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Chapter 9

Defining the Limits: Universal Jurisdiction and National Courts

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By granting the power to prosecute to all states, universal jurisdiction purports to remove the need for a particular connection to any one. It stands alone among the five generally accepted bases for exercising jurisdiction in not requiring a link between any part of the offence and the state seeking to exercise jurisdiction. Universal jurisdiction is also unique in another respect: it ultimately depends on domestic courts for its application. While domestic legislatures and executives, together with international tribunals, all contribute to the definition and scope of universal jurisdiction, its final point of application will be the courtroom. It is domestic judges who must grapple with defining the relationship between international law and national law. It is domestic judges who must consider the procedural and substantive scope of universal jurisdiction in their courts. And it is domestic judges who must tell us how, when, and why universal jurisdiction is or is not applicable in a given case.

The result is a potentially dramatic extension of judicial power and a corresponding threat to judicial legitimacy. Indeed, in the wake of the *Pinochet* case and reports of subsequent prosecutions based on universal jurisdiction in national courts, government officials, scholars, and media officials have already expressed concern over how to tame this new beast. If universal jurisdiction is to be more than an abstract category in international law treatises, what should be its proper limits?

The question may remain academic because in practice, many judges have already imposed quite severe limits. Contrary to claims of rampant judicial imperialism raised both in the media and by scholars such as Jack Goldsmith and Stephen Krasner, judges have actually been very aware of the problems raised by exercising universal jurisdiction, both in terms of the basis of their own judicial power and the potential for interfering in the affairs of other nations.[1] Indeed, as Cherif Bassiouni demonstrates so conclusively in his contribution to this volume, the exercise of pure universal

jurisdiction is actually very rare.[2] Justice Michael Kirby provides a firsthand insight into the precise reasons behind this judicial reluctance, listing fourteen distinct causes for concern at least among common-law judges.[3]

National judges have responded to these problems with a number of different strategies. Many judges and legislatures have in fact insisted on a more traditional jurisdictional nexus in addition to universal jurisdiction, requiring some connection through nationality or territoriality. Some judges sidestep the more problematic questions involved in universal jurisdiction even as they apply it.[4] Those few who have been willing to take the plunge and prosecute a defendant with no traditional connection to the national polity or territory have developed elaborate accounts of the basis and nature of universal jurisdiction. Each of these accounts overcomes some problems but immediately creates others. And each of these accounts is important for what it tells us about the role of judges in international lawmaking.

The two dominant accounts diverge quite sharply in their conception of the source of the demand for universal jurisdiction: international morality versus procedural convenience. This distinction has been long recognized in international law as the difference between "crimes under international law" and the jurisdictional principle of "universality."[5] In essence, crimes under international law are acts so heinous that they strike at the "whole of mankind" and shock "the conscience of nations."[6] In response, nations have come together and criminalized these acts at the international level, thereby permitting or obliging states to exercise jurisdiction over their perpetrator.

The principle of universality, by contrast, is a procedural device by which international law grants all states jurisdiction to punish specified acts that are independently crimes under national law. It is the way in which international law has responded to the pragmatic difficulties, under certain circumstances, of prosecuting offenses recognized as illegal in domestic legal systems around the world.[7] For many international lawyers the paradigmatic example of the principle of universality is piracy, a crime committed more or less indiscriminately against citizens of different nations but committed on the high seas, making it very difficult to exercise jurisdiction based on territory or nationality.[8] As Bassiouni describes, the theoretical origins of universal jurisdiction are complex and still contested.[9] At least in British and early American practice, however, the right to prosecute flowed from international law, but the crime of piracy itself was defined by national law and was prosecuted and punished under the law of the particular nation where the prosecution took place.

The purpose here is not to evaluate the relative merits of these two accounts. The point is rather to understand how each account gives rise to a different set of practical and theoretical problems that judges have had to struggle with. The standard account highlights the notion of an international polity determining what is right. Here, tying universal jurisdiction to crimes under international law is potentially quite expansionist and subject

to abuse, raising the specter of a small group of nations taking it upon themselves to prosecute officials from other nations based on their particular conception of customary international law. It also creates substantial problems of retroactivity for individual defendants and raises a host of difficult procedural questions as the prosecution goes forward. Reliance on the universality principle, by contrast, ameliorates some of these problems but then decouples universal jurisdiction from the limiting concept of extraordinary crimes so grave that they merit punishment by the community of nations and indeed humankind. This account suggests a bottom-up view of international law, stressing the domestic origins of international law. Taken to its extreme, however, it risks losing sight of the necessary role of international law in determining when a state may go beyond its traditional jurisdictional boundaries.

Judges facing these different questions have imposed their own limits on universal jurisdiction, limits that in many cases are probably more restrictive than is either necessary or desirable. The result, at least at this stage in the evolution of universal jurisdiction, is that although the basis for jurisdiction over war criminals and perpetrators of genocide and crimes against humanity has been established in many countries, the actual prosecutions have been blocked in many cases. The international community thus faces less a need for limits on universal jurisdiction than a need to overcome many of the limits already imposed.

The first part of this essay briefly summarizes the general problems posed by the exercise of universal jurisdiction and the corresponding desire of many judges to insist on "universal jurisdiction plus"—the plus provided by some element of one of the more traditional bases of jurisdiction. The second part explores the "standard account" of universal jurisdiction as based on international crimes and highlights the stringent limits that this account typically entails. The third part presents an alternative account that derives from the universality principle and appears to address many of the problems posed by the standard account, although it inevitably raises new problems of its own.

Discussion of the two dominant accounts begins by focusing on the Canadian prosecution in 1992 of Imre Finta for war crimes and crimes against humanity allegedly committed during World War II.[10] The judgments in the *Finta* case appear as the "purest" forms of the two accounts; discussion of the two leading opinions in *Finta* therefore provides a useful framework for considering other judicial opinions regarding universal jurisdiction. Other judges dealing with universal jurisdiction tend to be less explicit and less self-conscious about the account of universal jurisdiction on which their decision may be based. Indeed, judges frequently refer to elements of both accounts in the course of their judgments. Yet a clearer understanding of both accounts, and the differences between them, clarify the work of judges applying universal jurisdiction and will help in the definition of universal jurisdiction. In the second and third parts, therefore, the two accounts are separated out along with their respective strengths and weaknesses.

The fourth part offers a "revised standard account," combining international and domestic law and presuming a dynamic interrelationship between them. This account is both a more accurate account of the actual dynamic between international and national law and a more helpful tool for judges, allowing them to use each body of law to supplement the other where necessary to circumvent many of the current limits imposed on universal jurisdiction. This is not carte blanche to use domestic law to prosecute absent recognition of an international crime. Rather, it recongizes that domestic law may help clarify vague provisions of international law and vice versa. Indeed, this approach should be less frightening to those concerned about the overexpansion of universal jurisdiction, since it assumes the continued predominance of states while recognizing the relevance of each state's internal constitutional structure as well as the relevance of international law.

Finally, the fifth part proposes a process solution to the question of how limits to universal jurisdiction should be defined, arguing that although national judges must tackle universal jurisdiction within the framework of their own national legal traditions, they should also take account of the views of their fellow judges in both foreign and international tribunals. Mandating such a process of "consultation" will institutionalize transnational judicial dialogue and ensure that a healthy pluralism of approaches advances the goals of the international legal system as a whole. It is clear from all the cases discussed that domestic courts are a vital part of the development of universal jurisdiction. To this end, communication among judges will only strengthen the development of universal jurisdiction and clarify its limits.

The Princeton Principles themselves either explicitly adopt or are at least consistent with many of the suggestions advanced here and in other contributions to this volume. However, they are a composite set of guidelines designed to be of maximum use to many different constituencies: national and international judges, legislators, prosecutors, defense lawyers, international officials, and human rights activists, among others. They cannot follow any particular blueprint but must instead strike a balance between generality and specificity, between the law as it is and the law as it is becoming, and between prescription and aspiration. In this essay, I note points of convergence and congruence between the Principles and my own analysis. Finally, in the appendix to this essay I offer a few additional principles of my own, designed to guide judges in strengthening transjudicial communication in this area.

Universality "Plus"

The traditional bases for criminal jurisdiction all require a link between the exercise of the state's most potent power—the power to enforce the law and

thereby deprive an individual of property, liberty, and even life—and the protection of its people or territory. Territoriality is the easiest jurisdictional principle to accept in this regard; states clearly have the power to regulate what takes place on their territory. Nationality, similarly, allows a state to create order among its citizens by regulating the acts of its citizens, even where those acts have been performed outside its territory. Passive personality is explicitly based on a state's ability to protect its citizens;[11] the protective principle is equally explicit in allowing a state to guard against vital threats to its security whether defined in terms of its territorial integrity or the safety of its citizens.

The exercise of jurisdiction without a link either to people or territory raises two major problems: one internal and one external. The internal problem concerns the legitimacy of a court in concentrating the full power of the state against an individual defendant who, by definition, cannot be said to have in any way authorized the exercise of that power through nationality or conduct within the state's territory.[12] The external problem concerns the heightened danger of interference in the affairs of fellow states. When other bases of jurisdiction conflict, the solution generally depends on asking which state has the strongest link with the offense or which state has the strongest interest in exercising its jurisdictional rights. Universal jurisdiction, by contrast, allows the exercise of jurisdiction by a state with no apparent link to prosecute even when states with more traditional bases of jurisdiction do not wish to prosecute.[13] Those states are far more likely to cry foul.

Apparently responding to these concerns, many national courts have purported to exercise universal jurisdiction while actually requiring some kind of more traditional nexus to nationality or territory.[14] Thus, for instance, French courts have held that while universal jurisdiction could be exercised for torture, this could only apply where the accused was on French territory.[15] Such a requirement amounts to a territoriality nexus for France, as the French legal system otherwise allows trials in absentia. Even so, this nexus may have proved insufficient; subsequent cases calling for prosecution of foreign nationals for crimes against humanity have been based on passive personality.[16] Interestingly, the *Eichmann* prosecution relied on both passive personality and the protective principle in addition to universality.[17]

In a German prosecution for genocide related to the events in the former Yugoslavia, *Jorgic,* the Federal Supreme Court required a special link or nexus between Germany and the offense, even though no such nexus is required by the German law.[18] In the case at bar, the court found the necessary link on the basis that the defendant had lived in Germany from 1969 to 1982 and was still registered there, and that he had been arrested on German territory. This link of subsequent residence or citizenship can also be found in war crimes legislation passed in Australia, Canada, and the United Kingdom.[19] It attempts to graft at least some connection to both territory and nationality onto the pure exercise of universal jurisdiction.

These cases and statutes suggest a general discomfort with the notion that States can prosecute anyone for international crimes regardless of any traditional nexus. Indeed, one commentator, Hari Osofsky, has argued that limits can be placed on the exercise of universal jurisdiction in the United States through an adaptation of the civil law doctrine of *forum non conveniens.*[20] He adds that "[t]he four other traditional bases for jurisdiction could help establish the comparative connectedness of various possible forums for the crime."[21] In seeking limitations on the exercise of universal jurisdiction, Osofsky has returned to the traditional bases of jurisdiction.

Universal jurisdiction "plus" essentially avoids the difficult issues embedded in universal jurisdiction. Courts using this approach are trying to avoid having to address the bare fact of exercising jurisdiction with no territorial or national nexus. They thus try to create such a nexus, however thin or after the fact. Such approaches offer judges additional comfort and can provide expedient limits to universal jurisdiction. Judges who refuse such comfort, however, must struggle with the underlying justifications for universal jurisdiction and develop limits accordingly.

The Standard Account: Crimes under International Law

Judges who accept that universal jurisdiction is itself a separate and legitimate basis of jurisdiction quickly find themselves driven to articulate an underlying rationale as a framework for addressing a number of practical and principled issues that immediately arise. The two principal rationales rest on international morality and international convenience. However, neither of these accounts is ultimately satisfactory. Somewhat paradoxically, the vigorous assertion of the imperatives of the human conscience actually makes it harder to prove the crimes alleged. On the other hand, grounding universal jurisdiction in mutual convenience is counterintuitive and reduces the role of international law to that of procedural handmaiden, missing a vital opportunity to vindicate even a relatively thin conception of our common humanity. A third approach that synthesizes some elements of the first two is more promising; it will be explored more fully in Part 4.

The first account of universal jurisdiction may be called the standard account, as it is the most intuitive and best accords with the conventional wisdom summarized in most casebooks and short treatises. It can best be explored through the majority judgment of Justice Cory in the Canadian Supreme Court case *R. v. Finta.*[22] *Finta* offers a dramatic and in many ways distressing explication of many of the most important issues underlying the exercise of universal jurisdiction. The Canadian government undertook a lengthy and commendable effort to ensure that "any . . . war criminals currently resident in Canada . . . are brought to justice." These efforts included a national commission of inquiry and the subsequent adoption of legislation amending the Canadian Criminal Code to allow for the exercise of

jurisdiction over war crimes and crimes against humanity committed outside Canada by non-Canadians.

In 1992, forty-eight years after the deportation of Hungary's Jews, Imre Finta stood trial in Canada for war crimes and crimes against humanity for his role in the process of "de-jewification" of Szeged in the spring of 1944, pursuant to the Hungarian Ministry of the Interior's "Baky Order."[23] Finta was charged by the Crown with having overseen the removal of the Jews from ghettoes to a concentration center, keeping them in a brickyard where they were stripped of their valuables, loaded onto boxcars, and transported, mostly to Auschwitz-Birkenau. In keeping with the requirement under the Canadian statute that the offenses charged be crimes under *both* international law and domestic law, he was charged with two counts each of unlawful confinement, robbery, kidnapping, and manslaughter under the Canadian Criminal Code.[24] For each offence, there were alternative counts alleging that the offense committed constituted a crime against humanity and a war crime.[25]

At no stage in any of the proceedings did Finta attempt to deny his involvement in these actions or produce any evidence to counter the charges.[26] The case centered, therefore, on the mental element required for the crimes charged and whether Finta had this mental element. Did Finta have to know that the acts were inhumane? In the Supreme Court, La Forest, dissenting, argued that "[i]f an accused knowingly confines elderly people in close quarters within boxcars with little provision for a long train ride, then the fact that the accused subjectively did not consider this inhumane should be irrelevant."[27] By contrast, the majority in the Supreme Court argued that Finta must know subjectively that his acts, if viewed objectively in light of the facts and circumstances, would be considered inhumane.[28]

Despite clear and ample evidence of brutal and inhumane acts, the jury acquitted Finta. So overwhelming was the evidence against Finta that the author of the B'nai Brith amicus brief in the case, in a separate article, described the case as an example of jury nullification.[29] The case is striking as an example of how, notwithstanding the best intentions and assiduous government efforts, the exercise of universal jurisdiction can go awry. It is also significant as an example of an exhaustive and carefully reasoned analysis of the foundations of universal jurisdiction by both the majority and the dissent.

Perhaps most important, however, *Finta* stands for a more ordinary exercise of universal jurisdiction than the highly publicized and politicized cases against former leaders such as Pinochet. More ordinary also than the cases brought against alleged perpetrators of war crimes in Bosnia, in which grim media images and the existence of a special international tribunal focus both public and judicial attention on the importance of prosecution. *Finta* involved the kind of defendant who would likely become far more frequent if universal jurisdiction were genuinely institutionalized: a

perpetrator of unspeakable acts living far in time and space from the place of their commission, hoping to bury his past forever. Of this kind of defendant David Matas writes: "[W]hen the accused is old, when he has been a quiet friendly neighbour for decades, when the crime was committed a long time ago and far away in another country, and when the victim is a stranger and a foreigner, there are many people . . . who have little or no interest in a prosecution."[30]

The Majority Opinion

The decision in *Finta* turned on the correct interpretation of particular sections of the Canadian Criminal Code that had been enacted to allow for extraterritorial jurisdiction in certain cases involving people who were Canadian nationals at the time of prosecution, even if not at the time of the alleged offense.[31] The majority decided that the legislation had created two new offenses, war crimes and crimes against humanity, both of which required a different *mens rea* from that required for the equivalent offenses under domestic law. These offenses, war crimes and crimes against humanity, were not only different from the crimes that could be said to underlie them, such as murder, kidnapping and robbery, but also "far more grievous."[32]

Justice Cory's majority decision demonstrates an understanding of crimes against humanity and war crimes as crimes created by international law that are essentially unrelated to the underlying domestic law crimes.[33] They are crimes created by the "community of nations" in recognition of the horror and heinousness of the acts committed. For Justice Cory, "those persons indicted for having committed crimes against humanity or war crimes stand charged with committing offences so grave that they shock the conscience of all right-thinking people."[34] Universal jurisdiction can thus be exercised in the name of universal morality as enshrined and codified in international law.

Inherent Limits

The principal advantage of this account is that it captures the commonsense intuition that universal jurisdiction is a potentially fearsome power that should only be exercised in extraordinary circumstances. The inherent limits built into this account flow from the combination of the degree of depravity or fundamental inhumanity necessary to classify certain acts as international crimes and the necessity of agreement on that classification by a considerable majority of sovereign states.

A related safeguard is the often unstated but very deep assumption that international law typically regulates only relations among states and recognizes only states as subjects. Typically, therefore, states can be held responsible for failing to prevent the commission of acts by their subjects, but how

they choose to designate and regulate such acts is up to them. Only acts that require an extra measure of condemnation, by the international community as a body, merit designation as international crimes, with the accompanying specification of their perpetrators as owing independent duties under international law.

The problem of sovereign interference is thus minimal on this account. Sovereign states have all the protections that they have with respect to any other body of international law—they are free to exercise their sovereign will to constrain themselves through agreements with other states. They must agree, based on the heinous nature of certain offenses, that the state with the closest traditional link to the offense may not be the state that prosecutes it.

A further limit inherent in the international crimes account of universal jurisdiction concerns the problem of retroactivity. Assuming that the crime is defined under international law, then the prohibition on retroactive criminality requires that international law have prohibited the act at the time of its commission. This limit is even more restrictive if the requirement is read to mean that international law must have prohibited the act as committed by an individual rather than by a state. Hans Kelsen, for instance, accepted that international law recognized the crimes committed by the Nazis at the time they were committed, but argued that international law up to that point had provided only for collective rather than individual responsibility.[35]

Finally, the crimes under the international crimes account limits the exercise of universal jurisdiction based on a state's internal conception of the relationship between international and domestic law. "Monist" states are theoretically free to prosecute international crimes as soon as they are established at international law. "Dualist" states, on the other hand, must take the additional step of transposing the international law crime into domestic law. Courts in these states can only exercise universal jurisdiction if they are explicitly authorized to do so by domestic legislation. In addition, formally monist states such as the United States can transform themselves into effectively dualist states by attaching reservations to a treaty through the ratification process that require additional implementing legislation before the treaty can be actually applied.

Imposed Limits

The crimes under international law account of universal jurisdiction also raises a number of problems, many of which, notwithstanding the inherent limits just described, are related to the perception of unchecked judicial authority and hence a fear of expansion of the doctrine. The perception of these problems naturally leads to a search for additional safeguards, resulting in additional imposed limits on when and how courts can exercise universal jurisdiction. This can be a dangerous dynamic, resulting, as in the *Finta* case, in lofty rhetoric condemning the crimes while letting the accused go free.

Punishing Immorality

The first problem grows out of a particular response to the apparent limit of retroactivity.[36] As noted above, Justice Cory in *Finta* could have argued that Finta's alleged crimes were crimes under international law at the time of commission,[37] but he appears to have accepted that international law did not prohibit war crimes and crimes against humanity on an individual basis prior to the Second World War.[38] He nevertheless found that the principle of non-retroactivity was trumped by a higher principle of morality—the international morality that underlies the definition of crimes under international law.

Cory relies on an account found in the writings of Kelsen and Georg Schwarzenberger.[39] Kelsen believed that the Nuremberg and Tokyo Charters created new law, an exception to the prohibition on *ex post facto* laws. He recognized that the rule against retroactive legislation is a principle of justice but concluded that justice also required punishment of the accused, who were aware of the "immoral character" of the acts they committed. Kelsen continues: "Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions."[40]

Here's the rub. The emphasis on morality as a trumping principle fits well with Cory's account of universal jurisdiction as based on the need to punish the most morally culpable offences. Yet Cory's development of this account could justify prosecution even for acts that are universally recognized as being legal at the time of their commission. It is a far-reaching and, to many, frightening proposition.

It is in this light that Cory's concern with strict procedural protections, in the form of an emphasis on jury decision making, can be better understood. He insists that the defendant can be convicted only if the jury finds that he knew subjectively that his acts were of the serious nature of war crimes and/or crimes against humanity. The defendant must be found to know "that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right-thinking people."[41]

Why raise the *mens rea* bar so high? Because "[t]he degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter and robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence."[42] If prosecution and punishment is to be based on international morality, then the defendant must have subjectively understood the precise degree to which his or her actions

were immoral. The expansiveness of the jurisdictional account meets its limit in the restrictiveness of the *mens rea* requirement.

Crimes under Natural Law?

A second major problem with the crimes under international law account is that it can conflict sharply with the requirement in many nations and the deeply felt principle that crimes should be prosecuted and punished only on the basis of positive law. Customary international law is simply too indeterminate and unstable, in the eyes of many judges, to permit the exercise of universal jurisdiction and counter a charge of retroactivity.[43] This concern drives much of the third decision by the House of Lords in the Pinochet case. [44] Only one judge was willing to find that torture was a crime under British law before incorporation of the Torture Convention into British law on the basis of customary international law.[45] Further, all the law lords interpreted the double criminality principle of the Extradition Act[46] to require that the act be criminal under both domestic legal systems at the time it was committed and not at the time of extradition, an implicit nod to the principle of nonretroactivity.[47]

For other judges, the uncertainty of customary international law and concerns about retroactivity make them unwilling to override key structural provisions in their domestic constitutions. Thus, in *Nulyarimma v. Thompson,*[48] an Australian case on the question of whether genocide was a crime under Australian law by virtue of its status under international law, the majority of judges relied on the rule that only the legislature can create new crimes.[49] It is therefore impossible for the court to recognize a crime under customary international law. By contrast, the Australian High Court upheld legislation allowing for prosecution of war crimes and crimes against humanity committed in Europe during 1939 and 1945 whether or not the defendant was a national of Australia at the time of the offense, although not without a vigorous dissent by Brennan, discussed below.[50] These issues can be particularly acute for courts struggling with their own constitutional role and decisions about the powers of the separate branches of government.[51]

Courts appear no more willing to rely on customary international law as the basis of universal jurisdiction in so-called monist legal systems. In France, the Cour de Cassation has failed to recognize universal jurisdiction for genocide and crimes under the Geneva Conventions in the absence of an express provision for such jurisdiction in French law.[52] Similarly, the court in Senegal in the *Hissène Habré* case declined to recognize universal jurisdiction in the absence of express incorporation.[53]

Those few judges who are willing to accept jurisdiction based on customary international law must fall back once again on the seriousness of the offense, with the attendant need for procedural protections to ensure that any defendant potentially subject to such grave stigma be assured of every safeguard. Having determined that customary international law allows for universal jurisdiction for certain crimes under international law, Lord Millett argues that two criteria must be fulfilled before crimes prohibited by customary international law can attract universal jurisdiction.[54] The first is that the offenses be "contrary to a peremptory norm of international law." The second, more significantly, is that the offenses "be so serious and on such a scale that they can justly be regarded as an attack on the international legal order."[55] The seriousness of the offense allows its prosecution. Without this level of seriousness, such prosecution would not be possible. It seems that where customary international law is relied on for the creation of universal jurisdiction, the prosecution will face significant hurdles before it can prove that the crimes reach the seriousness required as a result.[57]

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The standard account of universal jurisdiction links such jurisdiction to the definition of crimes under international law. This category of crimes merits its special definition in international law due to their especially heinous nature. Conviction of a war crime or a crime against humanity is qualitatively different from a conviction for murder or rape or kidnapping, however grave those acts may be. Accordingly, however, defendants in danger of a conviction carrying such moral opprobrium must be granted every possible procedural safeguard, over and above those granted under domestic law. Further, any defendant facing such a charge should be granted the protection of a law that is as clear and determinate as possible. This concern leads courts to focus on treaties over customary law and domestic statutes over treaties.

The standard account thus appears to breed its own limits. In turn, however, setting the bar too high for prosecutions may result in no prosecutions, a position that counters the aim of international law to prosecute these offenses. Since 1995, as a result of the *Finta* decision, the Canadian Department of Justice has taken a policy decision not to prosecute under universal jurisdiction and to confine Canadian efforts to expulsion of foreign war criminals.[58] Similarly, some judges have chosen simply to recognize international law only when it has been expressly incorporated into domestic law, but not otherwise. This cuts off the potential for over-expansion, but may again result in a lack of prosecutions. In both instances, the limits imposed will strike many observers as simply too stringent.

An Alternative Account: Domestic Crimes with an International Jurisdictional Link

A second account of universal jurisdiction evident in a number of judicial opinions relies not on international law as the source of the crimes, but on

domestic law. The offenses underlying crimes against humanity and war crimes—offenses such as murder, kidnapping, confinement, and robbery—are prohibited by the domestic laws of virtually all nations. Defendants charged with such crimes are thus charged and prosecuted under domestic law. Such prosecutions cannot take place, however, for crimes committed outside the territory of the prosecuting state unless international law authorizes extraterritorial jurisdiction. International law thus provides the procedural trigger for such prosecutions; domestic law defines the substance.[59]

This account of universal jurisdiction is broadly consistent with the distinction between the universality principle in international jurisdiction and the substantive concept of crimes against international law. However, the actual relationship between domestic and international law in this account is more complex. It is exhaustively explicated in Judge La Forest's dissenting opinion in *Finta*, which directly seeks to circumvent the problems raised by the standard account as developed in Judge Cory's majority opinion. La Forest's analysis merits some attention here, in order fully to understand both its strengths and weaknesses.

La Forest begins from the proposition that the Canadian legislation simply extends Canadian jurisdiction for crimes already recognized in Canadian law, creating the legal fiction that the crimes were committed in Canada.[60] The legislation thus "remove[s] . . . the obstacle of extraterritoriality and . . . [enables] Canada to serve as a *forum* for the domestic prosecution of these offenders."[61] When, however, may this "obstacle of extraterritoriality" be overcome? When the acts are committed under "conditions [that tie] them to international norms."[62] For instance, crimes against humanity "are aimed at giving protection to the basic human rights of all individuals throughout the world, and notably against transgressions by states against these rights."[63] In the Canadian definition, they include as part of the offense an "act or omission that is committed against any civilian population or any identifiable group of persons. . . ."[64] This definition, itself borrowed from international law and embedded in the Canadian statute, is the "jurisdictional link grounding prosecution for the underlying Canadian offence."[65]

This is a "bottom-up" view of universal jurisdiction, in which it can be exercised for acts or omissions prohibited under national law around the world, as long as such acts or omissions have an "international aspect" sufficient to overcome the normal presumption of territorial jurisdiction and thus to provide a jurisdictional link to a non-territorial court.[66] But La Forest complicates matters still further by combining this account with a different "top-down" account from that adopted by the majority. He also recognizes that war crimes and crimes against humanity "are crimes under international law. They are designed to enforce the prescriptions of international law for the protection of the lives and the basic human rights of the individual, particularly . . . against the actions of states."[67] They fall into

a particular category of international crimes, however, in which pragmatic considerations dictate overcoming the normal presumption that such crimes will be prosecuted by the territorial state.[68]

Where the offenses occur in situations where prosecution is unlikely or impossible, this account argues, universal jurisdiction is made available to states. La Forest continues:

> It would be pointless to rely [for prosecution] solely on the state where [a war crime or crime against humanity] has been committed, since that state will often be implicated in the crime, particularly crimes against humanity . . . Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute; following the cessation of hostilities or other conditions that fostered their commission, the individuals who perpetrated them tend to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect.[69]

For a Canadian court to prosecute war crimes and crimes against humanity under the Canadian legislation, therefore, a determination must be made as to whether the acts alleged constitute war crimes or crimes against humanity under international law. This determination must be made by the judge, however, not the jury, as a jurisdictional determination.[70] It is then up to the jury to make the substantive determination whether the defendant has committed the offenses charged under the Canadian Criminal Code.

Inherent Limits

The La Forest account has a number of advantages. First, it overcomes the retroactivity problem without relying on international morality. The defendant cannot claim retroactivity because the crimes with which he is charged were already illegal under domestic law in every legal system and were therefore already illegal at the time of their commission.[71] In the Belgian proceedings regarding an extradition request for Pinochet, Judge Vandermeersch similarly refers to domestic law when discussing the claim of retroactivity.[72] While he fully accepts that crimes against humanity are part of Belgian law by virtue of incorporation of customary international law, he reinforces this argument with reference to the existence of the criminal elements of crimes against humanity in both Belgian and Chilean law.[73] These approaches to claims of retroactivity may not be convincing to everyone.[74] However, the acceptance of the idea that these acts were criminal in domestic systems throughout the world, particularly in the systems of the territory where the offense was committed and the territory where the prosecution is being held, tends to reduce unease about the application of these laws, even if they are, technically, retroactive.[75]

A second major advantage of the La Forest approach is that it facilitates actual prosecutions by avoiding the imposition of a very high *mens rea* requirement. Judge Vandermeersch's comments are particularly interesting in this regard: "The judicial authorities of several states have often given the impression that as far as crimes against humanity are concerned, they looked more for motives and juridical pretexts so as not to prosecute such crimes rather than check to what extent international law and internal law would allow them to institute such prosecutions."[76] La Forest is similarly distressed at the paradox of the majority opinion in *Finta*, whereby the effective result was to make prosecutions extremely difficult if not impossible. From his perspective, the defendant is entitled to all the procedural safeguards built into any domestic criminal prosecution, but no more.[77]

A third advantage of the La Forest approach is that it ensures that the "judge and especially the jury are able to function largely pursuant to a system of law which, being our own, is more familiar to us and more precise."[78] Only the judge is required to navigate the complexities of international law as part of a preliminary jurisdictional determination.

In a larger sense, these advantages all flow from the built-in constraints of the La Forest approach—inherent limits so strong that they avoid the need for additional imposed limits. On this account, the offense charged must be a violation of both domestic and international law at the time committed. It must further be a violation of a type of international crime that, in the eyes of the international community, may warrant the exercise of the universality principle, largely on pragmatic grounds. Yet even here, La Forest notes that under international law the exercise of this principle of jurisdiction is permissive rather than mandatory.[79] He thus concludes that "it is not self-evident that these crimes could be prosecuted in Canada in the absence of legislation."[80] Thus at least in many states, this account would allow prosecutions to go forward only based on a domestic statute.

Problems

Notwithstanding these apparent advantages, the La Forest account is problematic on a number of grounds and may also be too restrictive, albeit for different reasons than the standard account. First, his distinctions between substance/procedure and morality/pragmatism become increasingly artificial. The ultimate effect is one of complexity and periodic logical incoherence. Unlike the traditional explanation of the universality principle, according to which the crimes themselves are crimes under domestic law and international law supplies only the jurisdictional basis, La Forest seems compelled to recognize that war crimes and crimes against humanity are also crimes under international law. But if so, then why should they not be prosecuted under international law? Why would the Canadian legislation specifically invoke international law and require that the crimes prosecuted

be war crimes and crimes against humanity without recognizing that these constitute distinct crimes from the underlying domestic offenses? Further, this account makes it difficult for domestic prosecutions under the statute to evolve as international law evolves.

Second, this approach often seems deeply counter-intuitive, to a troubling degree. La Forest stresses that the charges of war crimes and crimes against humanity, because they are based on domestic offenses, are no more serious than these domestic offenses: they require the same *mens rea* and they have no additional stigma.[81] This seems wrong. For all the problems associated with legislating international morality, all the cases in which contemporary courts have actually sought to exercise universal jurisdiction involve acts so horrible that they trigger a deep desire to vindicate our common humanity by seeking justice—however incomplete and imperfect it may be. To deny this moral element at the moment of potential conviction impoverishes the very concept of universal jurisdiction and misses a vital public opportunity to affirm the existence of genuine global norms.

A further difficulty here is that this account does not adequately explain why certain crimes have transcended the traditional boundaries of domestic jurisdiction and become subject to universal jurisdiction. While piracy may be easy to explain, because pirates were stateless and the offence occurred on the High Seas, outside the jurisdiction of any one state,[82] exercising universal jurisdiction in a case where another state has a more traditional basis for jurisdiction is more problematic. La Forest's attempt to ground universal jurisdiction in "practical necessity" is unsatisfying and potentially expansive in its turn. Surely universal jurisdiction cannot be exercised whenever the international community recognizes that the territorial state will be unlikely or unable to prosecute.[83] That may be a sufficient basis for the jurisdiction of an international criminal tribunal; a similar formulation commanded the consensus of the states that negotiated the statute for the International Criminal Court.[84] But it seems extremely unlikely that those same states would grant the power to prosecute on the same basis to any other national state. Indeed, even La Forest is ultimately driven to recognize that part of the basis for universal jurisdiction rests on the "international revulsion" associated with the underlying crimes.[85]

Finally, the La Forest account leads to awkward and even perverse results regarding the availability of defenses and degrees of punishment. On the one hand, all the procedural protections of the domestic legal system are available. La Forest stresses several times that the defendant will be able to avail himself of any defenses available under international law at the time. However, where the offense is the same as the domestic one, the protections will not be stronger. The absence of additional protections may be highly problematic in the politically charged atmosphere of some criminal prosecutions under universal jurisdiction.

On the other hand, grounding universal jurisdiction in domestic law may

unduly restrict the punishments applicable to a convicted defendant. Judge Vandermeersch expressly argues that crimes against humanity "are of an unspeakable and unacceptable nature and the responsibility for their repression is shared by all."[86] Yet even he recognizes that where domestic criminal law is relied on to counter claims of retroactivity and to justify the application of universal jurisdiction, this must be combined with "the understanding that the applicable punishments will be those that were in force at the moment of the commission of the offences pursuant to the criminal law under the restriction of the possibly more favourable character of the new punishments (principles of legality of the punishments and of retroactivity of the mildest punishment)."[87]

In sum, the La Forest account raises as many problems as it solves. It might be argued that the contortions of the opinion flow from the need to counter the majority opinion in the context of the specific details of the Canadian war crimes legislation. However, the underlying issues debated between the majority and the dissent in *Finta* resonate around the world. The two opinions reflect a deep and determined effort to grapple with the problems posed by the exercise of universal jurisdiction in an actual case. They also expose the absence of consensus among international legal publicists and judges. The time may be thus ripe to propose something of a synthesis of the two approaches.

A Revised Standard Account: Combining International and Domestic Law

The distinction between crimes against international law and the universality principle in international jurisdiction, at least as operationalized in the *Finta* debate, is based on an outdated and essentially false dichotomy. Both accounts of universal jurisdiction presume a relatively fixed relationship between international and domestic law, one top-down and the other bottom-up. A better account would recognize an ongoing, dynamic relationship between international and domestic law, such that both continually feed into and supplement one another. That is the relationship in practice, as both international and domestic lawyers increasingly recognize. It is time to acknowledge it in theory and build on its implications.

Where, as in all cases likely to raise the question of universal jurisdiction, international law purports to regulate individuals as well as states, it makes moral and political sense to take as a point of departure the set of crimes prohibited under the domestic legal systems of virtually all nations.[88] Individuals can be presumed to have a role in defining these offenses through their domestic political systems and to internalize the resulting prohibitions. Where such domestic legal systems overlap, as in the case of murder, torture, kidnapping, or the deliberate shooting of civilians in wartime, international lawmaking rests on a strong foundation.

Moving from the domestic to the international level, states can be understood to come together as the representatives of their peoples and as the collective voice of global humanity to designate some subset of those crimes as worthy of additional prescription and condemnation. The conditions necessary for such a determination will inevitably involve both moral and pragmatic considerations. Designating specific offenses as international crimes must depend not only on the perception that their perpetrators are likely to go unpunished at home, but also on the deep sense that failure to punish them imperils values of justice and humanity as well as stability and security. Once such crimes have been designated, they should be deemed to carry with them a grant of universal jurisdiction, at least in the absence of a specific agreement or practice to the contrary.

The Princeton Principles grant universal jurisdiction over persons duly accused of committing serious crimes under international law.[89] However, the definition of such crimes in Principle 2(1)—piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture—selects offenses that are almost certain to be criminalized under the domestic law of virtually all nations. The Princeton Principles thus allow for any state to adopt the revised standard account suggested here as the basis for national legislation implementing the Principles. Such legislation need only set forth the presumed relationship between domestic and international law. Further, all states can be guided by this two-step process in defining additional crimes under international law, as envisioned by Principle 2(2).

The prosecution of crimes under international law, as defined here, can thus take place at the international or the domestic level.[90] Back at the domestic level, however, the particular domestic source of these international crimes can be recognized and relied on. The domestic criminal code is part of the basis for the prosecution. As Judge Vandermeersch recognized in the Belgian *Pinochet* case, it should not displace the international definition of the crime, but may supplement it.[91] Thus if the defendant cannot be shown to have the *mens rea* necessary to convict him of an international crime such as a crime against humanity, a war crime, or genocide, he can be prosecuted for the lesser included domestic offense. This was the result in *Djajic,*[92] a case based on the events in the former Yugoslavia that was ultimately decided by the Supreme Court of Bavaria. The defendant was found not to have the requisite *mens rea* for genocide, but was neverthless found guilty of abetting murder and assisting murder.[93] These offenses were in turn punishable by Germany because they took place in the context of international armed conflict, putting the victims within the protections of Article 4 of the Fourth Geneva Convention.[94]

Conversely, Principle 3 authorizes national courts to rely on universal jurisdiction even in the absence of national legislation. Such reliance may be necessary, but from the perspective of encouraging a dynamic relationship between national and international law, it should be a stopgap measure.

Courts may have to take the lead in the absence of legislative action, but legislatures should then respond to judicial action and canvass both international law and the laws of other countries on universal jurisdiction before adopting a national statute. National judges will then be much more comfortable in building on the initial precedent. Principle 9 explicitly exhorts states to take this step.

A similar conception of an interactive relationship between domestic and international law should take place regarding procedural issues. Where international law has not specified the applicable procedure, the court should be able to fill the gaps with standard domestic procedures. Conversely, where a domestic statute has superseded applicable international law, it should be understood to have been enacted against a backdrop of international law that itself draws on domestic law. Domestic courts should thus be able to rely on international law where possible to fill gaps in domestic legislation or resolve ambiguities.

This account avoids many of the difficulties of the standard account. It acknowledges the moral dimension of international crimes while nevertheless anchoring them firmly in both domestic and international lawmaking processes. It may also help alleviate some of the concerns about needing positive law on which to found a prosecution, although such concerns are likely to continue as a reflection of fundamental concerns about judicial legitimacy and the need for protection against abuse of judicial power. Above all, this account provides a fallback for cases in which an attempted prosecution for a crime against international law fails or falls short. Incorporation of international crimes tends to be ad hoc.[95] This approach will ensure that courts and executives are not left without a means of filling in uncontemplated gaps in domestic law. Surely convicting an individual accused of war crimes or crimes against humanity for multiple murder, confinement, or kidnapping is better than no conviction at all.

Finally, this account improves on the La Forest account because it rejects the strict substance versus procedure and morality versus pragmatism distinctions that La Forest seeks to draw. It recognizes instead that international and domestic law interact in response to all these issues and concerns. It also allays the concern that judges take too little notice of the international legal and political context in which they are operating. The danger of believing that judges are simply applying domestic law is that this undermines the traditional boundaries on the exercise of jurisdiction and minimizes the offence being punished.

The synthesis offered here instead recognizes a distinct and critical role for the international legal system, one that buttresses and builds on domestic legal systems rather than potentially undermining domestic judicial legitimacy. The international law version of the crime is based on the consensus of as many nations as possible, a consensus that may water down what any one nation would want but that adds the imprimatur of the international

community. The words of Judge Moore, dissenting in the *Lotus* case, are particularly apposite here in reference to piracy, which he, unlike many others, defines as an international crime: ". . . in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say 'piracy by law of nations,' because the municipal laws of many States denominate and punish as 'piracy' numerous acts which do not constitute piracy by law of nations, and which therefore are not of universal cognizance, so as to be punishable by all nations." He goes on to note that although domestic statutes "may provide for its punishment, it is an offence against the law of nations. . . ." It is the status of piracy as an international crime that allows the designation of the pirate "as the enemy of all mankind—*hostis humanis generis*—whom any nation may *in the interest of all* capture and punish."[96] Designation of a crime at international law thus assures each nation that they are acting on behalf of all others.

In sum, a more helpful account of universal jurisdiction emerges from a more subtle and complex understanding of the relationship between domestic and international law. Crimes recognized in domestic systems worldwide remain the starting point. Recognizing the role that domestic legal systems play without negating the role of international law in defining distinct and separate crimes legitimizes universal jurisdiction by simultaneous reference to a world of multiple polities and a global moral and legal community. At the same time, it provides more natural checks on the exercise of that jurisdiction. The account is one of a complex interaction of domestic law feeding into international law, which in turn both empowers and constrains domestic courts to develop their own synthesis of international and domestic rules and procedures. Many of the contributions to this volume emphasize this dynamic.[97] National legislators adopting the principles, and national judges seeking to apply them, should rely and build upon it.

A Process Solution: Global Judicial Dialogue

The revised standard account of universal jurisdiction developed above inevitably leaves many specific questions unanswered. However clear and compelling the underlying principles, they cannot generate clear and simple rules for courts grappling with many different cases in many different national legal systems. Different states have different constitutional structures. Further, despite the concentration in this article on the role of courts, courts are only one of the set of domestic actors involved in prosecutions based on universal jurisdiction. Consider the role of the prosecution—which in some countries comprises part of the executive branch and in others part of the judiciary—of other members of the executive branch and of the legislature.

In *Finta*, the executive may have been far more willing to prosecute than the court's final decision allowed. However, in most cases it is far more likely that the executive will be less willing to prosecute on the basis of universal jurisdiction than the judiciary. The legal procedure for initiating and pursuing criminal prosecutions may, therefore, affect the likelihood of such prosecutions. In Spain, the prosecuting judge responsible for the Pinochet extradition request was acting against the wishes of the Spanish government. Cases in France and Belgium have been initiated by victims of the alleged offenders and pursued by investigating judges with a central role in the case. By contrast, prosecutions in the United Kingdom are dependent on the independent Crown Prosecution Service, bound by the alternative principles of public interest and the likelihood of success. Decisions are discretionary and need not be explained.[98] The executive branch in all States is frequently faced with different pressures and issues, some of which are legitimate in the political arena but cannot be taken into account in the courtroom.[99]

Further, as was evident in the *Finta* case and the several Australian cases discussed above, domestic courts are often faced with trying to parse the intentions of the legislature. Dramatic prosecutions such as the Pinochet case, together with the well-publicized activity of international criminal tribunals, help mobilize public opinion in favor of legislation directly enabling, but also constraining, the exercise of universal jurisdiction by domestic courts. The actual prosecution of cases based on universal jurisdiction is a thus complex interaction between different state institutions. While national courts cannot rely on domestic law alone, they must operate within their own domestic framework, with international law only one factor in the decision-making process.

The alternative to generating uniform and determinate rules to address the myriad questions courts will inevitably face is a process solution. The revised standard account of universal jurisdiction assumes and thereby constitutes a community of domestic and international judges who bear equal responsibility for making universal jurisdiction operational.[100] In this context, judges can legitimately look to what other national judges are doing as well as to the decisions of international tribunals. The jurisprudence that is emerging is fact-based, contextual, and case-specific. At the same time, however, all judges seeking to exercise universal jurisdiction grapple with common problems. All would benefit from a more institutionalized process of transjudicial communication and consultation.

Principle 4 provides a doctrinal framework for this institutionalized process. Under the heading "Obligation to Support Accountability," it requires "states" to "provide[] other states investigating or prosecuting [crimes under international law] with all available means of administrative and judicial assistance."[101] This provision of course applies to prosecutors

and other members of the executive branch engaged in criminal investigations; it could also apply to legislators, where national legislation authorizing such assistance is required. But it is most likely to apply to judges, and can be read as encouraging them to seek assistance from one another. The next step is to encourage them to see themselves as part of a broader community and common enterprise serving the ends of both national and international justice.

Courts should also be encouraged to take account of other courts' decisions, recognizing the accounts that form the basis for decisions and working toward answers to some of the most difficult issues. To some extent, this process has already begun, as the number of cases has grown in recent years.[102] The need for this dialogue and the likelihood of it happening will only increase as states enact legislation to implement the Statute of the International Criminal Court, with its provisions on complementary jurisdiction. This substantive interaction will contribute substantially to the international legislative process. In Diane Orentlicher's phrase, the judges involved will be "constructing a genuinely common code of humanity."[103]

Since domestic structures play such an important role, complete convergence is both impossible and undesirable. Rather, what is sought is a constructive dialogue that will take into account international law, comparative law and domestic law. Judges looking outside their own legal system can borrow one another's approaches and solutions to specific problems only as persuasive authority. It could be immensely valuable, however, even for judges to consider and reject approaches adopted by their foreign, regional and international counterparts, at least to the extent that they provided reasons for the rejection. The result could be a process of thoughtful convergence and informed divergence that provides for plenty of experimentation, including mistakes and rethinking.[104]

As judges participate in this global judicial dialogue, they will enhance their own legitimacy and create a sphere in which they are seen to operate within a legal rather than a political context.[105] This legitimacy will enable courts to expand their recognition of universal jurisdiction and develop constraints on the exercise of this jurisdiction that do not cut it off completely as a basis for prosecution. At the same time, the principles and approaches on which they converge will renew and invigorate the domestic sources of the international lawmaking process.

A process solution is a solution that has the potential to transform the imposition of multiple limits on universal jurisdiction by multiple national courts into a common global search for solutions to the problems that the exercise of such jurisdiction inevitably poses. As stated at the outset, universal jurisdiction is an awesome power that inevitably calls for limits. In fact, however, an equally pressing need is to find ways to overcome many of the limits that have already been imposed. The aim is to construct a process

to help courts strike a balance among considerations that too often appear to conflict with each other: the desire to prosecute heinous international crimes versus the need to ensure that the defendant receives a fair and just process; international legal obligations versus domestic legal requirements; and the pragmatic versus the moral foundations for the exercise of universal jurisdiction.

Appendix: Guidance for National Judges

Principle 1

Primacy of Domestic Law

1. These principles are intended to provide guidance to judges confronted with a case involving universal jurisdiction in their national courts and are without prejudice to the domestic law of the forum State.

Principle 2

Applying Universal Jurisdiction

1. Judges should be guided by relevant international law when presiding over a case involving universal jurisdiction in their national courts, insofar as that international law does not directly conflict with the domestic law of the forum State.
2. For the purposes of this principle, relevant international law should be understood to include conventions that deal with crimes subject to universal jurisdiction and customary international law. In recognition of the role of international and foreign national courts in the elaboration of international law regarding universal jurisdiction, relevant international law should also be understood to include decisions of such courts addressing equivalent questions in cases involving universal jurisdiction.
3. In determining the content of relevant international law for the purposes of this principle, judges are encouraged to consult with international law experts.
4. In deciding whether or not to draw on or rely on decisions of foreign national courts, judges should take account of any relevant differences between the legal system of the forum State and the legal system of the foreign court concerned.

Principle 3

Procedural Questions

1. Where the law of the forum State is insufficient to decide procedural questions arising in a case involving universal jurisdiction, judges dealing with such a case in their national courts are encouraged to consult relevant international law when seeking solutions to these questions.
2. For the purposes of this principle, relevant international law should be understood to include conventions that deal with crimes subject to universal jurisdiction as well as customary international law. In recognition of the role of international and foreign national courts in the elaboration of international law regarding universal jurisdiction, relevant international law should also be understood to include decisions of such courts addressing equivalent questions in cases involving universal jurisdiction.
3. In determining the content of international law for the purposes of this principle, judges are encouraged to consult with and be guided by international law experts.
4. In deciding whether or not to draw on or rely on decisions of foreign courts, judges should take account of any relevant differences between the legal system of the forum State and the legal system of the foreign court concerned.

Chapter 10

Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable

Leila Nadya Sadat

Introduction

It is generally believed that the investigation and criminal prosecution of those who have ordered or have committed human rights atrocities is a desirable goal and may even constitute an international legal obligation. Requiring accountability for war crimes is posited as a remedy to impunity as well as a necessary, if not sufficient, condition for the reestablishment of peace.[1] Yet there are many challenges to the ideal of accountability: the desire to trade peace for justice in order to end a conflict more quickly, even if temporarily; the overwhelming task of bringing individual cases against hundreds or even thousands of individuals implicated in the commission of genocide or other mass atrocities; arguments that criminal trials may be counterproductive in bringing about reconciliation; and even the passage of time, which may cause authorities to hesitate in pursuing justice or extinguish otherwise valid cases through the application of statutes of limitations.[2]

The first two sections of this essay quickly survey these conflicting themes. The third evaluates the treatment of amnesties and other challenges to accountability from both a legal and a normative perspective, keeping in mind the principal goal of this project—to formulate principles that might guide or inform the responsible exercise of universal jurisdiction by states.[3] Ultimately, the issue becomes whether amnesties or other obstacles to prosecution created by one state have any binding effect outside of that jurisdiction. This problem has both a fascinating theoretical dimension and a practical consequence: putting it simply, can the beneficiaries of an amnesty (or some other bar to prosecution) travel abroad without losing the impunity they were granted at home?