remains absolute, *see* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 119 (1997), should have been part of the Lords's analysis, for they might have construed the applicable U.K. statute so as not to conflict with customary international law where applicable, in particular recognizing the persistent objector principle's application to the question of Head of State immunity.

the location of sovereignty in the Head of State. In a democratic era, where popular sovereignty would call for respect for the dignity of the Head of State only insofar as he acts within the outer perimeter of authority or functions delegated to him through authoritative domestic law,⁸⁸ a functional limitation on sovereign immunity would seem to follow⁸⁹—even in the U.K. where, in theory at least, constitutional theory provides for sovereignty in “the Crown-in-Parliament.”⁹⁰ Regardless of the thoroughness of its reasoning, however, if the U.K. interpretation of the scope of former Head of State immunity is extended to former diplomats, it may encourage other states to take a similar legal position in respect of former diplomats in order to support their view of internationally-recognized human rights. Indeed, because a Head of State’s functions are almost certain to be defined more broadly than the functions of diplomats, it may well be that the most significant applications of *Ex Parte Pinochet* will be found in prosecutions of former diplomats.

Second, the types of offenses that form the basis of exceptions to functional immunity may also be over-broad. Ordinarily, immunity principles are limited by treaty obligations between the interested states. In such situations, treaties should be construed where possible to be consistent with each other.⁹¹ Thus, if the U.K. purports to respect the principle of Head of State immunity on the ground that it is required to do so by the VCDR, then it would seem clear that other treaties creating bases of jurisdiction recognized as permissible under international law, such as human rights treaties recognizing universal jurisdiction, might be read not to overturn the VCDR unless they ex-

88. Cf. *Clinton v. Jones*, 520 U.S. 681, 694 (1997) (describing the civil immunity of the president of the United States while in office as grounded in the nature of “the function” performed rather than “the identity” of the actor).

89. Cf. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990) [hereinafter *Sovereignty and Human Rights*] (reconstructing the *Tinoco* Claims Arbitration Case in light of modern conceptions of popular sovereignty). A similar point applies to the modern conception of the general basis for diplomatic immunity as a transformation of the outdated conception of extra-territorialism. See HENKIN ET AL., *supra* note 52, at 1201.

90. See TUSHNET ET AL., *COMPARATIVE CONSTITUTIONAL LAW* 358, 360-61 (1999)(citations omitted). Indeed, *Ex Parte Pinochet* maybe evidence of the transformation of the theory of sovereignty in the U.K. to conform with the requirements of U.K. adherence to the EU. By this I mean that the supremacy of EU law in the U.K. may require a refashioning of the theory of Parliamentary sovereignty, since under the terms of the applicable EU treaties the U.K. may not withdraw from certain obligations. See J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991)(describing the emerging constitutional character of European Union law).

91. See Vienna Convention on the Law of Treaties, concluded May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/CONF. 39/27, art. 30 (3)(applying earlier treaties to the extent “compatible” with later treaties), art. 31(3)(a)(“taking into account” subsequent agreements in the interpretation of an agreement)[VCLT]. Together with the general principle of performance in good faith, *see id.*, art. 27, the relevant provisions of the VCLT thus imply a search for interpretations that where possible avoid incompatibilities.

pressly so provide.⁹² Evidence for such an inference might be found in the decision of the drafters of the ICC Statute expressly to provide that Head of State immunity shall not be available for the crimes within the ICC's jurisdiction.⁹³ Indeed, Lord Slynn of Hadley cited as evidence of the international community's cautious stance on this question that the ICC Statute's exclusion of Head of State immunity was prospective only.⁹⁴ The argument for restraint would seem to be even stronger in the case where merely customary law grounds supervene to provide the basis for the exercise of universal jurisdiction, even if theory and general principles support limiting former Head of State immunity under a functional approach.⁹⁵

In principle, however, one could more narrowly reinterpret *Ex Parte Pinoche's* reading of the U.K. decision to implement Head of State immunity through its domestic law implementing the VCDR. Rather, Head of State immunity is grounded solely in customary international law principles, which can be supervened by treaty law directly. If that is so, even assuming the absence of well-developed customary law or *jus cogens* permitting the prosecution of former Heads of State on universal jurisdiction grounds,⁹⁶ then *Ex Parte Pinochet*, could be narrowed to the case of specific violations of treaty-based norms. Under this reading, a state transitioning from dictatorship to democracy would have the option of withdrawing from treaties concerning human rights affording universal jurisdiction with any potential sanctuary state for the former dictator, in order to provide a past dictator assurances of freedom from

92. Cf. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

93. See ICC Statute, *supra* note 12, art. 27 ("official capacity as Head of State or Government . . . or a government official . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.").

94. *Ex Parte Pinochet*, *supra* note 11, 37 I.L.M. at 1312 (Lord Slynn of Hadley).

95. See *supra* text accompanying note 89 (citing Reisman, *Sovereignty and Human Rights*).

96. Given the ICC Statute's refusal to overturn immunity principles retroactively, it might be questioned whether a *jus cogens* norm permitting prosecution has arisen. See *supra* note 12. Arguably, the ICC statute's cautious drafting on this point would seem to establish that a *jus cogens* norm requiring prosecution for former dictators has not arisen, unless the ICC Statute on this point is to be deemed inoperative. See VCLT, *supra* note 91, art. 53 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law."). Also, under the VCDR as it relates to the functional immunity of diplomats and, to the extent the VCDR encompasses it, to Head of State immunity as well, any emerging *jus cogens*-based right to prosecute would not affect "any right, obligation or legal situation . . . created through the execution of the treaty prior to termination." See VCLT, *supra* note 91 art. 71(2)(b). Arguably, diplomatic or Head of State immunities that accrue for former diplomats or Heads of State would attach at the time the acts occurred when those persons were in the status from which rights of immunity would flow under the treaty.

prosecution both domestically and internationally. This may well be a relatively small price to pay in order to facilitate a transition. It is not so clear, however, that *Ex Parte Pinochet* need be read as having such a limited effect.⁹⁷ Nonetheless, in time it may be that the Lords' subsequent engagement in this issue will have greater influence on the legal analysis that other states will undertake when faced with similar situations.

C. *Ex Parte Pinochet III* – Synthesizing the Domestic and International

The new panel of Lords, convened after *Ex Parte Pinochet II* held that the appearance of impropriety suggested by Lord Hoffman's decisive vote in *Ex Parte Pinochet I* compelled substantive reconsideration, took advantage of the opportunity to build upon and refine the reasoning suggested by *Ex Parte Pinochet*. The Lords were able to reassess the scope of the underlying applicable extradition law of the U.K., narrowing its potential applicability to Pinochet himself in respect of torture only to offenses that occurred, serendipitously perhaps, roughly after the Chilean transition was initiated.⁹⁸ One might suspect that the Chilean Government's decision to make an appearance in *Ex Parte Pinochet III* to confirm that it did not waive Pinochet's former Head of State immunity, whatever that might be held to include, concentrated the panel's thinking on this question.⁹⁹ Accordingly, and of significance for the wider implications of their decisions, this opportunity also afforded the Lords a vehicle for framing a more sharply focused precedent with respect to Head of State Immunity, one that in some ways may well exacerbate for current and future Heads of State the potential impact of *Ex Parte Pinochet III's* holding by eliminating the option of dismissing *Ex Parte Pinochet's* abstract and inadequately reasoned conclusions.

This sharpening of the precedent occurred in a two-step process, re-focusing the definition of extradition crime and narrowing the lifting of former Head of State immunity. With respect to the U.K. definition of an extradition crime, Lord Browne-Wilkinson's lead opinion gave more extended consideration to the temporal argument concerning "dual criminality" that was summarily rejected by Lord Lloyd in *Ex Parte Pi-*

97. See *supra* text accompanying notes 61-65.

98. The Chilean transition effectively was triggered in 1988, when the Pinochet Government lost a popular referendum on its preferred constitutional settlement. See Roht-Arriaza & Gibson, *Developing Jurisprudence*, *supra* note 20, at 858. This time frame obviously coincides with the dates upon which, under U.K. law, the Lords found Pinochet's former Head of State immunity had terminated in respect of torture. See *infra* note 114. Judicial mind-readers might make a case for a connection, but this analysis of the opinions addresses their precedential force and therefore eschews that hermeneutic method.

99. See *Ex Parte Pinochet III*, *supra* note 11, 37 I.L.M. 581, 639 (1999) (noting Chilean intervention).

nochet.¹⁰⁰ In a detailed analysis of the temporal requirements of U.K. extradition law,¹⁰¹ whether or not as applied to a request from a European Convention country, Lord Browne-Wilkinson concluded that dual criminality meant, in effect, that U.K. law must provide for jurisdiction to prosecute the actual offenses for which the extraditee is sought by the Requesting State.¹⁰² Applying this principle to the specific facts, and excluding the murder charges based on pure passive personality grounds for jurisdiction, which had fallen out of the case after *Ex Parte Pinochet*,¹⁰³ it was clear that counts of murder and conspiracy to commit murder in Spain survived under objective territoriality,¹⁰⁴ since they involved conduct that would be punishable in the U.K. if it had occurred in the U.K.¹⁰⁵ Lord Browne-Wilkinson further found that the precise charges relating to hostage-taking did not *prima facie* constitute offenses under the applicable treaty or U.K. law, because the only conduct charged alleged "that a person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offense."¹⁰⁶ In the case of the crimes of torture and conspiracy to commit torture, however, the Lords faced an explicit statutory incorporation of universal jurisdiction for torture through Section 134 of the Criminal Justice Act, which came into effect on September 29, 1988 and was intended to implement the Torture Convention.¹⁰⁷

100. See *id.* at 586-87 (citing Lord Lloyd's statement at [1998] 3 W.L.R. 1481).

101. See *supra* text accompanying note 60 (noting Lord Berwick's reliance on treaty law as requiring dual criminality).

102. See *Ex Parte Pinochet III*, *supra* note 11, 37 I.L.M., at 639.

103. Based on the ruling in *Ex Parte Pinochet*, the British Home Secretary Jack Straw determined on December 11, 1998 to authorize the continuation of extradition proceedings and, accordingly, limited this authorization to the extradition crimes encompassed by a majority of the Lords' opinions. See *Ex Parte Pinochet II*, *supra* note 11, at 588.

104. Cf. RESTATEMENT(THIRD), *supra* note 28, § 402(1)(c) ("[A] state has jurisdiction to prescribe its law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory"). The European Community has also adopted the so-called "effects principle" in the Wood Pulp Case. See *Joined Cases 89, 104, 116, 117 & 125-29/85, Ahlstrom Osakeyhtiö v. Commission*, 1998 E.C.R. 5193.

105. See *Ex Parte Pinochet III*, Opinion of Lord Browne-Wilkinson, *supra* note 11, 37 I.L.M. at 639; see also Opinion of Lord Hope of Craighead, *id.* ("Murder is a common law crime which, before it became an extra-territorial offence if committed in a Convention country under Section 4 of the Suppression of Terrorism Act 1978 could not be prosecuted in the United Kingdom if it was committed abroad except in the case of a murder committed abroad by a British citizen."). Interestingly, Lord Millet drew on the doctrine of common-law crimes to even broader effect. He stated: "The jurisdiction of English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider the English courts have and always have had extra-territorial jurisdiction in respect of crimes of universal jurisdiction under customary international law." *Id.* at 650 (Opinion of Lord Millet).

106. See *Ex Parte Pinochet III*, Opinion of Lord Browne-Wilkinson, *supra* note 11, 37 I.L.M. at 588.

107. See *id.* at 590; Convention Against Torture and Other Cruel, Inhuman or Degrad-

Conceivably, the Lords might have found that this judgment of the U.K. political process in favor of asserting universal jurisdiction over torture was sufficient to dispose of the immunity issue. Lord Hutton concluded that on September 29, 1988, when the Criminal Justice Act entered into force and thus provided domestic jurisdiction to prosecute, as a matter of customary international law, Head of State immunity was lifted in the U.K. with respect to torture and conspiracy to commit torture.¹⁰⁸ Admittedly, even Lord Browne-Wilkinson recognized that the interpretation of U.K. law to confer Head of State immunity through implementation of the VCDR, particularly with respect to the functional immunity of former diplomats, was a somewhat tortured theory.¹⁰⁹ Accordingly, he also explicitly found that Head of State immunity was afforded under U.K. law through the incorporation of customary international law as part of U.K. law.¹¹⁰ Arguably, then, just as Head of State immunity was better grounded, as a matter of U.K. law, in the incorporation of customary international law, so too as a matter of U.K. law, customary international law might yield limitations on that immunity.¹¹¹ However, this view did not command a majority of the Lords.

Instead, the Lords addressed the question of immunity as a separate, conceptually independent issue. Focusing on the absence of clear state practice in stripping even former Heads of State of immunity in criminal proceedings, the need for a separate political decision on Head of State immunity loomed in overarching importance to the controlling voices on this panel of Lords.¹¹² Thus, treaty, not custom, assured the Lords that they did not overstep the boundaries prescribed by the international political process. Lords Browne-Wilkinson, Hope of Craighead, and Saville of Newdigate concluded that it was only when the Torture Convention entered into force for the U.K. on December 9, 1988, giving the U.K. treaty-based rights against Spain and Chile, that any functional Head of State immunity for torture and conspiracy to commit torture disappeared, as a matter of international law incorporated into domestic law.¹¹³ Lord Browne-Wilkinson's lead opinion en-

ing Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, as modified, 24 I.L.M. 535 (1985).

108. See *Ex Parte Pinochet III*, Opinion of Lord Hutton, *supra* note 11, 37 I.L.M. at 637-38.

109. See *Ex Parte Pinochet III*, Opinion of Lord Browne-Wilkinson, *supra* note 11, 37 I.L.M. at 592-93. Indeed, the preeminent U.K. authorities would not consider Head of State Immunity in any way derivative of diplomatic immunity principles. See OPPENHEIM, *supra* note 69, at 1031-1126 (treating the topics in two separate chapters).

110. See *Ex Parte Pinochet III*, Opinion of Lord Browne-Wilkinson, *supra* note 11, 37 I.L.M. at 594-95.

111. See, e.g., *Ex Parte Pinochet III*, Opinion of Lord Millet, *supra* note 11, at 594-95.

112. See *Ex Parte Pinochet III*, Opinion of Lord Browne-Wilkinson, *supra* note 11, 37 I.L.M. at 595 (citing, in particular, Lord Slynn of Hadley's concern in *Ex Parte Pinochet* over the absence of state practice, [1988] 3 W.L.R. 1456).

113. *Ex Parte Pinochet III*, Opinion of Lord Brown-Wilkinson, *supra* note 11, 37 I.L.M.

gaged in a detailed and plausible exercise of treaty interpretation, locating his judgment concerning the relation of former Head of State immunity and the Torture Convention in materials that reflected the probable intentions of the states that had adhered to the Torture Convention.¹¹⁴

Thus, at the heart of *Ex Parte Pinochet III*'s findings was the majority of the Lords' insistence on locating their authority for lifting Head of State immunity not only on positive law enacted by the political organs of the U.K., but also on the positive international law the U.K. joined with the rest of the international community to make through the Torture Convention itself. Indeed, the House of Lords found its way to a restrained exercise of judicial power, through treaty law that largely cabined limitations of former Head of State immunity, rather than through an arguably diffuse customary international criminal and human rights law relating to Head of State immunity. Clearly, a majority of the Lords were not prepared to strip Pinochet of former Head of State immunity, even on the limited basis permitted by the statutory analysis of the dual criminality requirement for extradition crimes, without a second, independent analysis of legislative intention on the immunity issue itself. This approach better allowed the Lords to avoid the criticism that, in engaging in an open-ended process of interpreting customary international law, they were – as perhaps Lord Hoffman was accused in *Ex Parte Pinochet II* of doing in *Ex Parte Pinochet* – subordinating their legal analysis to their preferred moral positions.

As a consequence, however, *Ex Parte Pinochet III* raises more ques-

at 582-85 (rejecting arguments that no exception from Head of State immunity should be inferred from the Torture Convention on the theory that retention of immunity would in effect defeat the very object and purpose of the treaty); cf. VCLT, *supra* note 41, art. 31 (requiring interpretation in accordance with a treaty's "object and purpose").

114. See *Ex Parte Pinochet*, at 595 (Opinion of Lord Browne-Wilkinson), 627 (Opinion of Lord Hope of Craighead), and 643 (Opinion of Lord Saville of Newdigate). Lord Goff of Chieveley's dissent, which would have dismissed the appeal from the Appellate Division's finding of immunity, thus formed a majority of the panel of seven Lords for this narrower definition of extradition crimes. See Dissenting Opinion of Lord Goff, *id.* at 595-608. The House of Lords' insistence on authorization both from domestic and international law-making processes finds support in the practice of other states as well. See Brigitte Stern, *Case Note: In Re Pinochet-French Tribunal de Grande Instance*, 93 AM. J. INT'L. L. 696, 698 (1999) (refusing to indict because "such an indictment could be based on neither national law nor on a self-executing international convention or international customary rule"). See also Curtis Bradley & Jack Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999) (arguing that for constitutional due process and separation of powers reasons the Pinochet case does not suggest that international human rights norms will have increased applications in U.S. courts, permitting actions against foreign nationals who violate international human rights); but see Luc Reydam, *Case Note: In Re Pinochet - Belgian Tribunal First Instance of Brussels, November 8, 1998*, 93 AM. J. INT'L. L. 700, 703 (1999) (reporting Belgian tribunal's reliance on the concept that *jus cogens* norms require no additional domestic legislation to be applicable as a source of authority to prosecute).

tions than it answers. By defining the scope of extraditable offenses primarily in terms of U.K. legislation, the decision leaves room for U.K. political decision-makers to correct the Lords' work. Moreover, it invites the international community to revisit the proper definition of the political offense exception found in extradition treaties. The international community could also determine whether the Lords' interpretation of the Torture Convention's effect on Head of State immunity should be revised, in particular, so as to not undermine the *jus cogens* character of the ban against torture, but perhaps to reconsider the modalities for deterring torture so as to include both subsequent punishment and international amnesty. As Lord Goff observed in dissent, "torture may, for compelling political reasons, be the subject of an amnesty, or some other form of settlement, in the state where it has been, or is alleged to have been, committed."¹¹⁵ In a sense, *Ex Parte Pinochet III* poses a question to the international political community.¹¹⁶ A sustainable answer from the international community to the questions posed by *Ex Parte Pinochet III* thus requires reasoned assessment of the considerations raised by Lord Goff's observation in light of the institutional capacities of the current international system.

IV. INTERNATIONALIZED AMNESTY

A workable framework for dealing with the tension between transitional justice and transitional democracy requires, first, an assessment of the comparative policy interests and, second, an appreciation of the institutional possibilities for coordinated action.

A. Policy Rationales for a Supranational Legal Solution

The threat of prosecution by a third party of human rights violations committed by anyone anywhere poses ethical and practical dilemmas for states indirectly involved in the transition process. This is because, from the standpoint of the transitioning states, there may now be a danger of over-enforcement of international human rights norms through multiple channels without the international community's consideration of broader political factors that might be implicated. In addition to the option of individual state prosecution along the lines of

115. *Ex Parte Pinochet III*, Opinion of Lord Goff of Chieveley, *supra* note 11, 37 I.L.M. at 594; see also *Ex Parte Pinochet*, Dissenting Opinion of Lord Lloyd of Berwick, *supra* note 11, 37 I.L.M. at 1325 ("It has not been argued [in this proceeding] that such amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators."); but see *Duty to Prosecute*, *supra* note 10.

116. See generally Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997) (describing the ICJ as operating, especially recently, in this question-posing mode in its relations with the international political process).

Spain's attempt to pursue Pinochet, an investigation at the ICC could be initiated at the request of a state.¹¹⁷ Thus, one might even imagine that an ICC prosecution, just as much as a unilateral state prosecution, could conflict with an amnesty produced through a domestic truth and reconciliation process, although the complementarity provision in the ICC Statute might be read to preclude this result.¹¹⁸ Regardless of the ultimate disposition of this question, states acting individually and outside the ICC might now take matters into their hands, following the Pinochet precedent, rather than wait for the ICC to resolve the complementarity issue.

The case of South Africa illustrates the dangers. Would states concerned that members of the ANC were able to avoid accountability be well-advised to rely on the Pinochet precedent to prosecute those who had escaped South African justice? Arguably, the intervening states would be fulfilling a moral imperative, in the narrow sense, of assuring equal treatment of dissidents as well as governmental violators of internationally-recognized human rights by combatants in a non-international armed conflict.¹¹⁹ This type of prosecution could rectify a

117. See ICC Statute *supra* note 12, art. 13(a), 14.

118. See *id.* art. 17(1)(a) (a "case is inadmissible where . . . [it] is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."). No doubt Article 17(1)(a)'s qualification to the principle of complementarity (that is, deference to state-initiated investigations and prosecutions) was designed to address the problem of bad faith prosecution, such as Libya's assertion of a right to prosecute under the Montreal Anti-Sabotage Convention, rather than to extradite the perpetrators to the U.S. or U.K. See generally Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 1992 I.C.J. Rep. 3 (Apr. 14). But whether it applies to, and thus excludes, an "investigation" initiated with the object of avoiding prosecution, such as one under a TRC, is not answered by the text and appears to have been avoided during the negotiations leading to the ICC. See Mahnouch Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L. L. 22, 28 (1999) (report of U.N. Legal Officer serving as Secretary of the Committee of the Whole of the Rome Conference that determining the meaning of "inability or unwillingness" of a state to prosecute or investigate were considered "thorny" issues in the negotiation); see also Jonathan Charney, *Editorial Comment: Progress in International Criminal Law?*, 93 AM. J. INT'L. L. 452, 459 (1999) (asserting that the ICC Statute does not explicitly resolve the tension between furthering national reconciliation and the prosecution of international wrongs); see also Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L. L. 383, 417-18 (1999) (noting that complementarity was not well defined by the draft statute and not further clarified by the subsequent Preparatory Commission).

119. This analysis sets aside, for the moment, the question of whether treaty law, and perhaps even customary law, would afford a basis for international or third state prosecution. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 16 I.L.M. 1442 (1977) (entered into force Dec. 7, 1978). Even though certain major states, such as the United States, are not party to Protocol II, it has been deemed relevant by the United States in particular contexts. See generally James O'Brien, *The*

past injustice and would not require morally-problematic distinctions to justify why some wrongdoers but not others have reached a degree of culpability that would require prosecution.¹²⁰ The likeliest general defense for ANC human rights violators may be that they were victims rather than persecutors — and that would not seem to be a tenable distinction, especially where the atrocities were committed well outside of the zone of combat in ANC camps in the Front-Line states. Thus, there is at the outside risk that the need to avoid problematic distinctions may well cause intervening states to paint with too broad a prosecutorial brush.

On the other hand, there is a sense in which states may have a larger responsibility — arguably either to act or refrain from acting, as the case requires — in order to further democratic values in transitional societies. This may be especially true for states that may already retain some responsibility for the transitional societies, such as might be the case for the United States with respect to Cuba, or in which their citizens having claimed a historical interest, as Spain might with respect to Chile. Even when the intervening state's motives are oriented toward complying with international law obligations, rather than selectively prosecuting former tyrants for merely domestic political satisfaction or unrelated foreign policy desiderata, the competing value of furthering democratic transitions also may be at stake.¹²¹ Finally, as

International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 AM. J. INT'L L. 639, 647 (1993) (noting the relevance of Protocol II given Yugoslavia's own adherence to that treaty).

120. Selective prosecution concerns flow from the possibility that the amnesty program of a transitioning state impermissibly discriminates between classes of offenders depending on their views or their status, not only in relation to the old but also the new regime. Thus, distinctions drawn by the prior regime concerning the kind of conduct that may warrant amnesty should not in principle receive broad deference from the international community in addressing selective prosecution concern, since often the moral framework for assessing personal accountability in respect of criminal acts has eroded and the typical strategy of the governing elites is to make as many in the society as possible complicit in the state's violation of human rights. See Osiel, *Obeying Orders*, *supra* note 46, at 1012-20 (describing the Argentine "dirty war"); see also Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2040-41. ("Selective prosecutions targeting high officials threaten the liberal principle of individual responsibility. . ."). Accordingly, the basis for making the fine-grain distinctions to implement a selective prosecution may be problematic and may raise serious questions about amnesties that extend to past conduct of those who play a key role in the new order.

121. See Ricardo Lagos & Heraldo Munoz, *The Pinochet Dilemma*, FOREIGN POL'Y 26, 32 (Spring 1999) [hereinafter *Pinochet Dilemma*] ("Much of the international community has resigned itself to the notion that the state may forgive under some circumstances in order to safeguard values—such as democracy and stability—that are as important to society as justice."). Arguably, democracy and stability may be as important to society as justice because, like justice, they are moral goods. Thus, a moral calculus that accepts the "lesser moral evil" may be deemed permissible, even in such predominantly Catholic countries as Chile, if "choice is unavoidable." See GERMAIN GRISEZ, 2 THE WAY OF THE LORD JESUS: LIVING A CHRISTIAN LIFE 291 (1993) (a neo-Thomist Catholic argument rul-

the responsibility for dealing with past violations in international human rights is shifted to international venues, democratic forces in transitioning states will be discouraged from addressing the question in a way that might further the consolidation of the principle of accountability in the political culture of the transitioning state.¹²² Are third-states free to disregard these concerns?

These ethical considerations need to be evaluated with as much foresight as is practicable. Generally, the question of the selective over-enforcement of human rights in a transitional context could draw lessons from the study of transitional justice in relation to economic rights. In that context, as any state that has moved from the more conventional case of regulation to deregulation of property and contract-related rights could testify, fully rectifying past wrongs may undercut transition.¹²³ Rulemaking concerning *ex post* compensation arrangements must always, in a transitional context, take into account the risk of changing incentives *ex ante* in ways that worsen the defects of the pre-transition situation or reduce the likelihood of welfare-enhancing transitions.¹²⁴ Transitions toward greater liberty and democracy are arguably amenable to similar analysis. That is to say, in finding the preferred trade off between maintaining "justice" in respect of past wrongs and maximizing "justice" in the future, economic reasoning counsels renewed attention to the effect that pursuing one kind of justice has on the production of the resources necessary to produce another kind of justice.¹²⁵ For example, to the extent that a TRC can assist the national

ing out the balancing of merely prudential concerns against moral demands).

122. See Lagos & Munoz, *Pinochet Dilemma*, *supra* note 121, at 36 (citing the example of the potential effect on Chilean democracy of Pinochet's return to Chile). Given the charges that have emerged in the proceeding in the U.K., it may be that Pinochet has committed offenses that would not be covered by the 1978 Chilean Amnesty Law. See *id.*

123. Jim Rossi writes in the deregulatory context: "the optimal compensation scheme from an economic efficiency perspective may provide for only partial indemnification of expectation or reliance losses from changes in regulation." See Rossi, *The Irony of Regulatory Takings*, 77 TEX. L. REV. 297, 318 (1998) (reviewing J. GREGORY SIDAK & DANIEL F. SPULBER, *DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES*) (citing Steve Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 59-60) (1979)).

124. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 537 (1986) [hereinafter *Economic Analysis*] (relating this proposition to the "moral hazard" problem in law and economics analysis of insurance problems).

125. Arguably, however, there is no justification for protecting the reliance interest of former human rights violators when their context did not entitle them to have a legitimate reliance interest. See generally Jill Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997) (arguing that only situations of "stable equilibria" – that is, circumstances in which background legal principles that form the basis of choice are not likely to change – generate reliance interests that merit compensation after transition). Fisch argues that an equilibrium is stable when "the applicable legal rules are clear, have been promulgated by a higher legal authority, have persisted over time and in a variety of specific cases, and have not been widely criticized or ques-

healing process by assuring full investigations of the truth, including the fate of the individual victims, the possibility that this information will be used in a prosecutorial context later, even if in another country, dramatically increases the likelihood that such information will not be presented.¹²⁶

However, a caveat is in order, for as much as the risk of prosecution, the fear of assassination after exile weighs on the mind of the departing dictator and those who supported him. One might wonder whether even the least Machiavellian of princes would ever believe that the mere parchment barrier erected through amnesty could guarantee

tioned by lawmakers with comparable authority. . . ." *Id.* at 1102. She acknowledges, however, that the "stability of a regulatory context is a matter of degree, and, in any given case, individual factors may point in opposite directions." *Id.* at 1103. Application of this analysis to the case of transitional justice may be difficult, particularly where, as in the case of selective prosecution, it implicates the "potentially serious concern . . . that the government might—arbitrarily or intentionally—single out particular individuals or groups, either as direct targets of punishment or as undeserving of equal consideration." *Economic Analysis*, *supra* note 124, at 574; *cf.* Osiel, *Obeying Orders*, *supra* note 46, at 1012-16 (noting the weakness of positivist justifications for subsequent punishment of unlawful orders issued in a fundamentally immoral legal order).

126. Of course, the point could be extended as well to the vindication of economic rights that, as a corollary of the suppression of political or civil rights, were in the past denied in transitional regimes. By this I mean that in the special case of transitional justice, domestic claims for vindication of property and contract rights may not be accorded their full weight in light of the common interest of victims in securing additional gains. See Sophia von Rundstedt, *The Restitution of Property After Communism: Germany, the Czech Republic and Poland*, 4 PARKER SCH. J.E. EUR. L. 261, 324 (1997) ("Some of the basic legislative decisions made in the restitution context conflict with international legal principles . . . [because of the] diverse motives that have prompted policy-makers to ignore legal problems in order to devise a politically, economically and socially acceptable compromise."). See generally INGA MARKOVITS, *IMPERFECT JUSTICE* (1995) (detailing GDR accommodation with accountability for the past and reconstruction and staffing of new institutions in the former GDR consistent with FRG norms). This may well restate the concept of "average reciprocity of advantage" underlying U.S. takings doctrine. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (described by Justice Brandeis, in dissent, as an implicit premise of Justice Holmes's majority opinion). Arguably, to the extent third parties also benefit from a transition in which they do not obtain full compensation, there may be room for extending the "average reciprocity of advantage" concept to international takings where the class of foreign investor interests, albeit not individual interests in the particular country, are ultimately better served by a successful transition than by full compensation. To state now the obvious, to achieve overall gains, international human rights and international economic values sometimes may require balancing, just as must other relevant policies. See, e.g., Antonio F. Perez, *WTO and U.N. Law: Institutional Comity in National Security*, 23 YALE J. INT'L L. 301, 358-81 (1998) [hereinafter *WTO and U.N. Law*] (for conflicts that may arise between trade interests and security interests at an international level, arguing for a policy-balancing approach in the developing of WTO jurisprudence); see also Antonio F. Perez, *To Judge Between the Nations: Post Cold War Transformations in National Security and Separation of Powers*, 20 HASTINGS INT'L & COMP. L. REV. 331, 383-401 (1997) (analyzing relative approaches of domestic governmental institutions in balancing trade, privatization and arms control concerns in an international law context).

his physical survival. If so, then amnesty would leave the bitter taste of impunity without the sweet aroma of democracy. On balance, however, it seems that the risk of independent state prosecution may undermine the larger purposes of human rights law enforcement in a way that gives new, ironic meaning to the classic Prisoner's Dilemma.¹²⁷

Accordingly, it seems essential that to come to a reasoned accommodation of potentially competing international interests, the international community cannot entirely forgo the policy option of international amnesty for international crimes.¹²⁸ The essential question, however, is how to structure a decision-making process that permits effective employment of this policy option.

B. Institutional Considerations and Choices

Management of these risks cannot be effected, however, without international coordination. Institutional options run the gamut from starting afresh to building on existing, related international organizations.

In theory, at least, one option might be to construct a counterpart to the ICC, which might dispense amnesty.¹²⁹ Yet an international convention, analogous to the ICC Statute, could very well take years to negotiate. In the meantime, the *Ex Parte Pinochet* and *Ex Parte Pinochet III* decisions, and the jurisprudence they may well spawn, will have immediate effects in undercutting transitional democracy. More to the point, even assuming an international TRC could be negotiated from the beginning, it is quite likely that domestic political considerations will prevent adherence for many states. This is because, for leaderships in stable democracies, a TRC counterpart to the ICC will not appear to be a high priority. For ruling elites in politically-unstable states, adherence to a TRC regime might well undercut domestic legitimacy by

127. See, e.g., Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation*, 79 AM. POL. SCI. REV. 923 (1985).

128. See W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROB. 75 (1996) (including amnesty in the policy options mix). The next question suggested by Reisman's insight is the "how" question. Recognizing the possibly anarchic implications of the Pinochet case, the international interests in offenses against the international community as a whole and a state's interest in national reconciliation "should be taken into account through some established international process, but this issue has not yet been resolved." Charney, *supra* note 118, at 458-59. See also Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 COLUM. J. TRANSNAT'L. L. 693, 721 (1999) (recognizing the potential policy conflict between international rule of law concerns and transitional democracy, and proposing as a resolution a legal rule of thumb, namely: "a presumption of extraditability and subsequent criminal jurisdiction that could only be overcome by a convincing showing that the implementation of international law would constitute a 'clear and present danger' for the country of the objecting government").

129. See Scharf, *supra* note 19, at 375.

conceding, perhaps, the need for such an option. Even more important, unless adherence to a multilateral TRC regime is universal, any rights or duties to prosecute that might survive for non-participating states will continue to have the effect of destabilizing amnesties conferred by the international TRC. Finally, to the extent a TRC regime is negotiable and enforceable, or at least able to reduce the level of exposure to the risk of third-party prosecution, such a TRC regime would likely commit the international community as a whole to a Procrustean set of standards and procedures in precisely the kind of exercise that, to achieve the goals of national reconciliation through internally negotiated accommodations, would require flexible international standards and procedures. It would, moreover, require the exercise of political discretion by international authorities, both in whether to defer to local preference and how to relate amnesty to other policy tools the international community might employ to advance its overall interests. An international counterpart to the ICC arguably would lack the political sensitivity to accomplish these objectives. Thus, perhaps an argument can be made for accepting the judicialization of the international prosecutorial function, particularly for furthering international judicial cooperation and the consolidation of rule of law principles in the legal cultures of emerging democracies (and even democracies such as Spain, where the task of consolidating democracy continues).¹³⁰ Yet, judicializing the amnesty function internationally would either divorce international amnesty from its broader political objectives or enable the exercise of political discretion by institutions unsuited to the task and lacking the political credibility that flows from accountability to the sources of power and experience in the international political process.¹³¹

Indeed, in the short term at the very least and perhaps as far as the eye can see, an international amnesty binding on all states that could exercise universal jurisdiction for relevant human rights violations would be achievable only through the Security Council. Only the Security Council has the power under Chapter VII of the U.N. Charter to make binding "decisions" in circumstances where it finds "the existence of any threat to the peace, breach of the peace, or act of aggression."¹³² The Members of the United Nations further "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter,"¹³³ both "directly and through their actions in the

130. See Ann-Marie Slaughter, *The Long Arm of the Law*, FOREIGN POL'Y 1999, at 34-35.

131. Cf. Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109 (1996)(assessing the relevance of power to the formation of rules of customary international law).

132. U.N. CHARTER art. 39.

133. U.N. CHARTER art. 25.

appropriate international agencies of which they are members."¹³⁴ The former Yugoslavia and Rwanda situations would seem to suggest that if the Security Council could make the prudential finding that the prosecution of human rights violations was warranted as a measure to prevent a "threat to the peace," then it might be reasonable for the Security Council to make the judgment that amnesty would be equally related to avoiding an eruption of international violence arising out of a transition to democracy.

There might be limits on the Security Council's exercise of discretion. For example, it appears that the Security Council has even considered creating an Ad Hoc Tribunal to address humanitarian law violations by the Khmer Rouge that occurred as far back as their reign of terror between 1975-79, although the Khmer Rouge is no longer a serious contender for power in Cambodia. Thus, the precise relation between punishment for offenses that were committed over a generation ago and existing "threats to the peace" might need to be articulated.¹³⁵ Yet any doubts that purely retrospective measures by the Security Council would be within Chapter VII, would not apply to the establishment of a regime conferring amnesty if such amnesty is deemed by the Security Council to be related to the success of a transitional regime and that regime's stability in turn furthers international peace and security. The relation between domestic stability, given the risks of regional destabilization through, among other things, and refugee flows is now a settled basis for Council action.¹³⁶ Indeed, the ICC Statute's deference to recommendations of the Security Council, which must also under Chapter VII satisfy the standard required for binding decisions,¹³⁷

134. U.N. CHARTER art. 48(2). Whether the ICC would be an "agency" for these purposes would seem beside the point, given the broad commandments of Articles 2(5) and 2(6) respecting cooperation with UN purposes and principles in their conduct both with respect to targets of UN enforcement action and non-Member states of the UN. *But cf.* Arsanjani, *supra* note 118, at 28 (arguing that if a state prosecution or investigation satisfies the complementarity criteria of Article 17 of the ICC Statute, then the ICC would be required to defer to the state, notwithstanding Article 103 of the Charter, because Article 103 "binds the state but not the court").

135. Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L. L. 462, 463 (1998) ("One of the issues before the Council regarding this proposal will be whether its powers under [chapter VII] encompass punishing members of a defunct regime for crimes committed two decades ago.").

136. *See generally* Perez, *On the Way to the Forum*, *supra* note 21. One might reasonably disagree whether international criminal tribunals really do cause the restoration of peace and security, so that their establishment would be rationally related to achieving the purposes for which the Security Council would be authorized to create them. *See e.g.*, Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TUL. J. INT'L. & COMP. L. 5, 46-9 (1998) (calling into question whether international criminal tribunals and the prosecution of war criminals further promotes stability rather than merely reflecting stability by the commitment of other human and material international resources).

137. U.N. CHARTER art. 40.

manifests international recognition of the Council's broad powers to at least delay criminal prosecutions if international peace and security so require.

Such a judgment would arguably be binding on Member States, since Article 103 of the United Nations Charter provides, "[I]n the event of a conflict between the obligations of Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."¹³⁸ Although subject to the theoretical caveats that in certain cases a duty to prosecute will arise from *jus cogens* or even customary international law,¹³⁹ so that a general amnesty would exceed the powers of the Security Council,¹⁴⁰ the Security Council mandated amnesty would provide the legal basis for credible international guarantees against subsequent prosecution of an amnesty beneficiary in a case of transitional justice. At the same time, to the extent the exercise of universal jurisdiction by a state unilaterally would constitute impermissible intervention in the internal affairs of the transitioning state,¹⁴¹ collective intervention under explicit UN authority would largely address such concerns.¹⁴² Indeed, the formal legality of the Security Council's

138. U.N. CHARTER art. 103.

139. Technically, the effect of Article 103 of the Charter is limited to other treaties of Member States, leaving open the theoretical possibility that supervening customary international law, which is ordinarily regarded as operating at the same level as treaty law. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1(a) & (b). Nonetheless, most arguments concerning the so-called duty to prosecute seem to be based on multilateral treaties. See Orentlicher, *Duty to Prosecute*, *supra* note 10. Accordingly, it may be reasonable to conclude that no international customary law independent of treaty-based norms could survive the Supremacy Clause effect of Article 103 of the Charter with respect to Chapter VII decisions of the Council concerning amnesty.

140. Setting aside natural law-like norms such as *jus cogens* and the theoretical claim that supervening custom could trump the law-creating powers of the United Nations Organization, the Security Council is limited, at a minimum, by the "purposes and principles" of the UN. See U.N. CHARTER, arts. 1 and 2. The limiting effect of this language has not been authoritatively determined as yet, and one suspects that the International Court of Justice, even though it has concluded that it has jurisdiction to consider the merits of Libya's claims, will somehow avoid reaching this issue now that the two Libyan suspects in the Lockerbie matter have arrived in the Netherlands to stand trial and the Security Council imposed sanctions against Libya have been lifted. See Peter Bekker, *The ICJ Upholds its Jurisdiction in Lockerbie Cases*, ASIL NEWSLETTER, Mar.-Apr. 1998 at 2; see U.N. Security Council Presidential Statement on Lockerbie Suspects, 38 I. L. M. 949 (1999) (reporting suspension of sanctions pursuant to Secretary-General report of April 5 and Security Council Resolutions 883 and 1192).

141. See *supra* note 45. In a separate context, Robert Post has written: "Individual citizens can identify with the creation of a collective will only if they believe that collective decision making is in some way connected to their own individual self-determination." Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997) (book review). Much the same can be said about the relationship between individual states and the global community.

142. Cf. Lori F. Damrosch, *Changing Conceptions of Intervention in International Law*, in EMERGING NORMS OF JUSTIFIED INTERVENTION 91 (Laura W. Reed & Carl Kaysen eds.,

exercise of its authority might minimize moral objections to international intervention and in a state's exercise of its sovereign right to determine its own destiny through choosing its own transitional justice policies.¹⁴³

The institutional vehicle for implementing an internationally-authorized and mandated amnesty would still need to be determined, however. One might still look to the ICC Statute for authority to exercise the kind of prosecutorial discretion that would be necessary to further a transition in a particular situation. The ICC Statute does not, however, as currently drafted, authorize the granting of an internationally-binding amnesty. First, Article 20's provisions relating to double jeopardy do not apply unless the person has been actually "convicted or acquitted" by the ICC.¹⁴⁴ Second, a close reading of the provisions relating to the prosecutor's functions suggest the Prosecutor arguably would not be authorized to employ the procedures of the ICC and the authorities of the Prosecutor's office to facilitate an internationally-sponsored investigation of facts for the purpose of establishing truth and achieving reconciliation, rather than imposing punishment. The Prosecutor of the ICC is authorized to terminate a prosecution only if "[the] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."¹⁴⁵ Admittedly, the Prosecutor's discretion not to prosecute is broad, for it allows consideration of "all the circumstances." Moreover, the illustrative list of grounds for exercise of prosecutorial discretion allows arguments concerning the "interests of the victims," which could include truth and reconciliation that flow from an appropriately structured procedure for the conferral of amnesty. A referral by a state of a situation to the ICC, however, must "request the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes."¹⁴⁶ More importantly, the Prosecutor's exercise of discretion not to prosecute may be exercised only "upon investigation."¹⁴⁷ Reading these two provisions together, it is difficult to conclude that the Prosecutor could initiate an investigation for any purpose other than ultimately to prosecute specific allegations, for the better reading is that discretionary grounds exist for declining to prosecute specific cases only

1993) (distinguishing collective use of force under Security Council authority from unilateral use of force).

143. See Lea Brilmayer, *AMERICAN HEGEMONY: POLITICAL MORALITY IN A ONE SUPERPOWER WORLD* 157 (1994) (arguing that even errors of substantive morality by the Security Council might be acceptable if procedural regularity were observed).

144. ICC Statute, *supra* note 12, art. 20(2).

145. *Id.* art. 53(2)(c).

146. *Id.* art. 14(1).

147. *Id.* art. 53(2).

when a particularized inquiry yields the conclusion that the interests of justice would be better served by not prosecuting even when the facts would otherwise satisfy applicable legal and evidentiary standards.

Third, and finally, the ICC Statute explicitly bars jurisdiction with respect to offenses committed prior to its entry into force.¹⁴⁸ It would be a particularly challenging task for the ICC to interpret flexibly its authorities so as to permit investigation, even if not for the ultimate purpose of prosecution, of even specific allegations concerning events that preceded the ICC's establishment. This would be even more problematic for situations in which no specific allegations can be marshaled prior to the initiation of an investigation but an internationally-approved amnesty commitment is deemed necessary to facilitate a transition.

All this is not to say that there is no room for expansion of the Prosecutor's powers through a process of authoritative interpretation that is customary for international organizations. At the request of the Security Council, for example, the International Atomic Energy Agency (IAEA) participated in the implementation of the arms control verification regime established by Security Council Resolution 687 with respect to Iraq,¹⁴⁹ even though the IAEA Statute nowhere explicitly provided for IAEA authority to monitor anything other than the peaceful use of nuclear material in IAEA member states, such as Iraq.¹⁵⁰ However, the better view would seem to be that the special claims of legitimacy in the sensitive area of international criminal responsibility and amnesty would be better served by express and unambiguous international law-making. Thus, if the ICC were deemed to be the appropriate institution for a particular international truth and reconciliation commission, then it would be possible for the Security Council to request the ICC to undertake investigative functions related to violations of human rights within the scope of its competence to prosecute. While the ICC may ultimately be able to conform its existing powers to participate in a broad range of possible cases at the request of the Security Council, an appro-

148. *Id.* art. 11(1).

149. S.C. Res 687, U.N. SCOR, 46th Sess., 2981st mtg., para. 13, U.N. Doc. S/RES/687 (1991).

150. Statute of the International Atomic Energy Agency, *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (entered into force July 29, 1957) ["IAEA Statute"]. The IAEA traditionally had interpreted its own mandate not to permit an IAEA role in the monitoring of even non-nuclear weapons related yet military uses, such as for nuclear power production in nuclear submarines, of nuclear material. See para. 14 of The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/153 (June 1972) (the model for all IAEA Agreements with non-nuclear weapon state parties to the NPT, such as Iraq). Nonetheless, the IAEA appears to have concluded that its own powers under the IAEA Statute could be extended to respond to the Security Council's request, notwithstanding the technical argument that it was not authorized to do so under its treaty relationship with Iraq or explicitly by the IAEA Statute.

priately cautious estimate of the ICC's capacities suggests that additional institutional structures or an explicit amendment to the ICC Statute may be necessary to deal with all possible transitional contingencies requiring internationally-binding amnesty.

That said, even if the Security Council were able to employ the ICC ad hoc to conduct the kind of factual investigations that would provide the meat for a South African-style TRC, there are serious doubts whether the Council should take direct responsibility for granting clemency. True, the political judgment of the Council may be instrumental in making the determination whether to trigger a TRC, for precisely the reason that amnesty should be available only when the competing demands for peaceful transition and accountability can best be reconciled in this fashion. This is a uniquely prudential judgment requiring assessment of political facts that are intrinsically beyond the competence of judicial authorities or of any likely set of international civil servants that might staff a TRC (or the ICC functioning as a pseudo-TRC). However, too deep Security Council involvement creating rules governing particular cases will appear to take the form of selective and perhaps unjust prosecution, just as too little UN supervision and local accountability have in the case of UN-authorized prosecution raised the specter of the same dangers.¹⁵¹ Principles of neutrality and generality in the administration of justice would call for as limited an exercise of political discretion as possible by the Security Council. Moreover, recent use by the Security Council of its chapter VII authorities in a wide range of cases has served in the eyes of many to de-legitimize Security Council enforcement action.¹⁵²

151. See Jose E. Alvarez, *Crimes of States, Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999) (arguing that the Rwanda Criminal Court established by the Security Council has failed adequately to take into account the needs of Rwandan society by focusing alone on accountability for high-level perpetrators).

152. See, e.g., David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993) (critiquing the so-called "reverse" veto, under which once the Security Council authorization is given for enforcement action, such as with respect to Iraq, the veto of one of the Permanent Members, such as the United States, prevents the international community from revoking authorization for the enforcement action). Still other instances of potential abuse of power by a Permanent Member of the Security Council have raised questions concerning the legitimacy of Security Council activities. See, e.g., John M. Goshko, *Chief U.N. Arms Inspector Sees Trouble in Spy Charge: Butler Says He Did Not Know of Espionage*, WASH. POST, Mar. 4, 1999, A2 (reporting admission by USG that, without knowledge of UN Special Commission on Inspections (UNSCOM) for Iraq established under Security Council Resolution 687, U.S. intelligence agents used UNSCOM special inspection teams for espionage activities in Iraq unrelated to legitimate weapons monitoring information collection activities). This evidence merely reinforced the long-brewing doubts spawned by the continuing U.S./U.K. use of force against Iraq since the end of the Gulf War. See generally Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124 (1999). The perception that the great powers use the Security Council solely when it suits them and evade its strictures when it

It thus must be feared by many states that the reposing power in the Security Council would simply enable the most powerful states to assure themselves that their own leaders could evade prosecution for international crimes for which there would be universal jurisdiction, including Security Council authorized use of force. Indeed, it might be feared that the Council would go farther by seeking to immunize the Heads of State of the five permanent Security Council seats — let us suppose, for example Presidents Clinton or Bush — for U.S. sponsored humanitarian intervention in Iraq or Yugoslavia. While these may be red herring arguments, for surely no reasonable prosecution could be brought against the authors of these kinds of uses of force, fear of this possibility could undermine the confidence that would be necessary for the Security Council to perform the discretionary political function of conferring amnesty.

Therefore, accomplishing the legitimate ends of using prosecutorial discretion to achieve the larger goal of transitional justice may require the Council to turn the reins over to an authoritative agent capable of wisely exercising discretion. Arguably, only a Secretary General commanding the respect of both the members of the Security Council and the General Assembly, and serving at their joint pleasure, would be in a practical position to exercise such authority.

But would the Security Council ever delegate this power? Arguably, it would be preferable for the Council not to make a general grant of authority to any delegee, even the Secretary General, without first testing the concept in particular cases, much as experience with the UN-authorized Yugoslavia and Rwanda Criminal Courts may have created momentum towards an ICC. On the other hand, the transition-promoting effect of establishing a mechanism for international amnesty calls for immediate action that would have, at a minimum, demonstrative effects countering the Pinochet precedent for the current crop of human rights violators masquerading as Heads of State. In the short term, immediate action could be taken internationalizing the amnesties conferred by qualifying current TRCs, such as the South African Truth and Reconciliation Commission. However, for the long haul, the test case for Security Council-authorized internationalized amnesty, rather than a multilateral solution suggested by the ICC model, would be one

does not was further buttressed by the recent NATO decision to use force in Kosovo without explicit U.N. authority. This, in turn, spawned a debate concerning the continuing validity of the legal framework for the management of collective security set forth in U.N. Charter. Compare Michael Glennon, *The New Interventionism: The Search for Just International Law*, 79 FOREIGN AFF. 2 (1999) (arguing that the Kosovo intervention signals the irrelevance of the Charter and emergence of a new legal framework) with Thomas Franck, *Sidelined in Kosovo?: The United Nations' Demise Has Been Exaggerated – Break It, Don't Fake It*, 79 FOREIGN AFF. 2 (1999) (maintaining that the Charter legal system is still adequate to the task and that the Kosovo action is an aberration rather than an example of an emerging new set of rules).

where the legitimacy of Security Council judgments would be most problematic — that is to say, a case like Cuba, where transition to democracy would directly affect the interests of a member of the Security Council itself.

V. TRANSITIONAL JUSTICE FOR CUBA UNDER INTERNATIONALIZED AMNESTY

Cuba's transition will require international attention, and not only from the United States. Much as the Pinochet case has resurrected some cold and hard questions about American complicity in the overthrow of Salvador Allende,¹⁵³ among other things that only time will reveal, Castro's political demise will reopen old wounds for the United States. Many still react viscerally to the very mention of Pinochet's name, and are willing to go to great lengths, including perhaps even destabilizing the Chilean Government's continuing efforts to construct a stable democracy in a still deeply divided society, many outside the United States and Cuba will go to extraordinary lengths to bring both Castro and the United States to account. The risk of judicial action, including, questions of civil liability,¹⁵⁴ against either Castro and his successors, and even against those on the American side of the Florida Straits who might be in legal jeopardy, would profoundly complicate any Cuban-American *rapprochement*.

Cuban-American relations over the past century have been, as Churchill said of Russia, "a riddle wrapped in a mystery inside an enigma."¹⁵⁵ From the 1898 sinking of the *Maine* in Havana harbor, precipitating the Spanish-American War,¹⁵⁶ to the 1996 shoot-down of two Brothers to the Rescue planes above the Florida Straits, which lead to

153. For an official defense of the U.S. role, the authoritative account may be found in HENRY KISSINGER, *PHILOSOPHY AND REALITY IN YEARS OF UPHEAVAL* 374-413 (1982); by contrast, the most pervasively critical account shaping public understanding of the U.S. role might be found in the film *MISSING* (1982).

154. See *Alexandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997) (lifting state sovereign immunity under terrorist offense exception); see also *Cuba's Repressive Machinery*, *supra* note 1, at 200-01 (reporting actions against Castro already initiated in France and Spain in the aftermath of the Pinochet case). See generally John Murphy, *Civil Liability of the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 47-55 (1999) (arguing that given barrier to implementation of the International Criminal Court, international civil liability for human rights violations, particularly through lawsuits in the United States, may offer a likelier method of deterrence than international criminal prosecutions, and recommending a multilateral approach for assuring the enforcement of such judgments); but cf. Bradley, *supra* note 113.

155. See Winston Churchill, Radio Broadcast [Oct. 1, 1939], quoted in BARTLETT'S, *supra* note 36, at 620.

156. See Thomas B. Allen, *Remember the Maine*, 193 NAT'L GEO. 91 (1998) [hereinafter *Remember the Maine*] (reviewing latest findings on the sinking of the *Maine*); Rafael E. Tarrago, *The Thwarting of Cuban Autonomy*, 42 ORBIS 517 (Fall 1998).

the enactment of the Helms-Burton sanctions legislation and a near trade war between the United States and its key allies,¹⁵⁷ too many questions of fact and doubts about the interpretation even of agreed facts have plagued the troubled Cuban-American relationship.

At one end, was exploding and sinking of the *Maine* an American plot to instigate an imperialist war, to obtain control of Cuba before it won independence on its own from Spain? At the other end, could U.S. forces have intervened to prevent the deaths of the two Brothers to the Rescue pilots, or was the U.S. government itself complicit in an attempt to deter the Brothers to the Rescue from embarrassing the Cuban government and thereby promoting the destabilization of the regime? Or worse yet, did elements of the U.S. government hope to provoke a Cuban overreaction that might compel the U.S. government to take even more extreme measures than the enactment of merely an additional economic sanctions bill? In between, did the United States drive Castro into the arms of the Soviet Union, or was separation from the United States the inevitable and strategically-necessary choice of any new Cuban leadership committed to nationalism during the height of the Cold War? As for U.S. attempts to assassinate Castro, how high up was this policy decided, and for how long was it maintained? How close did we come to nuclear war with the Soviet Union during the October 1962 missile crisis, and what did Fidel Castro, fearing assassination or invasion, do to instigate or exacerbate the crisis? Is there any truth to the long held belief by many U.S. citizens, and even by some U.S. officials including perhaps even Lyndon Johnson himself, that Castro may have had something to do with John F. Kennedy's assassination in November 1963?¹⁵⁸

Many of these questions reflect simple ignorance of recent historical research. For example, it now seems quite clear that the sinking of the *Maine* was not an imperialist plot,¹⁵⁹ even if that new fact does not make the U.S. declaration of war against Spain any less self-interested. Some of the questions, with all due respect to the legendarily high quality of the Cuban intelligence services, reflect Martryoshka doll narratives of mind-numbing Machiavellian sophistication smacking of dime store novels of Cold War vintage. Could even the Cubans pull off the Kennedy assassination without ultimately being discovered by the U.S. government? And if the U.S. government could prove such a thing, could that secret ever really be preserved in our post-Watergate political culture? But all these questions reflect a deep, and almost certainly

157. See generally Perez, *WTO and U.N. Law*, *supra* note 126, at 302-05.

158. WALTER CRONKITE, *A REPORTER'S LIFE* 307-08 (1996) (suggesting, remarkably for a person of Cronkite's status as a member of the U.S. elite, that President Lyndon Johnson in fact did fear that Kennedy's assassination was connected to Cuba and prior U.S. efforts to assassinate Castro).

159. See Allen, *Remember the Maine*, *supra* note 156.

dysfunctional, obsession of virtually all Cubans and all too many Americans with the Cuban-American relationship; and not only with the facts of that relationship but also with its myths. A series of repressed memories will break through to complicate present policymaking. What is worse, the Cuban transition to democracy and the United States's own engagement in that process will be burdened with the dead hand of a false past as well-for imagined violations will be as, if not more, disturbing than any truths that could be remembered. Somehow these memories, both true and false, need to be confronted if Cuba and the United States are to emerge, each whole and together free.

Castro is not immortal, though like Spain's own Francisco Franco, this Cuban also of Gallego stock may well linger far longer than most think possible. Yet transition is inevitable. The new leadership, even if the transition is orderly and gradual, will need to make some kind of break with the old order to establish its bona fides and confirm its legitimacy. But the likelier scenario is a wholesale repudiation of key dimensions of Cuba's past. Thus, assuming any plausible transition scenario, but especially in the case of a radical break that directly repudiates Castro or his surviving successors, U.S. political elites will insist on answers to many of these questions that have bedeviled U.S.-Cuban relations. Even if U.S. political elites do not insist on a full accountability, the Cuban-American political community will insist on some measure of vindication of the moral superiority of their struggle and their version of history. That political voice has been, and likely will continue make itself, heard in the corridors of power in Washington.

Thus, any new government probably will be asked to cooperate in investigating the past sins of the Castro regime. Quite possibly, as a condition of U.S. assistance, it will be asked even to do justice by punishing the guilty and compensating the victims. Already, current U.S. legislation requires forms of compensation, and litigation pending in U.S. courts may even generate enforceable obligations in the short term. Whether this agenda reflects maximum demands that will be sated by Castro's departure, or the first pangs of an ever-increasing hunger for vengeance once the appetizer is served, remains to be determined. But, however great or small the demand for a public accountability, it seems clear that some members of the old regime will have to answer in some way for their past conduct. This will be necessary not only to meet the external demands for justice, flowing from the United States as well as advocates of justice throughout the world, but also to address the need Cubans in Cuba will have to come to terms with their past. In addition to the historical myths that will plague Cuba's relationship with the outside world, real memories will complicate the tasks of the survivors of Castro's failed experiment. The collaborators and profiteers will fear the resentment of those who resisted and suffered. Individualists who could not abide socialism's effort to share the burdens and benefits of community life will thrive through

the new order's accommodation with market society and economic and social competition. The victors will include Cubans remaining in Cuba, as much as the exiles whose willingness to invest in a new Cuba will be an offer any new Cuban government will be unable completely to refuse. Envy of the new coupled with the victors' remembrance of their privations and deprivations will fuel an instinct for revenge in a society whose moral fabric is no longer sewn with the fibers of ideological conviction—the Marxist god having failed. And it is doubtful that traditional religions, particularly in a country only beginning to open the door to transcendental ethics through institutionalized religion, could fill the gap necessary to establish forgiveness and mercy as public values.

Thus, some measure of Cuba's past truths will of necessity emerge through the trial, in one form or another, of the perpetrators of past injustices. Yet, in the course of defending themselves, no doubt Castro or his successors will themselves have a story to tell, a tale that few Americans and Cuban exiles will want to hear. It will include claims about Cuban-American and even U.S. government actions that may have seemed far more morally tolerable when undertaken during the middle of a struggle against the "focus of evil in the modern world," just as the U.S. bombing of Dresden now takes on a different moral character when the need to eradicate a government bent on such evils as the Holocaust has begun to recede in memory. How would the Cuban-American community or the U.S. government fare in the light that would shine then? Would the failure to charge those responsible for excesses on the American side problematicize prosecutions of human rights violations and war crimes on the Cuban-Castroite side, much as the failure to prosecute those Soviets responsible for the Katyn forest massacres of Polish anti-Communists called into question the judgment at Nuremberg?

The devil of course would be in the details. Possibly, however, the body could be modeled on the South African Truth and Reconciliation Commission. Conditions relating to the handling of classified information could be negotiated so as to link the effectiveness of any amnesty offered to some degree of compliance with the requirements to divulge relevant information for the purposes of making an effective determination regarding amnesty; at the same time, there might be public dissemination of only the essential truths at stake subject to protection of legitimate national security concerns in intelligence-related and other relevant areas. Some limited carve-out from the grant of amnesty might be necessary, for acts so beyond the pale that no moral calculus could find that the scales of justice would tilt toward the claim of necessity, even when balanced against the moral weight attached to the formation of a new Cuban democracy and the establishment of a just and lasting peace between Cuba and the United States. And perhaps even some limited form of a superior orders defense would need to be in-

cluded, to take account of the extraordinary context for choice Cubans in Cuba faced after two generations of de-moralized life.

But reasonable people could differ about the answers to these questions. The immediate, necessary task is to begin a trans-Caribbean dialogue between Washington, Miami, and Havana. That is, both Havanas, the one still in power and the one that is emerging in the new civil society that is taking shape as the old Havana moves to adjust itself to an inevitable future. Foreign intermediaries, particularly Spanish, Mexican and Canadian investors, will be instrumental here. In fact, the dialogue may already have begun as the old elites work with the new investors to achieve a *modus vivendi*, a soft landing in the post-Communist *terra incognita*. Unfortunately, that dialogue may well raise false hopes of a seamless, commercially-driven transition in which the old elites replicate their power in new institutions, as may have been the case in the old Soviet Union. This is not a stable vision of Cuba's future; rather, it may even be calculated to place Cuba back on path leading it to repeat its history of cycles of dependence followed by rebellion succeeded by dependence again—repetitions of tragedy and perhaps of farce. Instead, the dialogue must seek real reform through genuine reconciliation. If the Security Council is to speak *ex cathedra* and use its power to restrain interested third parties from prosecuting either Castro or his coterie of followers (and perhaps Cuban-Americans and others who might have strayed), then moral authority must be brought to bear. Is the Vatican a candidate? That remains to be seen, but the possibility should not yet be foreclosed of a substantial Papal role in facilitating a transition. But the new international legal reality created by *Ex Parte Pinochet* makes clear that moral authority may not be enough to do all the necessary work. Rather, the Security Council, acting under Chapter VII, must be involved; and, because the United States is itself a deeply interested party in any Cuban transition, it would be better if the Council could act in a way that removed an appearance of impropriety. In this case, more than any other, it will be necessary for the Council truly to act as a P-5 rather than de facto as the P-1.¹⁶⁰

In sum, Cuba and the United States must learn not only the lessons of their own past but also the lessons from the tragic pasts of other transitional societies. Without justice there cannot be peace; and without peace there cannot be justice. But without a minimal level of reconciliation — at least at the level of the capacity to engage in a continuing conversation about the meaning of the past,¹⁶¹ but if possible through a

160. See W. Michael Reisman, *The Constitutional Crisis of the United Nations*, 87 AM. J. INT'L. L. 83, 97 ("Within the Council, the P-5 meet privately to coordinate policy and, within the P-5, the P-3 meet privately to coordinate policy. There is no question about the identity of P-1.")

161. See, e.g., Alvarez, *supra* note 151, at 483 (citing Mark Osiel, *Obedying Orders*:

new founding of civil and political society in Cuba, reflecting a broad consensus — there can be neither peace nor justice. *Ex Parte Pinochet* thus, fails to grasp this essential reality. By contrast, *Ex Parte Pinochet III* might be read, as I have argued, to perceive, even if dimly, the outlines of the wedded truths that national reconciliation must proceed in tandem with international reconciliation and, for this to occur, there will be no substitute for supranational governance. If transitional justice is wholly legalized or wholly politicized, then it will be neither just nor effective. As Grant Gilmore reminded us: “In Heaven there will be no law, and the lion will lie down with the lamb . . . In Hell there will be nothing but law, and due process will be meticulously observed.”¹⁶² Yet on earth, for the lion to lie down with the lamb, it must both fear and love the law.

Atrocity, Military Discipline, and the Law of War, 86 CAL. L. REV. 939 (1998), for a “civil dissensus” model of national reconciliation in which, by assumption, national reconciliation is not predicated on social consensus over foundational values or even a shared assessment of the legitimacy of the acts of the prior regime). The limited, “civil dissensus” model of national reconciliation bears some resemblance to the use of constructivist social theory, which posits the transformation of participants in dialogue through dialogical engagement as an account for the reconciliation of national policy with international obligations. See generally Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992) (articulating constructivist approach in international context).

162. PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 184 (1982) (quoting Gilmore’s Holmes Lecture at the Harvard Law School).

