

Redefining Universal Jurisdiction

Leila Nadya Sadat*

I. INTRODUCTION

Humankind has left the twentieth century desperately seeking new institutional and legal mechanisms capable of restraining its darkest impulses. The gravity of the problem cannot be overstated: it is estimated that 170 million people have been killed in more than 250 conflicts that have occurred since World War II.¹ The most obvious response would be to stop the atrocities before they have occurred or while they are occurring.² Unfortunately, the international legal community has not yet developed either the political institutions or the legal and logistical infrastructure that could effectively halt or prevent pathological disturbances of international *ordre public*.

One of the primary obstacles to establishing the rule of law has been the culture of impunity that has prevailed to date. Genocidal leaders flout their crimes openly, unconcerned about international reactions, which they suspect will probably range from willful blindness (at best, from their perspective) to diplomatic censure (at worst). In response, international legal regimes have been established, as well as, more recently, international institutions, that can assist in effectuating the transition from a culture of impunity to one demanding accountability. A cornerstone of this effort has been the traditional framework of the criminal law: the condemnation of certain behavior as *criminal*, not simply a breach of treaty or customary international law obligations, and the imposition of individual criminal responsibility.³

* Professor of Law, Washington University, St. Louis.

1. See M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 199, 203 (1998) [hereinafter *Normative Framework*].

2. See W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 *L. & CONTEMP. PROBS.* 75, 75 (1996).

3. In 1996, the United Nations Commission on Human Rights issued a report to which was attached a set of principles defining and attacking the culture of impunity. The report defined impunity as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims." *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997), at Annex II, Definitions, A [hereinafter *U.N. Impunity Guidelines*]. Although it ap-

The process of criminalizing the commission of human rights atrocities, whether in interstate conflict or civil wars, has taken place at both the international and national levels. Internationally, following the Nuremberg and Tokyo trials, a series of instruments were adopted following World War II that have not only prohibited the worst atrocities, but have required states to impose criminal sanctions on those responsible for their commission.⁴ These include the Convention on the Prevention and Punishment of the Crime of Genocide,⁵ the Convention Against Torture,⁶ the Convention on the Suppression and Punishment of the Crime of Apartheid⁷ and the grave breaches regime of the four Geneva Conventions of 1949.⁸ In the absence of an international criminal court or support from national legal systems, however, the regimes thus established⁹ were largely ineffective.

appears to leave room for a variety of legal responses to the commission of atrocities, by referring to “criminal, civil, administrative or disciplinary proceedings,” the definition clearly contemplates that “criminal proceedings” are the most appropriate response to atrocity.

4. Building upon the Nuremberg precedent, some of these instruments target not only a state’s treatment of foreigners or the nationals of another state, but a state’s mistreatment of its own citizens. The Genocide Convention goes even further and criminalizes non-state action that amounts to genocide, as well.

5. Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, G.A. Res. 260A (II), 78 U.N.T.S. 227, entered into force Jan. 12, 1951 [hereinafter Genocide Convention]. Article 2 of the Convention defines the crime; article 5 requires states to “provide effective penalties” for persons guilty of genocide or related offenses, and article 6 requires trial by “a competent tribunal of the State in the territory of which the act was committed, or by [an] international penal tribunal...” Although tremendously important from a normative perspective, implementation of the Genocide Convention has been virtually non-existent, the first-ever trial for Genocide occurring before the ICTR in 1998 in the *Akayesu* case.

6. Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39, U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention].

7. Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3086, U.N. GAOR Supp. No. 30, at 75, U.N. Doc. A/9030 (1973).

8. The Conventions provide that the High Contracting Parties “shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own Courts...[or] hand such persons over for trial to another High Contracting Party...” Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 75 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 75 U.N.T.S. 135, 236; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287, 386.

9. In addition to these Conventions, provisions in various human rights in-

The creation of the two *ad hoc* tribunals for the former Yugoslavia in 1993 and for Rwanda in 1994, however, suddenly rendered these norms enforceable in international courts of law. Their further elaboration in the Rome Statute for the International Criminal Court,¹⁰ as well as the establishment by that treaty of a permanent court to try perpetrators of the most serious crimes of international concern, suggests a continuing commitment to use international criminal law to combat impunity. Indeed, “Rome law” will apply to every human being in the world, through the possibility of a Security Council referral of a situation to the ICC.¹¹ This could represent a tremendous increase in the enforcement of international criminal law, assuming the sixty ratifications necessary to bring the ICC into force are attained and its operations are successfully implemented.¹² In this paper (and elsewhere), I suggest that the jurisdictional basis for the adoption and application of international criminal law norms by the international community has given rise to a new form of universal jurisdiction — *universal international jurisdiction*. This idea is explored in Part I, below.

International courts and tribunals, however, are only one vehicle for the pursuit of international criminals — domestic courts are another. National courts have traditionally been the only venue for the prosecution of international crimes, and have increasingly taken the lead in prosecuting foreigners for international crimes committed outside their borders.¹³ They do so by employing theories of universal jurisdiction, as an exception to the general rule that states traditionally apply their penal laws territorially. Applied in this manner, universal (inter-state) jurisdiction is a principle of international law permitting all states to apply their laws to an act “even if [it]...occurred outside its territory, even if it has been perpetrated by a non-national, and even if [its] nationals have not been harmed by [it]...”¹⁴

struments have been interpreted to require states to investigate and prosecute human rights violations.

10. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

11. See Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000) [hereinafter *Uneasy Revolution*].

12. As of this writing, twenty-two states have ratified the Statute and 115 have signed it. *Rome Statute Signature and Ratification Chart*, available at <http://www.iccnw.org/html/country.html>.

13. See Theodor Meron, *Is International Law Moving Towards Criminalization*, 9 EUR. J. INT'L L. 18 (1998). For a fine analysis of when international as opposed to national tribunals should be used, see Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998) [hereinafter Cassese, *Reflections*].

14. ROSAYLN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND

As classically conceived, this *universal inter-state jurisdiction* may be created by a treaty regime, or it may exist as a matter of customary international law. Although historically used in connection with piracy and slave trading,¹⁵ on the theory that the perpetrators of such acts were *hostis humani generis* — the enemy of all mankind¹⁶ — the crimes which are currently the focus of most exercises of universal jurisdiction by states as a matter of customary international law are genocide, crimes against humanity and grave breaches of and serious crimes against international humanitarian law.¹⁷ Application of the theory of universal jurisdiction in these cases is predicated largely on the notion that some crimes are so heinous that they offend the interest of all humanity — indeed, they imperil civilization itself.¹⁸ Thus, any state may, as humanity's agent, punish the perpetrators.¹⁹ In addition, these crimes are often committed by states or those in control of a state, and are therefore likely to go unpunished by the territorial state. Although traditionally considered a permissive basis for the exercise of jurisdiction by states,²⁰ universal jurisdiction has become increasingly mandated by international treaties, to such a degree that some argue that the *aut dedere aut judicare* principle is now found in customary international law.

While courts and commentators use the term “universal jurisdiction” repeatedly, rarely do they stop and consider either its real meaning or its implications. Indeed, universal jurisdiction as a concept has been under-theorized for, until quite recently, it was seldom invoked. The remaining portion of this paper suggests a methodology for conceptualizing and analyzing the exercise of universal jurisdiction by the international community (Part I) as well as by states (Part II).

HOW WE USE IT 57 (1994).

15. See Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 165 (1996).

16. The term has a venerable pedigree. See 4 W. BLACKSTONE, COMMENTARIES 71 (quoting Sir Edward Coke).

17. See, e.g., *U.N. Impunity Guidelines*, *supra* note 3, at Definition B. It is relatively uncontroversial to assert that universal jurisdiction may be exercised by states as a matter of customary international law with respect to these offenses. A question remains, however, as to whether the offenses must rise to a certain level of gravity or seriousness before universal jurisdiction is triggered.

18. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 803 (1988).

19. See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 & cmts. (1987) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS].

20. Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress*, in IMPUNITY AND HUMAN RIGHTS, IN INTERNATIONAL LAW AND PRACTICE 25 (Naomi Roht-Arriaza, ed., 1995) [hereinafter IMPUNITY AND HUMAN RIGHTS].

II. THE EXERCISE OF UNIVERSAL JURISDICTION BY THE INTERNATIONAL COMMUNITY AS A WHOLE: UNIVERSAL INTERNATIONAL JURISDICTION IN THE ICC STATUTE

Prior to the adoption of the Rome Treaty for the International Criminal Court, the international community, like national courts, was sparing in its use of universal jurisdiction. Other than a few arbitral tribunals envisaged by slave trading treaties in the nineteenth century, the Nuremberg tribunal and the establishment of the two *ad hoc* tribunals, there was little effort by the international community, taken as a whole, to exercise universal jurisdiction over international crimes.²¹ With the signing of the Rome Treaty, however, the situation changed dramatically. Indeed, the Rome Treaty is really the first instrument that clearly embodies an effort by the international community to articulate its jurisdiction to prescribe, to adjudicate, and to enforce all in one instrument. As I have argued elsewhere, the jurisdictional theories of the Statute are arguably quite revolutionary in nature. For, through a rather extraordinary process, these three jurisdictional categories classically known to international law have been transformed from norms providing “*which state* can exercise authority over whom, and in what circumstances,”²² to norms that establish under what conditions the international community, or more precisely the states-parties to the Treaty, may prescribe international rules of conduct, may adjudicate breaches of those rules, and may enforce those adjudications.

A. *Jurisdiction to Prescribe*

As classically defined, jurisdiction to prescribe refers to the manner in which the international community makes “its law applicable to the activities, relations, or status of persons, or the interests of persons in things...”²³ The Rome Statute does this by embodying prescriptive norms for the international community as a matter of substantive criminal law. The delegates’ willingness to engage in such an exercise overcame one of the major historical objections to an international criminal court: the absence of international criminal law with which potential defendants could be charged.²⁴ Moreover, the elaboration and adoption of an international criminal code as part of the Rome Treaty was perhaps the least controversial of the three jurisdictional axes within the Rome Statute, for the four

21. See *infra* note 50 and accompanying text.

22. HIGGINS, PROBLEMS AND PROCESS, *supra* note 14, at 56 (emphasis added).

23. RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 19, § 401(a) (1987).

24. See Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 717-20 (1996) [hereinafter Sadat, *The Proposed ICC*].

categories of crimes within the Statute were considered *jus cogens* norms by most writers,²⁵ even though their precise definition had not yet been completely agreed upon by all states. That is, even without complete accord on the definitional content of each offense, states generally seemed confident as to the propriety of defining them as a matter of treaty law at the Diplomatic Conference.

The use of the treaty as the legal vehicle by which the crimes were defined, however, should not obscure the innovative nature of the process used. Indeed, it must be recognized that to the extent the Rome Conference was actually a quasi-legislative process by which the international community "legislated" by a non-unanimous vote, the political legitimacy of the norms must rest, not on a theory of contract (treaty-making), but on some other grounds. Elsewhere I have argued that this marked a "constitutional moment" of sorts; a sea change in international law-making with which political theory and institutional form have not caught up.²⁶ For present purposes, it suffices to say that the power and legitimacy of these norms was premised on the well-accepted theory of universal inter-state jurisdiction that derives from the idea that when criminal activity rises to a certain level of harm (the gravity idea threaded through the Statute), or sufficiently important interests of international society are threatened, all states may apply their laws to the act.²⁷

This theory of universal inter-state jurisdiction was extended in Rome, following the precedent of Nuremberg and the two *ad hoc* tribunals, to a principle of universal international jurisdiction²⁸ which would permit the international community as a whole, in certain limited circumstances, to supplement, or even displace,²⁹ ordinary national laws of territorial application³⁰ with international laws that are universal in thrust and unbounded

25. See, e.g., Bassiouni, *Normative Framework*, *supra* note 1, at 201-02.

26. See Sadat, *Uneasy Revolution*, *supra* note 11, at 394-95.

27. See HIGGINS, PROBLEMS AND PROCESS, *supra* note 14, at 57; see also RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 19, § 404 (1987) (noting that states may define punishments for offenses which are of "universal concern"). See generally Randall, *supra* note 18.

28. The novelty of this theory is underscored by the fact that international law casebooks invariably treat international jurisdictional rules as rules governing the repartition of competences between states. See, e.g., LOUIS HENKIN ET AL., INTERNATIONAL LAW 821 (2d ed. 1987) ("International law has not yet developed a comprehensive set of rules defining with reasonable precision all forms of jurisdiction that may be exercised by states and other international legal persons."); see also MARK W. JANIS & JOHN W. NOYES, INTERNATIONAL LAW 609-57 (1997); COVEY T. OLIVER ET AL., THE INTERNATIONAL LEGAL SYSTEM 133-215 (4th ed. 1995).

29. National law is displaced if it is inconsistent with international law.

30. Territoriality is the most obvious nexus. Nationality, passive personality, effects, and the protective principle are also either recognized or asserted to be

in geographical scope.

The Statute does not propose a bright line test for sorting the international from the national; that is, there is no “interstate commerce clause requirement” such as we find in U.S. federal criminal law, nor is there a “subsidiarity principle,” such as we find in the delimitation of competencies in the European Union between the Communities and the Member States. That is because the Statute does not focus on this issue at all, leaving it essentially up to the complementarity principle and state consent regime to sort permissible from impermissible assertions of the Court’s jurisdiction (to adjudicate). The one explicit clue is the Treaty’s command that the Court is to exercise its jurisdiction only in cases involving “the most serious crimes of concern to the international community as a whole.”³¹ This phrase combines both a substantive limit on the Court’s jurisdiction with its underlying premise — that in a world of conflicting “sovereigns,” both territorial (states) and non-territorial (the international community as a whole), some system must be adopted to sort permissible from impermissible assertions of jurisdiction (to prescribe). As Professor Georges Levasseur noted some years ago, the problem is essentially akin to one of conflict of laws: international criminal law as a body of law may apply where an “individual’s behavior (whether a national or a foreigner) has troubled the *ordre public* of a country other than his own.”³²

As will be shown below, the complementarity principle and state consent regime will generally restrain the exercise of the Court’s prescriptive jurisdiction such that the Court’s reach does not exceed what reasonable theories of power distribution and lawmaking authority between “sovereigns” suggest the proper sphere of the Court’s authority should be — but it would have been useful for the Statute to have been more explicit on this point. For, without a doubt, there will be cases in which complementarity will not pose an obstacle to jurisdiction but which the Court should dismiss as inadmissible because it would be unreasonable for the Court, as an instrument of the international legal order, to exercise jurisdiction over the case. Moreover, it will likely increase the moral and political legitimacy of the Court to do so. If it is seen as an institution willing to exercise self-restraint and be constrained by fidelity to law, it may improve its credibility with state governments, skeptical of international power and meddling in otherwise domestic affairs.

legitimate bases upon which states may assert jurisdiction to prescribe. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 19, § 402 (1987).

31. Rome Statute, *supra* note 10, art. 5(1); *see also id.* art. 1.

32. Georges Levasseur, *Les crimes contre l’humanité et le problème de leur prescription*, 93 J. DU DROIT INT’L [J.D.I.] 259, 267 (1966).

B. Jurisdiction to Adjudicate

1. General Principles

Although the three separate components of jurisdiction — jurisdiction to prescribe, adjudicate, and enforce — are not always congruent,³³ jurisdiction to adjudicate generally follows jurisdiction to prescribe, subject to a rule of reasonableness. “Jurisdiction to adjudicate,” means “to subject persons [and in particular criminal defendants] or things to the process of [the ICC].”³⁴ According to the American *Restatement on Foreign Relations (Third)*, “[a] State may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the State to the person or thing is such as to make the exercise of jurisdiction reasonable.”³⁵ This principle generally applies in the ICC as well, with three major caveats. First, the state consent regime (explained below) excludes certain cases from the Court’s judicial jurisdiction even though prescriptive jurisdiction exists. Second, the complementarity principle removes another set of cases due to a different set of prudential concerns. Finally, if a defendant has already been tried for the conduct that is the subject of the complaint against him or her in the Court, the principle of *ne bis in idem* applies to remove the case from the Court, as a human rights protection afforded to the defendant that renders an otherwise justiciable case inadmissible.³⁶

In all three instances, the Rome Treaty removes a case from the Court, even though, as a matter of substantive law, the ICC Statute would otherwise apply to the conduct in question. Thus, if the defendant’s conduct is also being regulated (or he or she is being pursued) by a state, the ICC must relinquish jurisdiction over the case if the state so desires. In some instances, this will be true even though it might seem more appropriate for the ICC to pursue the case. Similarly, if the prosecutor or a state files a complaint with the Court, a state consent regime attaches, that again may divest the Court of jurisdiction to adjudicate. Finally, although the Statute outlaws genocide and crimes against humanity, a regime transitioning from a genocidal past may decide on amnesty and reconciliation instead of criminal prosecutions. This seems to be permitted by the Statute which is “creatively ambiguous” on this point, according to Philippe Kirsch, who presided over the Rome Conference as the Chair of the Committee of the

33. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 19, at 230-31.

34. *Id.* § 401(b).

35. *Id.* § 421(1).

36. See Rome Statute, *supra* note 10, arts. 17 (admissibility), 20 (*ne bis in idem*).

Whole.³⁷ It is hotly contested, however, when and under what conditions amnesties are permissible either as a matter of international law, or under the Statute.³⁸

This deference to state sovereignty seems derived from two separate concerns. First, there is an unease with the nature of the law being made. Legal theory and political reality conceive of international law-making as predominantly contractual and consensual. Yet, while the Rome Treaty takes the form of a contract between states it was clearly conceived as a codification of custom and indeed of *jus cogens* crimes. In cases involving a Security Council referral, the Statute's scope is unbounded by geography.³⁹ Thus, even though Article X attempts to separate the Statute from customary international law existing outside the Statute's application, and each definition of crimes purports to define the law only "for purposes of this statute," the Statute, as all have admitted, and to which some countries, including the United States, have strenuously objected, applies to non-party state nationals in certain circumstances, and can be applied by the Security Council to all the human beings of the world. In other words, there is a schizophrenia about the status and binding effect of the prescriptive norms that the text attempts to redress by, in certain limited cases, deferring to the sovereignty of states.

Second, there are legitimate questions involving finite resources. It is both logical and appropriate for states, rather than the ICC, to prosecute

37. See Michael P. Scharf, *Justice versus Peace, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 179, 186 (Sarah B. Sewall & Carl Kaysen eds., 2000).

38. For a discussion of this issue, see LEILA NADYA SADAT, *UNIVERSAL JURISDICTION AND NATIONAL AMNESTIES, TRUTH COMMISSIONS AND OTHER ALTERNATIVES TO PROSECUTION: GIVING JUSTICE A CHANCE* (Washington University, Working Paper No. 00-9-1) [hereinafter *UNIVERSAL JURISDICTION AND NATIONAL AMNESTIES*]; see also Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 *CAL. L. REV.* 449 (1990); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 *TEX. INT'L L.J.* 1 (1996).

39. It has been argued that the U.N. Charter is no more binding on non-signatories than any other treaty. See, e.g., Herman Mosler, *The International Society as a Legal Community*, in 140 *RECUEIL DES COURS* 1, 205-07 (1974). Most writers, however, do not share that view, see, e.g., Bardo Fassbender, *The United Nations charter as Constitution of the International Community*, 36 *COLUM. J. TRANSNAT'L L.* 529, 574-78 (1998), and appear to accept the suggestion that the U.N. Charter establishes a constitution of the international community: a constitution which "every State is bound to observe irrespective of its own will." *Id.* at 549. The states gathered in Rome seemed to take the latter view by making the Statute's application universal in cases involving Security Council referrals under Chapter VII.

cases where they are willing and able to do so. Certainly states have better developed systems of criminal justice, and, insofar as the crimes may have been committed on their territories, will not have the difficulties that the ICC is certain to face in terms of gathering evidence, conducting investigations, and arresting suspects. Moreover, although jurisdiction to adjudicate will generally follow jurisdiction to prescribe, it may be more acceptable (and will be more practical) to exercise judicial jurisdiction where there are clear links to the forum state in respect of the persons, interests, relations, or activities involved.⁴⁰

Finally, the question of *ne bis in idem*, or double jeopardy, as it is known in common law systems, raises human rights concerns central to the establishment of a new system of international criminal justice sensitive to the need to meet international human rights standards.

2. Universal Jurisdiction and State Consent

Under the 1994 ILC Draft Statute, only states and the Security Council could lodge complaints with the Court.⁴¹ As noted earlier, the Rome Statute also permits the prosecutor to bring cases before the Court on his or her own initiative. The Rome Statute rejected the ILC's initial conception, and requires all states parties to accept the Court's inherent jurisdiction⁴² over all crimes in article 5, subject to the seven-year opt-out for war crimes.⁴³ It also no longer permits reservations with respect to the Court's jurisdiction over particular offenses.⁴⁴ Moreover, it reduces, but in no way eliminates, the power of the Security Council over ongoing proceedings by permitting the Council to interfere only if it adopts a resolution under Chapter VII requesting the Court not to commence an investigation or prosecution, or to defer any proceeding already in progress.⁴⁵ Finally, the ILC requirement of a Security Council determination as to aggression⁴⁶ is now uncertain,⁴⁷ an important point should this crime eventually be brought within the Court's jurisdiction.

40. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 19, at 231.

41. See *Report of the International Law Commission*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10, arts. 23, 25 (1994) [hereinafter *1994 ILC Draft Statute*].

42. "Inherent jurisdiction" does not mean primacy, as some delegations mistakenly believed in Rome. Admissibility and complementarity are still limits on the exercise of jurisdiction in a particular case, even with respect to crimes over which there is inherent jurisdiction.

43. See Rome Statute, *supra* note 10, art. 124.

44. See *id.* art. 12(1).

45. See *id.* art. 16.

46. See *1994 ILC Draft Statute*, *supra* note 41, art. 23.

47. The Assembly of States Parties, however, will probably reintroduce this requirement when adopting the definition of aggression.

There is a great deal of discussion as to whether adjudicative jurisdiction in the Rome Statute is based on a “universal” or consent-based theory of jurisdiction.⁴⁸ Most of the confusion has been generated by a failure to separate the principles of jurisdiction upon which the Statute is premised from the regime governing the exercise of jurisdiction by the Court in particular cases. Indeed, jurisdiction over particular cases is premised on three principles which are widely accepted in international law. First, and foremost, is the universality principle, which operates not only as a principle of prescriptive jurisdiction, but of adjudicative jurisdiction, as well. If the Security Council refers a case to the Court, the Court may be asked to pass judgment on the commission of crimes anywhere in the world. The consent of no state is required, even as to the nationals of states not party to the Court’s Statute. This is uncontroversial except insofar as the universality principle has been extended from a principle governing interstate relations to one of general prescriptive international law, as discussed above. Even this, however, is not unprecedented, for it is presumably the jurisdictional basis upon which the ICTY and ICTR Statutes were premised.⁴⁹ Indeed, although some countries, particularly the United States, have objected to the assertion of jurisdiction by the Court over the nationals of states not parties to the Court’s Statute, it has been accepted ever since Nuremberg that, with respect to the establishment of courts for the trial of international crimes over which there exists universal jurisdiction, states may do together what any one of them could have done separately.⁵⁰

If the Prosecutor or a state refers the case, although the universality principle does not disappear, layered upon it is a state consent regime based on two additional principles (which are disjunctive) of jurisdiction: the territorial principle and the nationality principle. Thus the Court has jurisdiction over cases referred by states parties (or the Prosecutor *proprio motu*) so long as either the territorial state or the state of the accused’s

48. The U.S. position, for example, is that the Court does not exercise “universal jurisdiction,” but that the jurisdictional regime is nevertheless improper because the nationals of non-party states may find themselves before the Court even if their state of nationality objects. See David J. Scheffer, *Speech at the Twelfth Annual U.S. Pacific Command International Military Operations and Law Conference*, (Hawaii, Feb. 23, 1999), available at <http://www.state.gov/www/policy_remarks/1999/990223_scheffer_hawaii.html>.

49. See, e.g., ICTY Statute; ICTR Statute.

50. See Delegation of Samoa to the Fourth Preparatory Committee, *Note on (Inherent) Jurisdiction and State Consent*, at 5 (Aug. 7, 1997) (on file with author); see also Judgment of October 1, 1946, International Military Tribunal Judgment and Sentence, 41 AM. J. INT’L L. 172, 216-17 (1947). An earlier precedent for the exercise of universal adjudicative jurisdiction is cited by Professor Randall. He notes that several nineteenth century slave trading treaties entered into by Great Britain with other nations created tribunals jointly administered by the parties to the treaties. See Randall, *supra* note 18, at 799.

nationality is either a party to the Statute or has accepted the jurisdiction of the Court.⁵¹

One might argue that because states may certainly theoretically exercise jurisdiction concurrently with the ICC over the crimes within the Court's Statute, the state consent regime simply serves as a conflicts of jurisdiction principle: unless the Security Council asserts the need to refer the case to the Court because there has been a threat to world peace and security, states and the ICC may wrangle over which entity will prosecute the cases within the Court's prescriptive jurisdiction. Moreover, a state may, in limited circumstances, prevent the ICC from moving forward by withholding its consent. In addition, states that are not parties to the Statute may refuse their consent at least as to crimes committed on their territories, or by their nationals on the territories of states also not parties and which do not consent.

It is more likely, however, that the state consent regime was retained as a concession to the sovereignty of states, for the ends sought by the Statute are imperfectly addressed by the means chosen. First, the Statute stops short of permitting custodial states to consent to jurisdiction. That is, if a defendant of a state not party to the Statute travels to a state party to the Statute, the state to which the potential defendant has traveled may not serve as a jurisdictional nexus to the ICC, even though it could, under well-accepted principles of universal jurisdiction, try the defendant itself. The human rights community desperately, but unsuccessfully, fought to include the custodial state as a jurisdictional nexus to prevent the phenomenon of "traveling tyrants,"⁵² able to travel to any state, other than the territorial state, so long as they avoid states that join the ICC. Second, under the state consent regime, unlike the complementarity system, the state withholding its consent need not make any effort to try the defendant(s) involved itself. So, absent a Security Council referral, many of the most egregious cases might not be prosecuted by anyone. This result was certainly not required by any principle of jurisdiction; if it is

51. See Rome Statute, *supra* note 10, art. 12(2). The Statute seemingly permits states to consent to jurisdiction in a particular situation without subjecting themselves to jurisdiction in the same case. See *id.* art. 12(3). This is contrary to the framers' intent as well as the original draft of the Statute (as was noted by the Chair of the drafting committee, Professor M. Cherif Bassiouni, in his remarks at the annual meeting of the American Society of International Law, Spring 1999), which, as conceived by the ILC, did not permit states the benefits of the Statute without accepting the burdens. The problem was ultimately corrected by Draft Rule Procedure and Evidence [hereinafter Draft RPE] 44(2) which requires the Registrar to inform states lodging a declaration with the Court pursuant to article 12(3) that the consequence of making such a declaration is acceptance of the Court's jurisdiction with respect to the situation in question.

52. The phrase was coined by Jelena Pejic, who represented the Lawyer's Committee for Human Rights in Rome.

conceded that the international community has jurisdiction to prescribe (and the Statute is admittedly schizophrenic on this point), jurisdiction to adjudicate should follow, subject to the conflict of jurisdictions principles and reasonableness limitations one naturally expects with respect to any exercise of jurisdiction by any “sovereign.”

3. Complementarity with State Judicial Systems

Both the preamble to the Statute and article I express a fundamental principle of the Rome Statute: that the Court is to be “complementary” to national criminal jurisdictions.⁵³ While complementarity is not defined (and indeed, there is no general definition section in the Statute, although there are definitional provisions within particular articles),⁵⁴ an analysis of the articles on admissibility demonstrates that complementarity does not mean “concurrent” jurisdiction (which it arguably could have under the ILC’s original conception). Instead the Court may exercise jurisdiction only if: (1) national jurisdictions are “unwilling or unable” to; (2) the crime is of sufficient gravity; and (3) the person has not already been tried for the conduct on which the complaint is based.⁵⁵

Complementarity has a substantive component, a procedural component, and a component that we may think of as “political,” or “prudential” for lack of a better term. The procedural aspect of complementarity is embodied in the regime of admissibility to which all cases are subject. The prudential aspect refers to the policy choices made in determining which cases should be in the ICC, rather than national courts, which means that some cases that are clearly within the Court’s jurisdiction (prescriptively) will not be heard by the Court. As discussed earlier, the governments that gathered in Rome struggled to find a neutral and principled manner to determine what kind of cases this new international institution should hear. Those cases were deemed (by the framers) to be instances in which national courts are unwilling to or unable to proceed. The framers could have been bolder, of course. Having flexed their muscles in defining the crimes, they could have given the Court jurisdiction over all the cases conceivably within its purview. But to do so would most likely have made the Treaty unacceptable to many states. Thus the choice was probably a wise one in terms of limiting the Court’s jurisdiction; where complementarity is an unfortunate principle, however, is in the enforcement area and the state cooperation regime, a difficulty I take up elsewhere.

53. See Rome Statute, *supra* note 10, Preamble, art. 1.

54. See *id.* art. 7(2) (containing definitions respecting the definition of crimes against humanity outlined in paragraph 1 of the same article).

55. See *id.* art. 17(1).

C. *Jurisdiction to Enforce*

As classically conceived, jurisdiction to enforce concerns rules governing the enforcement of law by a state through its courts, as well as through executive, administrative, and police action.⁵⁶ If we extrapolate from this principle to the enforcement power of the ICC, we see the weakest of the three jurisdictional components of the Statute. Indeed, the Court's enforcement jurisdiction is so feeble that it has the potential to completely undermine the efficacy of the Court, which, in other respects (such as institutional structure and definition of crimes), is likely to be quite strong.

To begin with the most obvious point, the ICC has no police force.⁵⁷ Indeed, it was unthinkable to propose one either before or during Rome, although there was at least some precedent for doing so.⁵⁸ But the orders of the Court, whether they are arrest warrants, judgments, orders to seize assets, or sentences, will need to be enforced. The delegates were not unaware of the problem and many provisions of the Statute address it directly.⁵⁹ But virtually all of them are premised on three principles. First, the Court may not require compliance, either of individuals or of states, with its orders. That is, it may not compel the appearance of witnesses, it may not compel execution of arrest warrants and it may not seize bank

56. See RESTATEMENT (THIRD) FOREIGN RELATIONS, *supra* note 19, §401(c). "Jurisdiction to enforce," means "to induce or compel compliance or to punish noncompliance with [the orders and decisions of the ICC]." *Id.*

57. As one French writer pointedly remarked, the Court represents "*justice sans police*." Jean-Eric Schoettl, *Décisions du Conseil Constitutionnel: Cour Pénale Internationale*, L'ACTUALITÉ JURIDIQUE—DROIT ADMINISTRATIF, Mar. 20, 1999, at 230.

58. See Sadat, *The Proposed ICC*, *supra* note, 24 at 672-73 n.41 (discussing the proposed Statute of the London International Assembly which provided for an international constabulary charged with the "execution of the orders of the Court and of the Procurator General [of the Court]").

59. See, e.g., Rome Statute, *supra* note 10, art. 70 (permitting the Court to exercise jurisdiction over offences against its administration of justice, subject to conditions that are now set out in Draft RPE 162-69). Article 70 requires states-parties to extend their laws covering similar offenses against the Court, but notes that international cooperation "under this article shall be governed by the domestic laws of the requested State." *Id.* art. 70(2). Thus, even this jurisdiction in aid of enforcement is strongly dominated by reference to state law insofar as its execution is concerned. See *id.* Article 71 permits the Court to sanction persons present before it who disrupt its proceedings or deliberately refuse to comply with its directions by "administrative measures other than imprisonment." *Id.* art. 71. This section, which seems to allow the Court some direct enforcement power, only appears to apply to persons actually in front of the Court, and again would presumably require state cooperation if the sanctions were somehow unenforceable directly.

accounts or government documents of its own accord. There is no subpoena power;⁶⁰ there is no mandamus. Second, the Court will not be permitted to sanction states directly for noncompliance with the Statute or its orders. Rather, the Court will be required to make findings of noncompliance and direct those to the Assembly of States Parties and the Security Council, in the case of a Security Council referral to the Court.⁶¹ Finally, the personnel of the Court will have no right, in most cases, to proceed directly to the execution of their duties on the territories of states, but will work through the authorities present in the requested state, and will be subject to national law. There are three important exceptions to this. First, pursuant to article 56, a judge from the Court may be present “to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons.”⁶² Second, the Prosecutor may be authorized by the Pre-Trial Chamber to take “specific investigative steps” within the territory of a state party without the cooperation of the state, if the state is clearly unable to execute requests for cooperation because its judicial system has collapsed.⁶³ Finally, pursuant to article 99(4), the Prosecutor may under limited circumstances execute specific requests for assistance (other than arrest warrants) directly on the territory of a state party, if they require no compulsory measures.⁶⁴

Even this brief review of the Court’s enforcement jurisdiction suggests that the Statute will be much less revolutionary in practice than in theory. Indeed, it suggests the unease of the states parties to the Statute in Rome with the revolution they wrought. While they boldly proclaimed the right of the international community to prescribe, and, for the most part, suggested that jurisdiction to adjudicate followed in principle, they in no manner followed suit in terms of enforcement. Here classic paradigms of sovereignty in which each state is master of its territory prevail. Given the difficulty that the two *ad hoc* tribunals, and the ICTY in particular, have had with the arrest of suspects and conduct of investigations, even when backed with the power of the Security Council, the ICC’s ability to effectively enforce international criminal law remains in question.

60. The concept of subpoena power at the international level has proven controversial. *See generally* Prosecutor v. Blaskic, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of July 18, 1997 (Appeals Chamber Oct. 29, 1997).

61. *See* Rome Statute, *supra* note 10, art. 87(7).

62. *Id.* art. 56(2)(e).

63. *Id.* art. 57(3)(d).

64. The Statute specifically includes “the interview of or taking evidence from a person on a voluntary basis,” and “the examination without modification of a public site or other public place.” *Id.* art. 99(4).

III. THE EXERCISE OF UNIVERSAL JURISDICTION BY STATES: UNIVERSAL INTER-STATE JURISDICTION

States seeking to exercise universal jurisdiction over perpetrators do so pursuant to internal legislation adapted to that end. Until recently, there have been few cases in which the kinds of crimes found in the Rome Statute have been used in state prosecutions. The French war crimes trials of Klaus Barbie, Paul Touvier and Maurice Papon are one example; Israel's pursuit of Adolph Eichmann is another; Canada's trial of Imre Finta; and most recently, Spain's pursuit of General Pinochet are a few that come to mind. In each case, the national court, while applying national law, was to some extent, sitting as a court of the international community, raising interesting questions as to the law to be applied as a matter of substance, as well as the procedural regime that accompanied the substantive law.

The three categories of jurisdiction (prescriptive, adjudicative and enforcement) are quite similar in national and international prosecutions for international crimes, with one major difference: although the national court is applying prescriptive norms that apply worldwide, its adjudicative power and enforcement authority are confined to its territory. Many fascinating questions are raised by the application of international prescriptive rules by states. To begin with, what (international) rules govern the content of the substantive norm? Should states be free to vary either treaty definitions or customary international law definitions of crimes and still posit the universal application of their national legislation? Second, what procedural regimes should apply? If a defendant claims immunity or amnesty from his or her state of nationality, how should the forum state react? Finally, in a world in which very few states are likely to prosecute non-nationals for atrocities, having a theory of "absolute" universal jurisdiction, that is, universal jurisdiction subject to no limitations borne from prudential concerns makes sense. But if many states adopt legislation to punish perpetrators of international crimes, and then begin to assert jurisdiction over such offenders, should international law establish some reasonable and principled rules to resolve otherwise difficult conflicts of jurisdiction? This last concern affects both the application of the substantive law, and the procedural regime, and will be considered in both contexts.

A. The Content of the Prescriptive Norm

Here we have a gap between theory and practice. First, universal interstate jurisdiction postulates that all states are applying international norms through their internal law. In theory, this law would not vary from state to state. In practice, however, this law could vary considerably. Indeed, the framers of the Rome Statute arguably encouraged states to "improve" the international norms in the ICC Treaty, by inserting article 10 of the Statute

into the text. Article 10, which encourages the development of customary international law outside the treaty definitions of crimes contained in the Rome Statute, clearly envisages states' modifying the Rome Statute's definitions through internal legislation.

To take an obvious example, states could add political and social groups to the list of groups protected by article II of the Genocide Convention. A state taking this action could prosecute an individual for politicide, even though that person would escape such prosecution in the ICC or before most other national courts.⁶⁵ If the forum state was applying its law to a foreigner with no connection to its territory, the only basis upon which its criminal legislation could be extraterritorially applied would presumably be the theory of universal jurisdiction. Assuming that the state wished to further the purposes of international criminal law (holding war criminals accountable), and enacted a "more progressive" version of the current international law, one might not object too strenuously. Indeed, the Rome Statute clearly envisages itself to be a floor, not a ceiling, encouraging state practice to develop in new directions.⁶⁶ Yet the *nullum crimen* principle and the possible jumble of conflicting and overlapping laws that could be created if states felt completely free to modify existing international definitions of crimes (or to simply assert that their legislation reflects what they believe to be the customary international law definition) is clearly problematic. At some point it may be necessary to ask whether the international community can have it both ways: asserting definitions of crimes in the Rome Statute that serve as universal international legislation that may or may not be the same as "universal" definitions of crimes that exist either in customary international law or as a matter of internal legislation.

B. *The Procedural Regimes*

Even assuming that substantive international criminal law norms were constant from state to state, the procedural regimes to which they are subjected may vary considerably. Statutes of limitations, immunities, pardons, penalties, and the rights of the defendant, just to name a few, are all aspects of criminal procedure that are largely and almost exclusively local in character. Even as to aspects of procedure that are covered by international law, there is very rarely any formal connection between national and international proceedings. While many have asserted that national prosecutions either must occur, or must be characterized by certain rules,

65. Of course, they could most likely be prosecuted for crimes against humanity.

66. See generally Leila Nadya Sadat, *Custom, Codification and Some Thoughts About the Relationship between the Two: Article 10 of the ICC Statute*, 49 DEPAUL L. REV. 909 (2000).

there is virtually no integration of national and international legal criminal law regimes that would give those assertions real force.

If, for example, we consider the problem of amnesties or immunities granted by municipal law to a potential criminal defendant, the first question to be answered is what law applies. Public international law has not yet developed a system of conflicts of laws to address this question, because it is largely operating under the *Lotus* paradigm: as every state is an independent sovereign, any state may apply its law to a problem unless there is some rule prohibiting it from doing so.⁶⁷ Thus, it is not clear whether the forum state looks to its own law, the law of the state granting the defendant immunity, the law of the state of the defendant's nationality, the law of the state upon whose territory the crimes were committed (the territorial state), or international law to resolve the question.

It would seem paradoxical for the forum state to use the law of the state granting immunity as the measure of its own exercise of universal jurisdiction. First, as most of these crimes are committed in internal conflicts by regimes in power, the state granting immunity will typically be the state of the defendant's nationality as well as the territorial state. Since the defendant will presumably have violated clear norms of international law, there can be no issue relating to *nullum crimen, nullum poena sine lege* – no punishment without law – if an amnesty granted after the crime's commission is ultimately ineffective because the defendant travels abroad.⁶⁸ Second, many immunities are granted by regimes to themselves just before they step down, or are extracted under threat of rebellion and violence from a successor regime. The former situation is a classic example of law that is blatantly self-interested, and need not detain us further. The second situation, while involving amnesties granted by a presumably legitimate government, could appear to be an illegal contract, void *ab initio*, if the beneficiary seeks to enforce it, as against public policy, and extracted by duress.⁶⁹

Assuming then that it is not a state other than the forum state whose law

67. See generally S.S. "Lotus" (Fr. v. Tur.), 1927 P.C.I.J. (Ser. A) no. 10.

68. This may be less true, however, in the case of conditional amnesties, where the defendant has voluntarily come forward and placed him or herself in jeopardy of prosecution by confessing the crime. In this case, the better rule may be that the forum state should examine the particular proceeding to see if the principle of *ne bis in idem* should attach and immunize the particular defendant from subsequent prosecutions. Again, the issue arises whether the forum uses its own rules or an international rule of *ne bis in idem*. The practical response of most fora will most likely be to use some combination of the two, due to the fact that the international law on the subject is not well-codified, and the need to balance the competing interests involved.

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

should govern the question of whether the amnesty or other immunity is valid, the choices remaining are the law of the forum and international law. I discuss the last possibility first. As discussed above, international law criminalizing gross abuses of human rights has developed since World War II. There is general agreement that the substantive norms, whether initially established by treaty or by custom, are well-established norms of customary international law, and indeed, *jus cogens* norms that are non-derogable in nature.⁷⁰ This position was reaffirmed during the Rome Diplomatic Conference to establish the permanent international criminal court, where most governments were comfortable codifying these norms and applying them universally in the event the Security Council referred a particular case to the Court. A state investigating a non-national for one of these crimes pursuant to an exercise of universal jurisdiction, is thus applying, through the medium of its national law, international law. What is not clear is whether the state is also bound, in the absence of a specific treaty obligation, to apply international rules related to the substantive norm. The most that can be said is that there is at least some evidence that a state is required to do so, at least as to certain rules.

First, the Charter and judgment of the International Military Tribunal at Nuremberg clearly affirmed the primacy of international law over national law, at least insofar as crimes against peace, war crimes and crimes against humanity were concerned. The Charter essentially abolished the defense of superior orders, and was explicit in rejecting municipal law as a defense to an international crime. The Nuremberg principles were adopted in a resolution by the United Nations General Assembly in 1946,⁷¹ and have not been seriously questioned since. It would seem odd for international law to prime national law, only for national law to extinguish the legal obligation imposed either through the application of a statute of limitations, amnesty or some other form of domestic immunity. Although there was some doubt as to whether a rule concerning the statute of limitations existed in customary international law,⁷² that doubt would

70. See Bassiouni, *Normative Framework*, *supra* note 1, at 201-02.

71. See U.N. GAOR, 1st Sess., pt. 2, at 188, U.N. Doc. A/61/Add.1 (1946).

72. There are two treaties on the subject, but they have not been widely adopted. U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 75. The convention came into force on November 11, 1970 and according to the United Nation's web site, currently has only 10 signatories and 44 parties, available at <http://untreaty.un.org/>. Shortly thereafter, the Council of Europe adopted a similar convention. European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, E.T.S. No. 82, *reprinted in* 13 I.L.M. 540 (1974). The European Convention was only ratified by two states and never entered into force. Interestingly, both conventions were largely a response to German statutes of limitation that would have caused Nazi crimes to prescribe, and prevented prosecution. This result, which was apparently

seem to be laid to rest after the widespread adoption of the Rome Statute which provides that the crimes therein do not expire.⁷³ Similarly, head of state immunity and superior orders are clearly addressed in the Rome Statute, and its widespread adoption by states will presumably again create clear legal rules on those issues. Thus, although the modalities of incorporation of international law by states is generally a question of national law, given that these particular rules of international law appear to be inextricably intertwined with the application of a *jus cogens* norm of fundamental importance, the better rule would be that national legal systems are bound, as a matter of international law, to apply international, and not national, rules regarding superior orders and statutes of limitation.

Head of state immunity presents a slightly different problem, as the House of Lords recognized in the *Pinochet* case, for if international law abolishes head of state immunity as regards the international prosecution of current, as well as former, heads of state, national prosecutions of current leaders might unduly strain the international legal system, which is still premised largely on the sovereign equality of states. A complete exploration of this question is beyond the scope of this essay, but even this brief discussion suggests that because there is no clear international legal rule on this subject, the law that should probably be applied is national law as informed by developing international practice. As with any complex conflicts problem, whether of law or of jurisdictions, a balancing of the conflicting interests of the jurisdictions involved should occur.

I turn now to the last issue, the difficult question of amnesty, either *de facto* or *de jure*. In another essay, I suggest that international law appears to reject amnesties with respect to grave breaches and perhaps other serious crimes committed in international armed conflict.⁷⁴ However, with respect to crimes against humanity, genocide and other war crimes, a clear international rule does not appear. If we reject the law of the state granting the amnesty as a source of law to apply (for the reasons given above), we must assume the relevant law to be the national law of the forum state.

perceived as desirable in Germany, was viewed as unacceptable by many other countries. See Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 318-21 (1994).

73. See Rome Statute, *supra* note 10, art. 29 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.").

74. See, e.g., SADAT, UNIVERSAL JURISDICTION AND NATIONAL AMNESTIES, *supra* note 38. Pardons and conditional amnesties may be distinguishable, for both involve the use of judicial or quasi-judicial proceedings and involve particularized consideration of a defendant's guilt or innocence in a particular case. Assuming the proceedings are not a sham, even where amnesties are generally prohibited, pardons and conditional amnesties may be acceptable, or even required by the legality principle, if the defendant has been "put in jeopardy" of criminal proceedings.

It is quite likely; however, that the forum state may not have any law on the question, for its legislature probably has not considered the problem. Thus, the remainder of this section proposes some policy considerations that a court in the forum state might use in evaluating a foreign amnesty, keeping in mind that it will need to balance the international community's interest in pursuing justice against concerns of comity and the importance of respecting the difficult choices a particular jurisdiction has made as to how it will treat the perpetrators of past atrocities.

Courts in the forum state should keep in mind that, as a general principle, amnesties should be disfavored. Moreover, although international law may not yet have crystallized as to the legality of amnesties *per se*, to permit national amnesties to extinguish obligations imposed by international law would seem contrary to the foundational principles of international criminal law, and stand in opposition to the clear weight of authority and much of the state practice emerging in this field. In particular, blanket amnesties and any grant of immunity to a former leader should most likely be rejected out-of-hand.

This should create a presumption that the forum state should refuse to accept the amnesty. This presumption would be rebuttable, however, in specific cases. First, even the Rome Statute for the International Criminal Court did not prohibit amnesties *per se*. Instead, as noted earlier, it left open the possibility that some amnesties might serve the interest of justice. Assuming the decision is made in good faith, national fora presumably should have the same margin of discretion. Their courts may already be overburdened, the defendant may have already been placed "in jeopardy" of criminal prosecution elsewhere, or comity may require that the forum state abstain from prosecution in a specific case, particularly with respect to conditional amnesties that have resulted from a carefully negotiated and potentially fragile agreement entered into as part of a transition to democracy. Assuming the decision of the forum state is made without the influence of political pressure, and pursuant to sound jurisprudential reasoning, a case-by-case approach to the problem of amnesties would appear to serve the interest of justice more than a *per se* rule might.

Before concluding this section, it is worth noting that the conundrum posited by the application of international law by national legal systems is not a new problem. All legal systems involving multiple and overlapping courts must address this problem. As an example, the United States Supreme Court has articulated a complex doctrine governing the application of state law by federal courts, a brief look at which may prove instructive. In the seminal case of *Erie Railroad v. Tompkins*,⁷⁵ the Court held, for a variety of reasons having to do with the peculiarities of the United States Constitution and statutes granting federal jurisdiction, that federal courts

75. 304 U.S. 64 (1938).

sitting in diversity, meaning that they were essentially hearing cases involving citizens from different states, were required to apply state law to decide the case before them. The Court was later faced with the difficult question, very similar to our problem here, of what the state law governing a case included. That is, if New York law was to be applied to govern the tort liability of a particular defendant, should New York's statute of limitations apply to the case, or was the federal court free to apply its own law to the problem? In a series of complicated decisions, the Supreme Court suggested that many factors would govern whether state or federal law would apply, in particular relying upon whether the application of one or the other would be "outcome determinative,"⁷⁶ or bound up in the rights and obligations created by the state law to be applied.⁷⁷ Thus, if the state law question was "substantive," state law applied. If it was simply procedural, federal law applied. The Court has often suggested that the purpose of the *Erie* doctrine, aside from its constitutional underpinnings, was to avoid "forum shopping" and the "inequitable administration of the laws."⁷⁸ *Erie* and its progeny have plagued first year law students ever since its elaboration, but there is no doubt that federal and quasi-federal systems in which many courts may potentially hear a case need some sort of rules to systematize the situation and balance the competing interests involved if the legal rules sought to be enforced are not to be undermined by inconsistent and widely varying application.

The European Court of Justice (ECJ) has developed similar doctrines governing the application of European law by national courts. (This is *Erie* in reverse). Faced with the disparate application of EU law by national courts, the ECJ has, through a set of complex and sophisticated cases, developed doctrines that require national courts to apply EU law, but allow them a certain freedom in the manner by which they do so. A central point in the ECJ's jurisprudence, however, which the *Erie* doctrine also underscores, is that a national court's application of procedural rules to an EU cause of action may not discriminate against the application of Community law, or completely vitiate the substantive right, nor render the right impossible to exercise in practice.⁷⁹

The relationships between EU courts and national courts, and between federal and state courts in the United States, are of course quite different than the diffuse and relatively informal links that characterize the relationship of national courts to each other, to the two *ad hoc* tribunals and to the future ICC. The treaties establishing the European

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

77. *See* *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958).

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

79. *See* PAUL CRAIG & GRÁINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 214-15 (1998).

Communities and the European Union form a nascent constitution constraining the member states, the communities and the EU in a much more formal and legal relationship than exists in the international arena. Similarly, the balance between the federal and state courts in the United States is governed by a written constitution. Nevertheless, as the international legal system matures, and as we continue to explore questions involving the multiple and conflicting application of the law by courts with concurrent jurisdiction, it may be instructive to consider case law elaborated in two well-developed two-tier legal systems as a guide to doctrines that might ultimately be useful to international criminal law.

IV. CONCLUSION

The international community is forging ahead with the establishment of an international criminal court, and, at the same time, encouraging the robust exercise of universal jurisdiction by states. This is as it should be: the harm inflicted on society by the commission of atrocities must be addressed, if human society is to flourish. Yet the legal tools available are too blunt – they need to be sharpened and fine tuned if they are to continue to meet our needs. Universal jurisdiction is a term freely bandied about, and little considered. This essay attempts to provide a framework for considering its meaning as well as its application. In particular, it is suggested that its application at the international level is quite different than its application in national legal systems; and suggests that, ultimately, it may be useful to harmonize the two regimes so that they become more coherent. This would better protect criminal defendants, as well as respect the real need for the exercise of restraint in applying law extraterritorially. The international community should, over time, develop a set of rules to govern the exercise of universal jurisdiction by states, taking into account both substantive norms and procedural regimes of application. In particular, conflicts of law and conflicts of jurisdiction rules that could assist states in considering amnesties or other immunities granted by other states with regard to the perpetrator(s) in a particular case should be developed. Justice, for the defendants as well as for the victims, requires no less.