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From the eXile Files: An Essay on Trading Justice for Peace

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I. Introduction

Since 1990, three different U.S. Presidents have accused Iraqi leader Saddam Hussein of committing grave breaches of the 1949 Geneva Conventions and acts of genocide.[1] Although the Geneva Conventions and the Genocide Convention require state parties to bring offenders to justice, on the eve of the 2003 invasion of Iraq, President George W. Bush offered to call off the attack if Saddam Hussein and his top lieutenants would agree to relinquish power and go into exile.[2] This was no publicity stunt, as some have characterized it. Working through President Hosni Mubarak of Egypt, the United States actively pursued the matter with several Mideast countries, ultimately persuading Bahrain to agree to provide sanctuary to Hussein if he accepted the deal.[3] When Hussein rejected the proposal, Bush promised that the Iraqi leader would be forced from power and prosecuted as a war criminal.[4]

Admittedly, thousands of lives could have been spared if Hussein had accepted the deal. But at the risk of being accused of blindly embracing Kant's prescription that "justice must be done even should the heavens fall,"[5] this

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1. *See* Michael P. Scharf, *Don't Just Fight Him, Indict Him*, L.A. TIMES, Oct. 6, 2002, at M1 (recounting Hussein regime's atrocities); Michael P. Scharf, *Can This Man Get a Fair Trial?* WASH. POST, Dec. 19, 2004, at B1 ("[T]here is a mountain of evidence of atrocities committed by Hussein's regime."). On July 1, 2004, Saddam Hussein was arraigned before the Iraqi Special Tribunal, and informed that he was charged with (1) the systematic killing of religious figures in 1974, which constituted a crime against humanity; (2) killing off the Kurdish Barzani clan in 1983, which constituted genocide; (3) torturing and killing members of political parties over the last thirty years, which constituted a crime against humanity; (4) using chemical weapons against the Kurds in Halabja in 1988, which constituted a crime against humanity; (5) the "Anfal" ethnic cleansing campaign against Kurds in 1987–88, which constituted genocide; (6) war crimes during the 1990 invasion of Kuwait, which constituted grave breaches of the Geneva Conventions; and (7) the drying up of rivers, killing hundreds of thousands of Marsh Arabs in response to their 1991 uprising, which constituted genocide. *Charges Facing Saddam Hussein*, BBC NEWS, July 1, 2004, http://news.bbc.co.uk/2/hi/middle_east/3320293.stm (last visited Jan. 26, 2006).

2. *See* Julian Borger, *Diplomacy Dies, Now It's War: Bush Gives Saddam and His Sons 48 Hours to Leave Iraq or Face Massive Military Onslaught*, GUARDIAN (LONDON), Mar. 18, 2003, at 1 (describing President Bush's exile offer).

3. Emily Wax, *Arab Leaders Fail in Last Minute Efforts: Mubarak Blames Iraq, Cautions Coalition: Bahrain Signals that it Would Give Hussein Sanctuary*, WASH. POST, Mar. 20, 2003, at A21.

4. Richard W. Stevenson, *Threats and Responses: The President; Bush Gives Hussein 48 Hours, and Vows to Act*, N.Y. TIMES, Mar. 18, 2003, at 1.

5. IMMANUEL KANT, THE METAPHYSICS OF MORALS 141 (Mary Gregor trans., Cambridge

Article argues that it was inappropriate for the Bush Administration even to make the offer, and that if implemented the exile-for-peace deal would have seriously undermined the Geneva Conventions and the Genocide Convention, which require prosecution of alleged offenders without exception.

A few months after the invasion of Iraq, U.S. officials helped broker a deal whereby Liberian President Charles Taylor, who had been indicted for crimes against humanity by the Special Court for Sierra Leone, agreed to give up power and was allowed to flee to Nigeria, where he received asylum.[6] At the time, forces opposed to Taylor, which had taken over most of the country, were on the verge of attacking the capital city Monrovia, and tens of thousands of civilian casualties were forecast. The exile deal averted the crisis and set the stage for insertion of a U.N. peacekeeping mission that stabilized the country and set it on a path to peace and democracy.[7] In contrast to the Hussein case, the Taylor arrangement did not in any way violate international law. This Article explains why international law should treat the two situations differently, prohibiting exile and asylum for Saddam Hussein while permitting such a justice-for-peace exchange in the case of Charles Taylor.

This is the first scholarly article in recent years to focus on the significant issue of exile. Scholarship on the analogous issue of amnesty has been written largely from the point of view of aggressive advocates of international justice, whose writing is based on the assumption that the widespread state practice favoring amnesties constitutes a violation of, rather than a reflection of, international law in this area.[8] Before analyzing the relevant legal principles,

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1991) (1785).

6. Ryan Lizza, *Charles at Large*, NEW REPUBLIC, Apr. 25, 2005, at 10.

7. *Id.*

8. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW, 492, 500–01 (1992) (arguing that there is an international duty to prosecute or extradite those who commit crimes against humanity); Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 194–201 (Stephen Macedo ed., 2003) (arguing that amnesties create a "culture of impunity" incompatible with international justice); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 63 (1996) (arguing that states have an obligation to prosecute *jus cogens* crimes); Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 14 (1994) (noting U.N.'s affirmation of duty to prosecute war crimes); Diane F. Orentlicher, *Settling Account: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2585, 2593 (1991) (explaining that analysts interpret law generated by the Nuremberg trials, and U.N. actions ratifying that law, to "require punishment of crimes against humanity"); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 461 (1990) (urging the necessity of an international duty to investigate grave human violations).

the Article begins with an examination of the practical considerations that counsel for and against the practice of "trading justice for peace." Next, using the Saddam Hussein and Charles Taylor cases as a focal point, the Article analyzes the relevant international instruments which require prosecution under limited circumstances. This is followed by a critique of the popular view that customary international law and the principle of *jus cogens* broadly prohibit actions that prevent prosecution of crimes under international law. The Article establishes that there does not yet exist a customary international law rule requiring prosecution of war crimes in internal armed conflict or crimes against humanity, but that there is a duty to prosecute in the case of grave breaches of the Geneva Conventions, the crime of genocide, and torture. Where the duty to prosecute does apply, it is important that states and international organizations honor it, lest they signal disrespect for the important treaties from which the duty arises, potentially putting their own citizens at risk and generally undermining the rule of law.

II. Practical Considerations

A. Interests Favoring Exile, Asylum, and Amnesty

Notwithstanding the popular catch phrase of the 1990s—"no peace without justice"—achieving peace and obtaining justice are sometimes incompatible goals—at least in the short term. In order to end an international or internal conflict, negotiations often must be held with the very leaders who are responsible for war crimes and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more deaths, destruction, and human suffering.[9]

Reflecting this reality, during the past thirty years, Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay have each, as part of a peace arrangement, granted amnesty to members of the former regime that committed international crimes within their respective borders.[10]

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9. As an anonymous government official stated in an oft-quoted article: "The quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow." Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 258 (1996).

10. *See* Steven Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 722–23 (1999) (mentioning the governments in transitional democracies that have passed amnesty laws); Roht-Arriaza, *supra* note 8, at 461 (noting grants of amnesty in Argentina, Chile, Uruguay, Guatemala, and El Salvador); Michael P. Scharf, *The Letter of the*

With respect to five of these countries—Cambodia, El Salvador, Haiti, Sierra Leone, and South Africa—"the United Nations itself pushed for, helped negotiate, or endorsed the granting of amnesty as a means of restoring peace and democratic government."[11]

In addition to amnesty (which immunizes the perpetrator from domestic prosecution), exile and asylum in a foreign country (which puts the perpetrator out of the jurisdictional reach of domestic prosecution)[12] is often used to induce regime change, with the blessing and involvement of significant states and the United Nations. Peace negotiators call this the "Napoleonic Option," in reference to the treatment of French emperor Napoleon Bonaparte who, after his defeat at Waterloo in 1815, was exiled to St. Helena rather than face trial or execution.[13] More recently, a number of dictators have been granted sanctuary abroad in return for relinquishing power. Thus, for example, Ferdinand Marcos fled the Philippines for Hawaii; Baby Doc Duvalier fled Haiti for France; Mengisthu Haile Miriam fled Ethiopia for Zimbabwe; Idi Amin fled Uganda for Saudi Arabia; General Raoul Cedras fled Haiti for Panama; and Charles Taylor fled Liberia for exile in Nigeria—a deal negotiated by the United States and U.N. envoy Jacques Klein.[14]

As Payam Akhavan, then Legal Adviser to the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, observed a decade ago: "[I]t is not unusual in the political stage to see the metamorphosis of yesterday's war monger into today's peace broker."[15] This is because, unless the international community is willing to use force to topple a rogue regime, cooperation of the leaders is needed to bring about peaceful regime change and put an end to violations of international humanitarian law. Yet, it is not realistic to expect them to agree to a peace settlement if, directly following the

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Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes, 59 LAW & CONTEMP. PROBS. 41, 41 (1996) (discussing these countries' amnesty programs).

11. Scharf, *supra* note 10, at 41.

12. In cases of exile, the state where the offense occurred (the territorial state) cannot commence proceedings as it does not have physical custody over the accused, and the sanctuary state is generally prevented from prosecuting or extraditing by the doctrine of head of state immunity. *See, e.g.*, Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 242 (H.L. 1999) (U.K.) (noting that the doctrine "protects all acts which the head of state has performed in the exercise of the functions of government").

13. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 5 (1997).

14. *See* Dave Gilson, The Exile Files, 2003 (Aug. 21, 2003), http://www.globalpolicy.org/intljustice/general/2003/0826exile.htm (discussing the exile arrangements of more than a dozen individuals).

15. Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259, 271 (1996).

agreement, they would find themselves or their close associates facing potential life imprisonment.

This conclusion finds support in the observations of the 2004 Report of the International Truth and Reconciliation Commission for Sierra Leone:

> The Commission is unable to condemn the resort to amnesty by those who negotiated the Lomé Peace Agreement [which provides amnesty to persons who committed crimes against humanity in Sierra Leone]. The explanations given by the Government negotiators, including in their testimonies before the Truth and Reconciliation Commission, are compelling in this respect. In all good faith, they believed that the RUF [insurgents] would not agree to end hostilities if the Agreement were not accompanied by a form of pardon or amnesty.
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> . . . .
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> The Commission is unable to declare that it considers amnesty too high a price to pay for the delivery of peace to Sierra Leone, under the circumstances that prevailed in July 1999. It is true that the Lomé Agreement did not immediately return the country to peacetime. Yet it provided the framework for a process that pacified the combatants and, five years later, has returned Sierra Leoneans to a context in which they need not fear daily violence and atrocity.[16]

In brokering the Charles Taylor exile deal, the United States and United Nations were particularly encouraged by the success of similar amnesty/exile for peace arrangements relating to Haiti and South Africa in the 1990s. From 1990–1994, Haiti was ruled by a military regime headed by General Raol Cedras and Brigadier General Philippe Biamby, which executed over 3000 civilian political opponents and tortured scores of others.[17] The United Nations mediated negotiations at Governors Island in New York Harbor, in which the military leaders agreed to relinquish power and permit the return of the democratically elected President (Jean-Bertrand Aristide) in return for a full amnesty for the members of the regime and a lifting of the economic sanctions imposed by the U.N. Security Council.[18] Under pressure from the United

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16. 3B WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION 365 (2004), *quoted in* William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 163–64 (2004). Schabas, the Director of the Irish Centre for Human Rights, was a member of the International Truth Commission for Sierra Leone.

17. *See* Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 4–5 (1996) (describing human rights violations documented by the U.S. Department of State and various human rights groups).

18. *See* The Secretary-General, *The Situation of Democracy and Human Rights in Haiti*,

Nations mediators, Aristide agreed to the amnesty clause of the Governors Island Agreement.[19] The Security Council immediately "declared [its] readiness to give the fullest possible support to the Agreement signed on Governors Island,"[20] which it later said constitutes "the only valid framework for the resolution of the crisis in Haiti."[21] When the military leaders initially failed to comply with the Governors Island Agreement, on July 31, 1994, the Security Council took the extreme step of authorizing an invasion of Haiti by a multinational force.[22] On the eve of the invasion on September 18, 1994, a deal was struck, whereby General Cedras agreed to retire his command and accept exile in response to a general amnesty voted into law by the Haitian parliament and an offer by Panama to provide him asylum.[23]

The amnesty deal had its desired effect: The democratically elected Aristide was permitted to return to Haiti and reinstate a civilian government, the military leaders left the country for sanctuary in Panama, much of the military surrendered their arms, and most of the human rights abuses promptly ended—all with practically no bloodshed or resistance.[24] Although the situation in Haiti has once again deteriorated, with a wave of violent protests and strikes erupting in 2004, the more recent problems were due largely to President Aristide's mismanagement and corruption, not the fact that the military leaders escaped punishment ten years earlier.[25]

U.N. Doc. S/26063, A/47/975 (July 12, 1993) (reproducing the text of the Governors Island Agreement). The Governors Island Agreement was supplemented by a document known as the New York Pact, which was signed by the two sides on July 16, 1993. Paragraph 4 of the New York Pact provides that "[t]he political forces and parliamentary blocs undertake to ensure that the following laws are passed, on the bases of an emergency procedure: . . . (ii) Act concerning the amnesty." The Secretary-General, *The Situation of Democracy and Human Rights in Haiti* annex, ¶ 4, U.N. Doc. S/26297, A/47/1000 (Aug. 13, 1993).

19. *See* Irwin P. Stotzky, *Haiti: Searching for Alternatives*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 188 (Naomi Roht-Arriaza ed., 1995) (describing Aristide's opposition to granting amnesty to "common criminals" and his ultimate capitulation in the face of tremendous pressure). Professor Stotzky of the University of Miami School of Law served as Aristide's legal adviser while Aristide was in exile in the United States.

20. Letter from the President of the Security Council to the Secretary-General, U.N. SCOR, 48th Sess. at 120, U.N. Doc. S/INF/49 (July 15, 1993).

21. Statement of the President of the Security Council, U.N. SCOR, 48th Sess., 3298th mtg. at 126, U.N. Doc. S/INF/49 (Oct. 25, 1993).

22. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

23. *Haitian Lawmakers Pass Partial Amnesty to Pressure Cedras*, COMM. APPEAL (Memphis), Oct. 8, 1994, at A1.

24. *See* Maggie O'Kane, *After the Yanks Have Gone*, GUARDIAN (London), Feb. 18, 1995, at 24 (describing Aristide's generally peaceful return to power).

25. International Crisis Group, *A New Chance for Haiti?*, International Crisis Group Report No. 10, 7–11 (Nov. 18, 2004).

South Africa stands as another success story, indicating the potential value of trading justice for peace. From 1960 to 1994, thousands of black South Africans were persecuted and mistreated under that country's apartheid system. With the prospect of a bloody civil war looming over negotiations, "[t]he outgoing leaders made some form of amnesty for those responsible for the regime a condition for the peaceful transfer to a fully democratic society."[26] The leaders of the majority black population decided that the commitment to afford amnesty was a fair price for a relatively peaceful transition to full democracy.[27] In accordance with the negotiated settlement between the major parties, on July 19, 1995, the South African Parliament created a Truth and Reconciliation Commission, consisting of a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation.[28] Under this process, amnesty would be available only to individuals who personally applied for it and who disclosed fully the facts of their apartheid crimes. After conducting 140 public hearings and considering 20,000 written and oral submissions, the South African Truth Commission published a 2739-page report of its findings on October 29, 1998.[29] Most observers believe the amnesty in South Africa headed off increasing tensions and a potential civil war.

It is a common misconception that trading amnesty or exile for peace is equivalent to the absence of accountability and redress.[30] As in the Haitian and South African situations described above, amnesties can be tied to accountability mechanisms that are less invasive than domestic or international prosecution. Ever more frequently in the aftermath of an amnesty- or exile-for-peace deal, the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges (referred to as "lustration") that keep such perpetrators from positions of public trust.[31] While not the same as criminal

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26. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 52 (1998).

27. *Id.* at 55.

28. National Unity and Reconciliation Act 34 of 1995 §§ 2, 12, 16 & 23.

29. The text of the South African Truth Commission's Report is available on the Internet at www.info.gov.za/otherdocs/2003/trc.

30. *See* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 482 (2001) (classifying amnesties into four categories, from least to most legitimate: (1) "Blanket Amnesties"; (2) "Locally Legitimized, Partial Immunities"; (3) "Internationally Legitimized, Partial Immunities"; and (4) "Constitutional Immunity").

31. NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 282–91(1995).

prosecution, these mechanisms do encompass much of what justice is intended to accomplish: prevention, deterrence, punishment, and rehabilitation. Indeed, some experts believe that these mechanisms do not just constitute "a second best approach" when prosecution is impracticable, but that in many situations they may be better suited to achieving the aims of justice.[32]

B. Factors Favoring Prosecution

Although providing amnesty and exile to perpetrators may be an effective way to induce regime change without having to resort to force, there are several important countervailing considerations favoring prosecution that suggest amnesty/exile should be a bargaining tool of last resort reserved only for extreme situations. In particular, prosecuting leaders responsible for violations of international humanitarian law is necessary to discourage future human rights abuses, deter vigilante justice, and reinforce respect for law and the new democratic government.

While prosecutions might initially provoke resistance, many analysts believe that national reconciliation cannot take place as long as justice is foreclosed. As Professor Cherif Bassiouni, then Chairman of the U.N. Investigative Commission for Yugoslavia, stated in 1996, "[i]f peace is not intended to be a brief interlude between conflicts," then it must be accompanied by justice.[33]

Failure to prosecute leaders responsible for human rights abuses breeds contempt for the law and encourages future violations. The U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have concluded that impunity is one of the main reasons for the continuation of grave violations of human rights throughout the world.[34] Fact finding reports on Chile and El Salvador indicate that the granting of amnesty or de facto impunity has led to an increase in abuses in those countries.[35]

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32. *See* MINOW, *supra* note 26, at 9 (contending that prosecutions "are slow, partial, and narrow").

33. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 13 (1996).

34. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Working Group on Enforced or Involuntary Disappearances, *Report on the Consequences of Impunity*, ¶ 344, U.N. Doc. E/CN.4/1990/13 (Jan. 24, 1990), *reprinted in* 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 18, 19 (N. Kritz ed., 1995).

35. U.N. Econ. & Soc. Council [ECOSOC], *Protection of Human Rights in Chile*, ¶ 341, U.N. Doc. A/38/385 (Oct. 17, 1983).

Further, history teaches that former leaders given amnesty or exile are prone to recidivism, resorting to corruption and violence and becoming a disruptive influence on the peace process. From his seaside villa in Calabar, Nigeria, for example, Charles Taylor orchestrated a failed assassination plot in 2005 against President Lansana Conte of Guinea, a neighboring country that had backed the rebel movement that forced Taylor from power.[36]

What a new or reinstated democracy needs most is legitimacy, which requires a fair, credible, and transparent account of what took place and who was responsible. Criminal trials (especially those involving proof of widespread and systematic abuses) can generate a comprehensive record of the nature and extent of violations, how they were planned and executed, the fate of individual victims, who gave the orders, and who carried them out. While there are various means to develop the historic record of such abuses, the most authoritative rendering of the truth is possible only through the crucible of a trial that accords full due process. Supreme Court Justice Robert Jackson, the Chief Prosecutor at Nuremberg, underscored the logic of this proposition when he reported that the most important legacy of the Nuremberg trials was the documentation of Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future."[37] According to Jackson, the establishment of an authoritative record of abuses that would endure the test of time and withstand the challenge of revisionism required proof of "incredible events by credible evidence."[38]

In addition to truth, there is a responsibility to provide justice. While a state may appropriately forgive crimes against itself, such as treason or sedition, serious crimes against persons, such as rape and murder, are an altogether different matter. Holding the violators accountable for their acts is a moral duty owed to the victims and their families. Prosecuting and punishing the violators would give significance to the victims' suffering and serve as a partial remedy for their injuries. Moreover, prosecutions help restore victims' dignity and

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36. *See* Lizza, *supra* note 6, at 10 (citing an intelligence report prepared by investigators for the Special Court for Sierra Leone). In response, the U.N. Security Council adopted Resolution 1532, which required all states to freeze Charles Taylor's assets in order to prevent him from further engaging "in activities that undermine peace and stability in Liberia and the region." S.C. Res. 1532, pmbl., U.N. Doc. S/RES/1532 (Mar. 12, 2004).

37. Report from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, to the President (Oct. 7, 1946), *in* 20 TEMPLE L.Q. 338, 343 (1946).

38. Report from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, to the President (June 7, 1945), *in* 39 AM. J. INT'L L. 178, 184 (Supp. 1945).

prevent private acts of revenge by those who, in the absence of justice, would take it into their own hands.[39]

While prosecution and punishment can reinforce the value of law by displacing personal revenge, failure to punish former leaders responsible for widespread human rights abuses encourages cynicism about the rule of law and distrust toward the political system. To the victims of human rights crimes, amnesty or exile represents the ultimate in hypocrisy: While they struggle to put their suffering behind them, those responsible are allowed to enjoy a comfortable retirement. When those with power are seen to be above the law, the ordinary citizen will never come to believe in the principle of the rule of law as a fundamental necessity in a society transitioning to democracy.

Finally, where the United Nations or major countries give their imprimatur to an amnesty or exile deal, there is a risk that leaders in other parts of the world will be encouraged to engage in gross abuses. For example, history records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity. In a 1939 speech to his reluctant General Staff, Hitler remarked, "Who after all is today speaking about the destruction of the Armenians?"[40] Richard Goldstone, the former Prosecutor of the International Criminal Tribunal for the former Yugoslavia, has concluded that "the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein and Mohammed Aidid, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia with the expectation that they would not be held accountable for their international crimes."[41] When the international community encourages or endorses an amnesty or exile deal, it sends a signal to other rogue regimes that they have nothing to lose by instituting repressive measures; if things start going badly, they can always bargain away their responsibility for crimes by agreeing to peace.

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39. Haitian citizens, for example, have committed acts of violence against the former members of the brutal military regime who were given amnesty for their abuses. Gary Borg, *Former Haitian General is Gunned Down in Street*, CHI. TRIB., Oct. 4, 1995, at 4.

40. Adolf Hitler, Speech to Chief Commanders and Commanding Generals (Aug. 22, 1939), *quoted in* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 176 n.96 (1992).

41. Michael Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 398 n.128 (1997).

III. The Limited International Legal Obligation to Prosecute

In a few narrowly defined situations (described below) there is an international legal obligation to prosecute regardless of the underlying practical considerations. Where this is the case, failure to prosecute can amount to an international breach. An amnesty or asylum given to the members of the former regime could be invalidated in a proceeding before either the state's domestic courts[42] or an international forum.[43] International support for such an amnesty or asylum deal would undermine international respect for and adherence to the treaties that require prosecution. Finally, it would be inappropriate for an international criminal court to defer to a national amnesty or asylum in a situation where the amnesty or asylum violates obligations contained in the very international conventions that make up the court's subject matter jurisdiction.

A. Crimes Defined in International Conventions

The prerogative of states to issue an amnesty or grant asylum for an offense can be circumscribed by treaties to which the states are party. There are several international conventions that clearly provide for a duty to prosecute the humanitarian or human rights crimes defined therein, including in particular the grave breaches provisions of the 1949 Geneva Conventions,[44] the Genocide

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42. When the South African amnesty scheme was challenged on the grounds that it violated the rights of families to seek judicial redress for the murders of their loved ones, the newly created Constitutional Court rejected the claim on the ground that neither the South African Constitution nor any applicable treaty prevented granting amnesty in exchange for truth. *See Azanian Peoples Org. v. President of S. Afr.* 1996 (4) SA 671 (CC) ¶ 50 (S. Afr.), *available at* http://www.constitutionalcourt.org.za/Archimages/2529.PDF ("[T]he epilogue to the Constitution authorised and contemplated an 'amnesty' in its most comprehensive and generous meaning."). A challenge to the Argentinian amnesty law fared better. In March 2001, an Argentinian judge declared the amnesty law unconstitutional and in violation of international law, a decision confirmed in August 2003 when Argentina's Parliament voted to annul the amnesty law. Debora Rey, *Argentina Approves Ending Laws on Amnesty*, WASH. POST, Aug. 22, 2003, at A16. As this Article went to press, a lawsuit was winding its way through the courts of Nigeria, seeking to strike down the asylum granted to Charles Taylor on the ground that it violated Nigeria's obligations under international and domestic law to prosecute and deny asylum to perpetrators of war crimes and crimes against humanity. James A. Goldston, *Some Quiet Victories for Human Rights*, INT'L HERALD TRIB., Dec. 22, 2005, at 8.

43. "Challenges to amnesty laws enacted in Argentina, El Salvador, Suriname, and Uruguay have been lodged with the Inter-American Commission on Human Rights of the Organization of American States." Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 n.5 (1991).

44. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick

Convention,[45] and the Torture Convention.[46] When these Conventions are applicable, the granting of amnesty or asylum to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception. It is noteworthy, however, that these Conventions were negotiated in the context of the Cold War and by design apply only to a narrow range of situations, as such limitations were necessary to ensure widespread adoption.

1. The 1949 Geneva Conventions

The four Geneva Conventions were negotiated in 1949 to codify, inter alia, the international rules relating to the treatment of prisoners of war and civilians during armed conflict and in occupied territory after a war. Almost every country of the world is party to these conventions. Each of the Geneva Conventions contains a specific enumeration of "grave breaches," which are war crimes under international law for which there is individual criminal liability and for which states have a corresponding duty to prosecute or extradite. Grave breaches include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, willfully depriving a civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.[47]

Parties to the Geneva Conventions have an obligation to search for, prosecute, and punish perpetrators of grave breaches of the Geneva Conventions, or to hand over such persons for trial by another state party. The

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in Armed Forces in the Field art. 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

45. Convention on the Prevention and Punishment of the Crime of Genocide art. IV, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

46. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, *opened for signature* Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113, *reprinted in* 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1984) (entered into force June 26, 1987) [hereinafter Torture Convention].

47. Geneva Convention I, *supra* note 44, art. 50; Geneva Convention II, *supra* note 44, art. 51; Geneva Convention III, *supra* note 44, art. 130; Geneva Convention IV, *supra* note 44, art. 147.

Commentary to the Geneva Conventions, which is the official history of the negotiations leading to the adoption of these treaties, confirms that the obligation to prosecute grave breaches is "absolute," meaning, inter alia, that state parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches of the Conventions.[48]

It is important to recognize that while states or international tribunals may prosecute persons who commit war crimes in internal armed conflicts, the duty to prosecute grave breaches under the Geneva Conventions is limited to the context of international armed conflict. Further, there is a high threshold of violence necessary to constitute a genuine armed conflict, as distinct from lower level disturbances such as riots, isolated and sporadic acts of fighting, or unilateral abuses committed by a government in the absence of widespread armed resistance by the target population.[49] Moreover, to be an international armed conflict, the situation must constitute an armed conflict involving two or more states, or a partial or total occupation of the territory of one state by another.[50]

In contrast to the duty to prosecute grave breaches occurring in an international armed conflict, with respect to internal armed conflict amnesties are not only permitted, but are encouraged by Article 6(5) of Additional Protocol II[51]—a point the South African Constitutional Court stressed in finding that the amnesties granted by the Truth and Reconciliation Commission

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48. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL COURT FOR THE FORMER YUGOSLAVIA 114–15 & n.356, 341 (1995) (quoting GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD: COMMENTARY 373, cmt. to art. 51 (J. Pictet ed., 1952)); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 210 (1989) (noting that the universality principle of jurisdiction, on which the grave breaches clauses of the Geneva Conventions are based, requires states to prosecute or extradite those charged with committing grave breaches).

49. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (stating that the Protocol "shall not apply to situations of internal disturbances and tensions, such as riots [and] isolated and sporadic acts of violence"). *But see* Michael P. Scharf, *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 36 CASE W. RES. J. INT'L L. 359, 365–67 (2004) (citing the Inter-American Commission on Human Rights' 1997 decision in *Juan Carlos Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶¶ 155–56 (1997), and the United States response to the 9/11 attacks as developments that have sought to lower the armed conflict threshold).

50. Geneva Conventions I, II, III, and IV, *supra* note 44, art. 2.

51. Additional Protocol II, *supra* note 49, art. 6(5) ("At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.").

did not violate international law.[52] The rationale for this provision is to encourage reconciliation, which is of greater importance in noninternational armed conflicts where patrolable international borders do not exist between former enemies. Thus, the Commentary on the Protocol, prepared by the International Committee of the Red Cross, states: "The object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided."[53]

The Geneva Conventions, then, would require prosecution of Saddam Hussein for acts committed during the international armed conflicts involving Iran, Kuwait, and the 1991 Persian Gulf War. They would not, however, require prosecution of Charles Taylor, who is accused only of complicity in war crimes during the internal armed conflict in Sierra Leone.

2. The Genocide Convention

Most of the countries of the world are party to the Genocide Convention, which entered into force on January 12, 1952, and the International Court of Justice has determined that the substantive provisions of the Convention constitute customary international law binding on all states.[54] Like the Geneva Conventions, the Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in the Convention.[55]

The Genocide Convention defines genocide as one of the following acts when committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:"

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52. *Azanian Peoples Org. v. President of S. Afr.* 1996 (4) SA 671 (CC) ¶ 30 (S. Afr.).

53. CLAUDE FILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1402 (1987).

54. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (stating that the Convention's principles are binding on states, "even without any conventional obligation").

55. Article IV of the Genocide Convention states: "Persons committing genocide or any of the acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 45, art. IV. Article V of the Genocide Convention requires states to "provide effective penalties" for persons guilty of genocide. *Id.* art. V. Article VI of the Genocide Convention requires prosecution by the state in whose territory genocide occurs or in an international court established for this purpose. *Id.* art. VI. While Article VI suggests that only the territorial state and state parties to an international criminal court have an obligation to prosecute the crime of genocide, other states would still be bound to extradite an individual accused of genocide if they are not able to prosecute. Therefore amnesty or exile/sanctuary for peace deals would be manifestly inconsistent with the obligations of the Genocide Convention.

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.[56]

There are several important limitations inherent in this definition. First, to constitute genocide, there must be proof that abuses were committed with the specific intent required by the Genocide Convention. It is not enough that abuses were intended to repress opposition; the intent must be literally to destroy a group of people. Second, and even more importantly, the victims of such abuses must constitute a group of one of the four specific types enumerated in the Genocide Convention, namely, national, ethnic, racial, or religious. In this respect, it is noteworthy that the drafters of the Genocide Convention deliberately excluded acts directed against "political groups" from the Convention's definition of genocide.[57]

The Genocide Convention would require prosecution of Saddam Hussein, who has been accused of ordering attacks aimed at destroying the Northern Iraqi Kurds and the Southern Iraqi Marsh Arabs as a people, resulting in hundreds of thousands of casualties. Charles Taylor, in contrast, has not been accused of acts of genocide.

3. The Torture Convention

The Torture Convention entered into force on June 26, 1987, and currently has 138 parties.[58] The Convention defines "torture" as:

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56. Genocide Convention, *supra* note 45, art. II; Rome Statute for the International Criminal Court art. 6, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf.

57. The exclusion of "political groups" was due in large part to the fact that the Convention was negotiated during the Cold War, during which the Soviet Union and other totalitarian governments feared that they would face interference in their internal affairs if genocide were defined to include acts committed to destroy political groups. According to Professor Kuper, "one may fairly say that the delegates, after all, represented governments in power, and that many of these governments wished to retain an unrestricted freedom to suppress political opposition." L. KUPER, GENOCIDE 30 (1982).

58. Office of the United Nations High Commissioner for Human Rights, Status of the

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[59]

The Torture Convention requires each state party to ensure that all acts of torture are offenses under its internal law[60] and to establish its jurisdiction over such offenses in cases where the accused is found in its territory,[61] and if such a state does not extradite the alleged offender, the Convention requires it to submit the case to its competent authorities for the purpose of prosecution.[62] Persons convicted of torture are to be subjected to harsh sentences proportionate to the grave nature of the offense.[63]

The Special Court for Sierra Leone charged Charles Taylor with committing crimes against humanity in Sierra Leone, including complicity in widespread and systematic acts of torture, from 1991–1999.[64] Notably, however, neither Sierra Leone (the state where the acts of torture occurred), Liberia (the state of nationality of the accused), nor Nigeria (the state where Charles Taylor was given asylum) were parties to the Torture Convention when the acts of torture in Sierra Leone were committed.[65] And although the United

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Ratification of the Convention Against Torture, http://www.ohchr.org/english/law/cat-ratify.htm (last visited Nov. 22, 2005) [hereinafter Torture Convention Ratification Status].

59. Torture Convention, *supra* note 46, art. 1.

60. *Id.* art. 4. Article 4 also requires parties to criminalize acts which "constitute[] complicity or participation in torture." *Id.*

61. *Id.* art. 5.

62. *Id.* art. 7.

63. According to the negotiating record of the Torture Convention, "[i]n applying article 4 [which requires states to make torture "punishable by appropriate penalties which take into account their grave nature," Torture Convention, *supra* note 46, art. 4], it seems reasonable to require . . . that the punishment for torture should be close to the penalties applied to the most serious offenses under the domestic legal system." J. BURGERS & H. DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 129 (1988).

64. Prosecutor v. Charles Ghankay Taylor, Case No. SCSL-2003-01-I, Indictment, ¶¶ 29–31 (Mar. 7, 2003), *available at* http://www.sc-sl.org/Documents/SCSC-03-01-I-001.pdf.

65. The acts of torture alleged in the Special Court for Sierra Leone's indictment of Charles Taylor occurred from 1991 to 1999. Sierra Leone ratified the Torture Convention on Apr. 25, 2001; Nigeria ratified the Convention on July 28, 2001; Liberia ratified the Convention on Sept. 22, 2004; and the United States ratified the Convention on Oct. 21, 1994. *See* Torture Convention Ratification Status, *supra* note 58 (listing ratifying states).

States, which helped broker the exile-for-peace deal, was a party to the Torture Convention during that time, the requirements of the convention are not applicable to the United States in this case because the acts of torture did not occur in U.S. territory, the offender was not a national of the United States, and the offender was not present in U.S. territory.[66] Under the Vienna Convention on the Law of Treaties, the provisions of a treaty "do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party."[67] Consistent with the Vienna Convention as well as the reasoning of the British High Court in the *Pinochet* case, the obligations to prosecute and to refrain from taking actions which would frustrate prosecution contained in the Torture Convention were not applicable to the case of Charles Taylor because his alleged involvement in acts of torture pre-dated the ratification of the Convention by the relevant states.[68]

Still, some might argue that the Torture Convention is relevant to the situation involving Charles Taylor based on the Committee Against Torture's 1990 decision concerning the Argentinean amnesty laws. In that case, the Committee Against Torture, which is the treaty body created by the Torture Convention to facilitate its implementation, decided that communications submitted by Argentinean citizens on behalf of their relatives who had been tortured by Argentinean military authorities were inadmissible since Argentina had ratified the Convention only after the amnesty laws had been enacted.[69] However, in dictum, the Committee stated "even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture."[70]

The Committee's statement should not be mistakenly construed as suggesting that amnesties/asylum for persons who commit torture is invalid

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66. *See* Torture Convention, *supra* note 46, art. 5 (setting forth conditions under which a state must take action in response to Convention violations).

67. Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 112 Stat. 2681-822, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *cf.* Rome Statute, *supra* note 56, art. 24 (recognizing that the International Criminal Court has no retroactive jurisdiction and that obligations under the Rome Statute do not apply to crimes committed prior to the ICC's entry into force in July 2002).

68. *See* Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 148–49 (H.L. 1999) (U.K.) (holding that head of state immunity prevented prosecution or extradition of former Chilean President Augusto Pinochet for acts that predated the ratification of the Torture Convention by Chile, Spain, and the United Kingdom).

69. U.N. Committee Against Torture, *Decision on Admissibility* annex VI, at 109–13, U.N. Doc. A/45/44 (June 21, 1990).

70. U.N. Committee Against Torture, *Decision on Admissibility* annex VI, at 109–13, U.N. Doc. A/45/44 (June 21, 1990).

under customary international law. By using the word "should," the Committee indicated that its statement was aspirational rather than a declaration of binding law. On the basis of its decision, the Committee *urged* Argentina to provide remedies for the victims of torture and their surviving relatives; it did not suggest that international law *required* that Argentina do so.[71] Nor did it specify that the remedy should be prosecution of those responsible, rather than some other appropriate remedy such as compensation. The Committee's decision, therefore, should not be read as indicating that the Torture Convention required Nigeria, Liberia, or Sierra Leone to prosecute those whose acts of torture pre-dated their ratification of the Convention.

4. General Human Rights Conventions

General human rights conventions include the International Covenant on Civil and Political Rights,[72] and the similarly worded European Convention for the Protection of Human Rights and Fundamental Freedoms,[73] and American Convention on Human Rights.[74] Although these treaties do not expressly require states to prosecute violators, they do obligate states to "ensure" the rights enumerated therein. There is growing recognition in the jurisprudence of the treaty bodies responsible for monitoring enforcement of these conventions and the writings of respected commentators that the duty to ensure rights implies a duty to hold specific violators accountable.[75]

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71. *Id.* at 111.

72. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171. The International Covenant currently has 154 parties, including both Liberia and Nigeria. Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations: International Covenant on Civil and Political Rights*, http://www.ohchr.org/english/countries/ratification/4.htm (last visited Dec. 18, 2005).

73. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

74. Organization of American States, American Convention on Human Rights, *adopted* Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123.

75. *See* Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, *in* THE INTERNATIONAL BILL OF RIGHTS 114, 119 (Louis Henkin ed., 1981) (arguing that parties to the International Covenant on Civil and Political Rights arguably must exercise due diligence to prevent intentional deprivation of life by individuals, "as well as to apprehend murderers and to prosecute them in order to deter future takings of life"); Orentlicher, *supra* note 8, at 2568 (arguing that states have a duty to bring torturers to justice); Thomas Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS 72, 77 (Louis Henkin ed., 1981) ("[The] obligation to 'ensure' rights creates affirmative obligations on the state—for example, to discipline its officials.").

Yet, a careful examination of the jurisprudence of these bodies suggests that methods of obtaining specific accountability other than criminal prosecutions would meet the requirement of "ensuring rights."[76] This jurisprudence indicates that a state must fulfill five obligations in confronting gross violations of human rights committed by a previous regime: (1) investigate the identity, fate, and whereabouts of victims; (2) investigate the identity of major perpetrators; (3) provide reparation or compensation to victims; (4) take affirmative steps to ensure that human rights abuse does not recur; and (5) punish those guilty of human rights abuse. Punishment can take many noncriminal forms, including imposition of fines, removal from office, reduction of rank, forfeiture of government or military pensions, and exile.

B. Crimes Against Humanity

1. Definition

As developed in the jurisprudence of the Nuremberg Tribunal and codified in the Statutes of the International Criminal Tribunal for the Former Yugoslavia,[77] the International Criminal Tribunal for Rwanda,[78] the Special

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76. *See* Scharf, *supra* note 10, at 49–51 (criticizing conclusion that decisions of the Inter-American Court and Commission establish criminal prosecution as the only permissible remedy for violations of the American Convention); Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, Judgment ¶¶ 164, 194 (July 29, 1988) (reaching disposition of case without ordering criminal prosecution); Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report. No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶¶ 57, 63, 66, 77 (1996) (finding that Chile's grant of amnesty and failure to investigate related disappearances violated American Convention because they foreclosed victims' families' rights to pursue their own criminal and civil remedies); Orayece v. Chile, Case 11.505 et al., Inter-Am. C.H.R, Report No. 25/98, OEA/ser.L/V/II.98, doc. 6 rev. ¶¶ 60–71 (1998) (making similar findings regarding Chile's violation of duty to investigate and to provide victims and families with judicial remedies); Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R., Report No. 133/99, OEA/Ser.L/V/II.106, doc. 3 rev. ¶¶ 79–107 (2000) (making similar findings). For a summary of several relevant decisions of international and regional human rights bodies, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, ¶¶ 50–92, U.N. Doc. E/CN.4/SUB.2/1993/8 (July 2, 1993) (*submitted by* Theo van Boyen), *reprinted in* 59 LAW & CONTEMP. PROBS. 284, 303–24 (1996).

77. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, annex, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993).

78. S.C. Res. 955, annex art. 3, U.N. Doc. S/RES/955 (Nov. 8, 1994).

Court for Sierra Leone,[79] and the Rome Statute for the International Criminal Court,[80] crimes against humanity are defined as:

> any of the following acts when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[81]

States are required to prosecute grave breaches of the Geneva Conventions and the crime of genocide, but there exists no treaty requiring prosecution of

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79. Statute of the Special Court for Sierra Leone, art. 2, http://www.sc-sl.org/scsl-statute.html (last visited Nov. 13, 2005).

80. Rome Statute, *supra* note 56, art. 7.

81. *E.g.*, *id.*

crimes against humanity (except for torture where the state is party to the Torture Convention at the time the crime is committed); crimes against humanity are purely a creature of customary international law.[82] Traditionally, those who committed crimes against humanity were treated like pirates, as *hostis humani generis* (an enemy of all humankind), and any state, including their own, could punish them through its domestic courts.[83] In the absence of a treaty containing the *aut dedere aut judicare* (extradite or prosecute) principle, this so called "universal jurisdiction" is generally thought to be permissive, not mandatory. Yet several commentators and human rights groups have recently taken the position that customary international law (and the notion of *jus cogens*—meaning peremptory norms) not only establishes permissive jurisdiction over perpetrators of crimes against humanity, but also requires their prosecution and conversely prohibits the granting of amnesty or asylum to such persons.[84]

2. *Customary International Law*

Notwithstanding the chimerical conclusions of some scholars, there is scant evidence that a rule prohibiting amnesty or asylum in cases of crimes against humanity has ripened into a compulsory norm of customary international law. Customary international law, which is just as binding upon states as treaty law, arises from "a general and consistent practice of states followed by them from a sense of legal obligation" referred to as *opinio juris*.[85] Under traditional notions of customary international law, "deeds were what counted, not just words."[86] Yet those who argue that customary international

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82. The Charter of the Nuremberg War Crimes Tribunal was the first international instrument in which crimes against humanity were codified. *See* Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *as amended by* Berlin Protocol of Oct. 6, 1945, *reproduced in* VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 473–80 (1998).

83. 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 (N. Roht-Arriaza ed., 1995).

84. *See supra* note 8 (collecting sources).

85. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 1051, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments.htm (providing that sources of international law applied by the court include "international custom, as evidence of a general practice accepted as law").

86. Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, *in* 4 (Book 2) COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW

law precludes amnesty/exile for crimes against humanity base their position on nonbinding General Assembly resolutions,[87] hortative declarations of international conferences,[88] and international conventions that are not widely ratified,[89] rather than on any extensive state practice consistent with such a rule.

153, 216 (1995).

87. *See, e.g.*, Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), art. 4, U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6716 (Dec. 1, 1967) (stating that the right to asylum may not be invoked for crimes contrary to the purposes and principles of the United Nations); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2712 (XXV), ¶ 3, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Dec. 15, 1970) (adopted 55-4 with thirty-three abstentions) (condemning crimes against humanity and calling "upon the States concerned to bring to trial persons guilty of such crimes"); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2840 (XXVI), ¶ 4, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (Dec. 18, 1971) (adopted 71-0 with forty-two abstentions) (affirming that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law"); Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), ¶ 1, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (Dec. 3, 1973) (adopted 94-0 with twenty-nine abstentions) (providing that crimes against humanity "shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trials and, if found guilty, to punishment"); Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133 pmbl., art. 14, U.N. Doc. A/47/49, at 207, 209 (Dec. 18, 1992) (equating disappearances to a crime against humanity and requiring states to try any person suspected of having perpetrated an act of enforced disappearance); *see also* Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65 annex ¶ 18, U.N. Doc. E/1989/89, at 53 (May 24, 1989) (resolving that states shall bring to justice those accused of having participated in extra-legal, arbitrary, or summary executions). It is noteworthy that large numbers of countries abstained during voting on the above listed resolutions, and thereby did not manifest their acceptance of the principles enumerated therein.

88. The final Declaration and Programme of Action of the 1993 World Conference on Human Rights affirms that "[s]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law." World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action* ¶ 60, U.N. Doc. A/Conf.157/23 (June 25, 1993).

89. *See, e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, art. 1(b), *done* Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970) (providing that no statutory limitation shall apply to crimes against humanity, irrespective of the date of their commission). Only thirty-nine states have ratified the Convention. Even if the Convention were more widely ratified, the prohibition on applying a statute of limitations to crimes against humanity is not the equivalent of a duty to prosecute such crimes.

Commentators often cite the 1967 U.N. Declaration on Territorial Asylum[90] as the earliest international recognition of a legal obligation to prosecute perpetrators of crimes against humanity. The Declaration provides that "the right to seek and enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a . . . crime against humanity."[91] Yet according to the historic record of this resolution, "[t]he majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum."[92] This evidences that, from the outset, the General Assembly resolutions concerning the prosecution of crimes against humanity were aspirational only, and not intended to create any binding duties.

In addition to this contrary legislative history, the trouble with an approach to proving the existence of customary international law that focuses so heavily on words is "that it is grown like a flower in a hot-house and that it is anything but sure that such creatures will survive in the much rougher climate of actual state practice."[93] Indeed, to the extent any state practice in this area is widespread, it is the practice of granting amnesties or asylum to those who commit crimes against humanity.[94] That the United Nations itself has felt free of legal constraints in endorsing recent amnesty and exile-for-peace deals in situations involving crimes against humanity suggests that customary international law has not yet crystallized in this area. The Special Court for Sierra Leone confirmed this when it recently held that domestic amnesties for crimes against humanity and war crimes committed in an internal armed conflict were not unlawful under international law.[95]

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90. Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), art. 1(2), U.N. GAOR, Sess. 24, Supp. No. 16, U.N. Doc. A/6716 (Dec. 14, 1967).

91. *Id.* at 81. Even if the Declaration were binding, the prohibition on granting asylum is not the equivalent of a duty to prosecute, and informal sanctuary can be accorded without a formal grant of asylum.

92. *Declaration of Territorial Asylum*, 1967 U.N.Y.B. 758, 759, U.N. Sales No. E.68.I.1.

93. Simma, *supra* note 86, at 217.

94. *See* Scharf, *supra* note 10, at 57–58 (citing numerous examples).

95. Prosecutor v. Kallon & Kambara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty ¶ 7 (Mar. 13, 2004), *available at* http://www.sc-sl.org/Documents/SCSL-04-15-PT-060-I.pdf & http://www.sc-sl.org/SCSL-04-15-PT-060-II.pdf (holding that there was no "general obligation for States to refrain from amnesty laws on these crimes . . . . [and that] [c]onsequently, if a State passes any such law, it does not breach a customary rule" (quoting ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 315 (2003))).

Commentators may point to the Secretary General's August 2004 Report to the Security Council on the Rule of Law and Transitional Justice as an indication that the United Nations has recently altered its position on the acceptability of amnesty/exile for peace deals. In that report, the Secretary-General of the United Nations said that peace agreements and Security Council resolutions and mandates should "[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or -assisted court."[96] It is more significant, however, that in the Security Council's debate on the Secretary-General's Report, there was no consensus on this particularly controversial recommendation (only two of the fifteen members of the Council—Brazil and Costa Rica—spoke in favor of it while several opposed it), and the statement approved by the Council at the end of the debate made no reference to the issue of amnesty.[97]

3. Jus Cogens

The concept of *jus cogens*—meaning "peremptory norms"—is said to be among the "most ambiguous and theoretically problematic of the doctrines of international law."[98] Since the inception of the modern state system three and a half centuries ago,[99] international law has been based on notions of consent. Under this concept of *jus dispositivium* (positive law), states were bound only to treaties to which they had acceded and to those rules of customary international law to which they had acquiesced. The concept of *jus cogens*, in

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96. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* ¶ 64, U.N. Doc. S/2004/616 (Aug. 23, 2004). See also U.N. SCOR, 59th Sess., 5052nd mtg. at 5, U.N. Doc. S/PV.5052 (Oct. 6, 2004), for the Secretary-General's remarks to the Security Council.

97. U.N. SCOR, 59th Sess., 5052nd mtg. at 14, U.N. Doc. S/PV.5052 (Oct. 6, 2004); U.N. SCOR, 59th Sess., 5052nd mtg., Resumption 1 at 26, 37–38, U.N. Doc. S/PV.5052 (Resumption 1) (Oct. 6, 2004).

98. Christopher A. Ford, *Adjudicating* Jus Cogens, 13 WIS. INT'L L.J. 145, 145 (1994); *see also* Anthony D'Amato, *It's a Bird, It's a Plane, It's* Jus Cogens, 6 CONN. J. INT'L L. 1, 1–2 (1990) (discussing the broad array of norms lumped under the heading *jus cogens*).

99. The state system, characterized as an association of sovereign states governed by positive law rules to which they must consent before they are bound, is widely believed to have originated with the Peace of Westphalia, which ended the Thirty Years War in 1648. Stephane Beaulac, *The Westphalian Legal Orthodoxy—Myth or Reality?*, 2 J. HIST. INT'L L. 148, 148 (2000). For the full text of the Peace of Westphalia (Osnabruck and Munster) Treaties, in both their Latin and English versions, see 1 CONSOLIDATED TREATY SERIES 119, 270 (Clive Parry ed., 1969).

contrast, is based in part on natural law principles that "prevail over and invalidate international agreements and other rules of international law in conflict with them."[100]

Though the term itself was not employed, the *jus cogens* concept was first applied by the U.S. Military Tribunal at Nuremberg, which declared that the treaty between Germany and Vichy France approving the use of French prisoners of war in the German armaments industry was void under international law as *contra bonus mores* (contrary to fundamental morals).[101] The debates within the U.N. International Law Commission, which codified the *jus cogens* concept in the 1969 Vienna Convention on the Law of Treaties,[102] reflect the view that the phenomenon of Nazi Germany rendered the purely contractual conception of international law insufficient for the modern era.[103] Consequently, the International Law Commission opined that a treaty designed to promote slavery or genocide, or to prepare for aggression, ought to be declared void.[104]

Thus, pursuant to the *jus cogens* concept, states are prohibited from committing crimes against humanity and an international agreement between states to facilitate commission of such crimes would be void *ab initio*. Moreover, there is growing recognition that universal jurisdiction exists such that all states have a right to prosecute or entertain civil suits against the perpetrators of *jus cogens* crimes.[105] From this, some commentators take what they view as the next logical step and argue that the concept also prohibits

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100. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

101. United States v. Krupp, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERENBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1395 (1950).

102. Article 53 of the Vienna Convention provides:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention, *supra* note 67, at 344.

103. Remarks of Antonio de Luna (Spain) *in Summary Records of the 15th Session, 684th Meeting*, [1963] 1 Y.B. Int'l L. Comm'n 72, ¶ 61, U.N. Doc. A/CN.4/156 & Addenda.

104. *Id.*

105. Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 88–90 (2001) ("It is now widely accepted that crimes against humanity are subject to universal jurisdiction."); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (observing that "[i]nternational law recognizes 'universal jurisdiction' over certain offenses," including crimes against humanity and genocide).

states from undertaking any action that would frustrate prosecution, such as granting amnesty or asylum to those who have committed crimes against humanity.[106]

Such scholars fail, however, to take into consideration the fact that although *jus cogens* has natural law underpinnings, the concept is also related to customary law. A rule will qualify as *jus cogens* only if it is "accepted by the international community of States as a whole as a norm from which no derogation is permitted."[107] Thus, *jus cogens* norms have been described by one court as "a select and narrow subset of the norms recognized as customary international law."[108] As with ordinary customary international law, *jus cogens* norms are formed through widespread state practice and recognition,[109] but unlike ordinary customary international law, a state cannot avoid application of a *jus cogens* norm by being a persistent objector during its formation.

Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm,[110] this does not mean that the associated duty to prosecute has

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106. *See supra* note 8 (collecting sources).

107. Vienna Convention, *supra* note 67, at 344.

108. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J., dissenting) (citing Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988)).

109. As Judge Patricia Wald noted in *Princz*:

> To ascertain customary international law, judges resort to "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators." These same tools are used to determine whether a norm of customary international law has attained the special status of a *jus cogens* norm.

Id. (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

110. *See* Siderman de Blake v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992) ("The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts—are the direct ancestors of the universal and fundamental norms recognized as jus cogens." (citation omitted)); *Demjanjuk*, 776 F.2d at 582 (stating that "[i]nternational law recognizes 'universal jurisdiction' over certain offenses," including crimes against humanity and genocide); Hirsh v. Israel, 962 F. Supp. 377, 381 (S.D.N.Y. 1997), *aff'd* 133 F.3d 907 (2d Cir. 1997) ("A foreign state violates *jus cogens* when it participates in such blatant violations of fundamental human rights as 'genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.'" (quoting Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 941 (D.C. Cir. 1988)); Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5) (distinguishing between rights of protection that have entered into the body of general international law and those that are conferred by international instruments); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) ("The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation."); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 558 (1995) ("The core prohibitions of crimes against humanity and the crime of genocide constitute *jus*

simultaneously attained an equivalent status. In fact, all evidence is to the contrary. Not only have there been numerous instances of states providing amnesty and asylum to leaders accused of crimes against humanity, but, even more telling, there have been no protests from states when such amnesty or asylum has been offered. Moreover, there has been widespread judicial recognition that the *jus cogens* nature of crimes against humanity does not prevent accused perpetrators from successfully asserting head of state immunity or sovereign immunity to avoid criminal or civil liability in foreign courts.[111] Because *jus cogens*, as a peremptory norm, would by definition supersede the customary international law doctrine of head of state immunity where the two come into conflict, the only way to reconcile these rulings is to conclude that the duty to prosecute has not attained *jus cogens* status.

As compared to the substantive rule of law prohibiting states from entering into international agreements that facilitate the commission of crimes against humanity, the procedural obligation of third parties to prosecute such crimes after their commission constitutes a far greater intrusion into a state's internal sovereignty, with far less justification. Thus, it is sensible that such an encroachment would require the state's consent through the carefully negotiated provisions of a treaty—such as the Geneva Conventions, Genocide Convention, or Torture Convention—which would narrowly define the applicable circumstances and perhaps—like the Rome Statute—provide escape clauses permitting states to disregard the obligation to prosecute when strict enforcement would frustrate greater interests of international peace and justice.

C. Amnesty/Exile and the International Criminal Court

The above discussion indicates that there are frequently no international legal constraints on the negotiation of an amnesty/exile-for-peace deal, and that

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cogens norms.").

111. *See* Wei v. Jiang, 383 F.3d 620, 627 (7th Cir. 2004) (concluding that violation of *jus cogens* is not an implied waiver of head of state immunity); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996) (same); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (same); Siderman de Blake v. Argentina, 965 F.2d 699, 719 (9th Cir. 1992) (determining whether sovereign immunity under U.S. law applies to *jus cogens* violations); Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 1999) (U.K.) (allowing head of state immunity defense for crimes committed prior to ratification of Torture Convention); Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 21–22 (Feb. 14), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm (denying exception to head of state immunity for war crimes); Al-Adsani v. United Kingdom, No. 35763/97, § 61, Eur. Ct. H.R. (2001) (affirming state immunity from international civil suits).

in certain circumstances swapping amnesty/exile for peace can serve the interests of both peace and justice. However, an international criminal tribunal is not bound to defer to a domestic amnesty/exile arrangement.[112] During the negotiations for the Rome Statute creating the International Criminal Court (ICC), the United States and a few other delegations expressed concern that the ICC would hamper efforts to halt human rights violations and restore peace and democracy in places like Haiti and South Africa.[113]

According to the Chairman of the Rome Diplomatic Conference, Philippe Kirsch of Canada, the issue was not definitively resolved during the Diplomatic Conference. Rather, the provisions that were adopted reflect "creative ambiguity" that could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty or asylum exception to the jurisdiction of the court.[114]

1. The Preamble

The preamble to the Rome Statute suggests that deferring a prosecution because of the existence of a national amnesty or asylum deal would be incompatible with the purpose of the court, namely to ensure criminal prosecution of persons who commit serious international crimes. In particular, the Preamble:

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112. The Special Court for Sierra Leone (SCSL) recently held that the Lomé Accord, which granted amnesty to the perpetrators of crimes committed during the conflict in Sierra Leone, could not deprive the SCSL of jurisdiction because the SCSL was an international court with jurisdiction over international crimes. Prosecutor v. Kallon & Kambara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty ¶¶ 87–89 (Mar. 13, 2004), *available at* http://www.sc-sl.org/Documents/SCSL-04-15-PT-060-I.pdf & http://www.sc-sl.org/SCSL-04-15-PT-060-II.pdf.

113. *See* U.S. Delegation Draft: State Practice Regarding Amnesties and Pardons 1 (Aug. 17, 1997), http://www.iccnow.org/romearchive/documentsreportsprepcmt4.html ("The U.S. delegation has raised the difficult matter of how to address amnesties and pardons in the context of a statute for an international criminal court.").

114. The author discussed this issue with Philippe Kirsch over dinner during an international conference in Strasbourg, France, on November 19, 1998. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 522 n.104 (1999). U.N. Secretary-General Kofi Annan has stated that it would be "inconceivable" for the ICC to undermine an amnesty-for-peace arrangement by pursuing prosecution in a situation like South Africa. Kofi Annan, Secretary-General of the U.N., Speech at the Witwatersrand University Graduation Ceremony (Sept. 1, 1998), *quoted in* Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 482 n.5 (2003).

> Affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured . . .
>
> Recall[s] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .
>
> [And] Emphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.[115]

Preambular language is important because international law provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[116] Thus, the Rome Statute's preamble constitutes a critical source of interpretation because it indicates both the treaty's context and its object and purpose. Yet, notwithstanding this preambular language, there are several articles of the Rome Statute (discussed below) that might be read as permitting the court under certain circumstances to recognize an amnesty exception to its jurisdiction. The apparent conflict between these articles and the preamble reflects the schizophrenic nature of the negotiations at Rome: The preambular language and the procedural provisions were negotiated by entirely different drafting groups, and in the rush of the closing days of the Rome Conference, the drafting committee never fully integrated and reconciled the separate portions of the Statute.

2. Article 16: Action by the Security Council

With respect to a potential amnesty/asylum exception, the most important provision of the Rome Statute is Article 16. Under that article, the ICC would be required to defer to a national amnesty if the Security Council adopts a resolution under Chapter VII of the United Nations Charter requesting the court not to commence an investigation or prosecution, or to defer any proceedings already in progress.[117] The Security Council recently invoked its right under

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115. Rome Statute, *supra* note 56, pmbl.

116. Vienna Convention, *supra* note 67, at 340.

117. Article 16 of the Rome Statute, titled, "Deferral of investigation or prosecution," states:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 16 of the Rome Statute in adopting Resolution 1593, referring the Darfur atrocities to the ICC for prosecution but at the same time providing that the ICC could not exercise jurisdiction over foreign military personnel in Darfur who are from states (other than Sudan) that are not parties to the Rome Statute.[118]

The Security Council has the legal authority to require the court to respect an amnesty or asylum if two requirements are met, namely: (1) the Security Council has determined the existence of a threat to the peace, a breach of the peace, or an act of aggression under Article 39 of the U.N. Charter;[119] and (2) the resolution requesting the court's deferral is consistent with the purposes and principles of the United Nations with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the U.N. Charter.[120]

The decision of the Appeals Chamber of the Yugoslavia Tribunal in the *Tadic* case suggests that the ICC could assert that it has the authority to independently assess whether these two requirements were met as part of its incidental power to determine the propriety of its own jurisdiction (competence de la competence).[121] One commentator has characterized this aspect of the Appeals Chamber decision as "strongly support[ing] those who see the U.N. Charter not as unblinkered license for police action but as an emerging constitution of enumerated, limited powers subject to the rule of law."[122] It is possible, then, that the ICC would not necessarily be compelled by the existence of a Security Council resolution to terminate an investigation or prosecution were it to find that an amnesty contravenes international law.

While an amnesty or exile arrangement accompanied by the establishment of a truth commission, victim compensation, and lustration might be in the interests of justice in the broad sense, it would nonetheless be in contravention of international law where the grave breaches provisions of the 1949 Geneva Conventions, the Genocide Convention, or the Torture Convention are applicable. It is especially noteworthy that the Geneva Conventions require

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Rome Statute, *supra* note 56, art. 16.

118. S.C. Res. 1593, ¶ 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005), *available at* http://www.un.org/Docs/sc/unsc_resolutions05.htm.

119. U.N. Charter art. 39.

120. U.N. Charter art. 24, paras. 1–2.

121. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 6 (Oct. 2, 1995).

122. Jose E. Alvarez, *Nuremberg Revisited: The* Tadic *Case*, 7 EUR. J. INT'L L. 245, 249 (1996).

parties "to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention,"[123] that the Genocide Convention requires parties "to provide effective penalties for persons guilty of genocide,"[124] and that the Torture Convention requires parties to make torture "punishable by appropriate penalties which take into account their grave nature."[125]

This would suggest that the ICC might not defer to the Security Council under Article 16 of the Rome Statute where the accused is charged with grave breaches of the 1949 Geneva Conventions, the crime of genocide, or torture. Yet, a strong counterargument can be made that the Rome Statute codifies only the substantive provisions of the 1949 Geneva Conventions, the Genocide Convention, and the Torture Convention, and does not incorporate those procedural aspects of the Conventions that require prosecution (which apply to the state parties but not to the ICC, which has its own international legal personality). Accordingly, the nature of the charges might constitute a factor to be considered but would not necessarily be a bar to deferring to an amnesty or exile arrangement.

3. Article 53: Prosecutorial Discretion

Where the Security Council has not requested the ICC to respect an amnesty or exile-for-peace deal and thereby to terminate a prosecution, the court's prosecutor may choose to do so under Article 53 of the Rome Statute.[126] That article permits the prosecutor to decline to initiate an investigation (even when a state party has filed a complaint) where the prosecutor concludes there

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123. Geneva Convention I, *supra* note 44, art. 49.

124. Genocide Convention, *supra* note 45, art. V.

125. Torture Convention, *supra* note 46, art. 4.

126. Article 53 of the Rome Statute titled, "Initiation of an Investigation," provides in relevant part:

> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: . . .
>
> > (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
>
> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

Rome Statute, *supra* note 56, art. 53.

are "substantial reasons to believe that an investigation would not serve the interests of justice."[127] However, the decision of the prosecutor under Article 53 is subject to review by the pretrial chamber of the court. In reviewing whether respecting an amnesty or exile deal and not prosecuting would better serve "the interests of justice," the pretrial chamber would have to evaluate the benefits of a particular amnesty or exile arrangement and consider whether there is an international legal obligation to prosecute the offense (as discussed above).

4. Article 17: Complementarity

Where neither the Security Council nor the prosecutor has requested the ICC to defer to a national amnesty, the concerned state can attempt to raise the issue under Article 17(1)(a) of the Rome Statute. That article requires the court to dismiss a case where "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[128] It is significant that the article requires an investigation but does not specify that it be a criminal investigation. The concerned state could argue that a truth commission (especially one modeled on that of South Africa) constitutes a genuine investigation. On the other hand, subsection (2) of Article 17 suggests that the

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127. *Id.* Darryl Robinson, who served on Canada's delegation to the ICC Preparatory Committee from 1997–2002 and is currently a legal adviser to the ICC Prosecutor, has proposed the following criteria for determining whether deferring to an amnesty or exile arrangement would be "in the interests of justice":

- Was the measure adopted by democratic will?
- Is the departure from the standard of criminal prosecution of all offenders based on necessity, i.e. [sic] irresistible social, economic or political realities?
- Is there a full and effective investigation into the facts?
- Does the fact-finding inquiry 'name names'?
- Is the relevant commission or body independent and suitably resourced?
- Is there at least some form of punishment of perpetrators (are they identified, required to come forward, required to do community service, subject to lustration)?
- Is some form of remedy or compensation provided to victims?
- Does the national approach provide or sense of closure or justice to victims?
- Is there a commitment to comply with other human rights obligations?

Robinson, *supra* note 114, at 497–98.

128. *Id.* art. 17(1)(a).

standard for determining that an investigation is not genuine is whether the proceedings are "inconsistent with an intent to bring the person concerned to justice"[129]—a phrase that might be interpreted as requiring criminal proceedings.

* * *

In sum, the Rome Statute is purposely ambiguous on the question of whether the ICC should defer to an amnesty/exile-for-peace arrangement in deciding whether to exercise its jurisdiction. While amnesties and exiles are sometimes a necessary bargaining chip in negotiations for the peaceful transfer of political power, it must be recognized that such arrangements can vary greatly. Some, as in South Africa and Haiti, are closely linked to mechanisms for providing accountability and redress; others, as in the case of the exile of Charles Taylor, are simply a mindful forgetting. The ICC should take only the former types of amnesties/exiles into account in prosecutorial decisions. Moreover, the ICC should be particularly reluctant to defer to an amnesty/exile in situations involving violations of international conventions that create obligations to prosecute, such as the Genocide Convention and the grave breaches provisions of the Geneva Conventions. The other international agreements and customary international law crimes that make up the ICC's subject matter jurisdiction make prosecution for related crimes possible, but not mandatory, and should be treated as such by the court in the broader interests of peace and international security.

IV. Conclusion

This Article has described how, under the present state of international law, the international procedural law imposing a duty to prosecute is far more limited than the substantive law establishing international offenses.[130] The

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129. *Id.* art. 17(2)(b). *Compare* Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, *in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 144 (M. Cherif Bassiouni ed., 1999) ("It is also conceivable that an amnesty granted in the context of a 'truth commission' process could be considered an 'investigation' followed by a bona fide decision not to proceed for the purposes of Article 17(1)(b)."), *quoted in* Robinson, *supra* note 114, at 499 n.78, *with* John Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 77 (R.S. Lee ed., 1999) ("It is clear that the Statute's provisions on complementarity are intended to refer to criminal investigations. . . . A truth commission and the amnesties it provides may not meet the test of a criminal investigation . . . ."), *quoted in* Robinson, *supra* note 114, at 499 n.81.

130. *Cf.* Ratner, *supra* note 10, at 714 (characterizing the procedural requirement to prosecute as "accountability norms" and the substantive law establishing offenses as "liability

reason for this is historical: With respect to all but the most notorious of international crimes, it was easier for states to agree to recognize permissive jurisdiction than to undertake a duty to prosecute. But where the duty to prosecute does apply, it is critical that states and international organizations honor it, lest they express contempt for the important treaties from which the duty arises, potentially putting their own citizens at risk pursuant to the international law principle of reciprocity.

This is not to suggest, however, that states must rush to prosecute all persons involved in offenses under these treaties. Selective prosecution and use of "exemplary trials" is acceptable as long as the criteria used reflect appropriate distinctions based upon degrees of culpability and sufficiency of evidence.[131] Moreover, while the provisions of the treaties requiring prosecution are nonderogable even in time of public emergency that threatens the life of the nation, the doctrine of *force majeure* can warrant temporary postponement of prosecutions for a reasonable amount of time until a new government is secure enough to take such action against members of the former regime or until a new government has the judicial resources to undertake fair and effective prosecutions.[132]

In the case of Saddam Hussein, the United States had accused the Iraqi leader of grave breaches of the Geneva Conventions and violations of the Genocide Convention. Both the United States and Iraq were parties to these treaties, which contain an absolute obligation to prosecute offenders. By offering to permit exile and perpetual sanctuary in Bahrain in lieu of invasion and prosecution, the Bush administration signaled that the provisions of these treaties are inconsequential, thereby undermining the rule of law in a critical area of global affairs. This must be viewed also in light of other U.S. actions involving application of the Geneva Conventions to the conflict in Iraq, most notably the infamous White House memos authored by now Attorney General Alberto Gonzales. The memos refer to the Geneva Conventions as "obsolete" and "quaint,"[133] and wrongly opine that the Torture Convention permits mild

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norms"); Mark A. Summers, *The International Court of Justice's Decision in* Congo v. Belgium*: How Has It Affected the Development of a Principle of Universal Jurisdiction that Would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63, 95 (2003) (characterizing the procedural requirement to prosecute as "obligatory universal jurisdiction," and distinguishing it from "voluntary universal jurisdiction").

131. Michael P. Scharf & Nigel Rodley, *International Law Principles on Accountability*, *in* POST-CONFLICT JUSTICE 89, 95 (M. Cherif Bassiouni ed., 2002).

132. *Id.* at 96.

133. Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush, at 2 (Jan. 25, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gov_rep/gov_memo_intlaw.htm. In a dissenting memo, Secretary of State Colin Powell

forms of torture,[134] thereby creating a climate of disdain toward international humanitarian law and opening the door to the abuses committed at Abu Ghraib prison in Iraq. In a statement before the Senate Judiciary Committee, Admiral John Hutson, Judge Advocate General of the U.S. Navy from 1997–2000, urged the Bush administration to officially and unequivocally repudiate Gonzales's erroneous position. In doing so, Hutson stressed that:

> Since World War II and looking into the foreseeable future, United States armed forces are more forward-deployed both in terms of numbers of deployments and numbers of troops than all other nations combined. What this means in practical terms is that adherence to the Geneva Conventions is more important to us than to any other nation. We should be the nation demanding adherence under any and all circumstances because we will benefit the most.[135]

Because Hussein did not accept the exile-for-peace offer, the damage to the rule of law in this instance was negligible. Would greater damage to the rule of law have nevertheless been acceptable if it succeeded in averting a war which has resulted in tens of thousands of casualties on both sides since 2003? This Article has described the policy reasons generally favoring prosecution, including the fact that former leaders who have resorted to war crimes and crimes against humanity tend to be recidivists. Saddam Hussein himself launched a coup and initiated his policy of terror after he was released from prison through a domestic amnesty in 1968. It is not hard to imagine the dangers Hussein could present to the Iraqi democratic transition from exile in nearby Bahrain. Moreover, the people of Iraq have insisted on Hussein's trial before the Iraqi Special Tribunal.[136] Morally, what right would American negotiators have to trade away the ability of thousands of Hussein's victims to see the dictator brought to justice? Finally, it is worth stressing that the duty to

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argued that Mr. Gonzales's position "reverse[s] over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine[s] the protections of the law of war for our troops, both in this specific conflict and in general." Memorandum from Colin L. Powell, U.S. Secretary of State, to Alberto R. Gonzales, Counsel to the President, and Condoleezza Rice, Assistant to the President for National Security Affairs, at 2 (Jan. 26, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gov_rep/gov_memo_intlaw.htm.

134. Memorandum from U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, at 1 (Aug. 1, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gov_rep/gov_memo_intlaw.htm.

135. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 507 (2005) (testimony of John D. Hutson, Dean and President of Franklin Pierce Law Center).

136. *See* Scharf, *Can This Man Get a Fair Trial?*, *supra* note 1 (noting that Iraqis "insisted, over initial U.S. objections, on the inclusion of a provision . . . that enables the [Iraqi Special Tribunal] to prosecute Hussein for the crime of aggression").

prosecute Hussein arising from these treaties did not require or even justify the invasion of Iraq. Rather, it merely prohibited actions that are manifestly incompatible with the prosecution of Hussein, such as arranging for exile and sanctuary in Bahrain.

The situation involving Charles Taylor is distinguishable. Taylor has been charged by the Special Court for Sierra Leone with complicity in crimes against humanity and war crimes in an internal armed conflict. As the Special Court itself has recognized, since there is no treaty-based nor customary international law duty to prosecute crimes against humanity or war crimes in an internal conflict, an amnesty or exile-for-peace deal would not constitute a violation of international law.[137]

The distinction reflects the fact that, notwithstanding the natural law rhetoric of *jus cogens* employed by proponents of a broad duty to prosecute, the international legal order is still governed by principles of positive law under the 357-year-old Westphalian concept of sovereignty.[138] State practice belies the existence of a customary international law duty (based on the positive law notion of state acquiescence to rules over time) to prosecute outside of the treaty framework. Consequently, the obligation to prosecute and the corresponding duty to refrain from frustrating prosecution through amnesty or exile applies only to certain treaty-based crimes where the treaty sets forth such an obligation and the affected states are party to the treaty at the time of the acts in question. This conclusion is analogous to that of the House of Lords in the *Pinochet* case, in which the British High Court held that the head of state immunity doctrine prevented the United Kingdom from extraditing to Spain former Chilean President Augusto Pinochet for crimes against humanity, with the exception of crimes of torture committed after the U.K., Chile, and Spain had all ratified the Torture Convention.[139] Thus, while there was a treaty-based duty to prosecute Saddam Hussein under the Geneva Conventions and Genocide Convention, no such duty existed in the case of Charles Taylor, who was accused of crimes against humanity.

This does not mean that the Special Court for Sierra Leone has to honor the Charles Taylor exile-for-peace deal. The Special Court made clear that amnesty and exile arrangements are only binding within the state(s) granting them. They do not apply to other states or to international tribunals such as the Special Court. Moreover, it is important to recognize that amnesty, exile, and

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137. *Supra* note 95 and accompanying text.

138. *See* Beaulac, *supra* note 99, at 148 (describing the origins of the state system in the Peace of Westphalia, which ended the Thirty Years War in 1648).

139. Regina v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 148–49 (H.L. 1999) (U.K.).

sanctuary arrangements are often temporary in nature. They are not a permanent right of the recipient, but a privilege bestowed by the territorial state, which can be revoked by a subsequent government or administration. The trend in recent years is to use amnesty and exile as a transitional step toward eventual justice, not as an enduring bar to justice.[140] As a U.S. Department of State official explained with respect to Charles Taylor, "First we'll get him out of Liberia, then we'll get him to the Court."[141]

140. Peter A. Barcroft, *The Slow Demise of Impunity in Argentina and Chile*, (Jan. 2005), http://www.asil.org/insights/2005/01/insight050107.htm (reporting that Chile has revoked Pinochet's immunity and initiated criminal proceedings against him) (on file with the Washington and Lee Law Review).

141. Lizza, *supra* note 6, at 10. The European Parliament is currently pushing for the adoption of a U.N. Security Council Resolution that would require Nigeria to surrender Taylor to the Special Court for Sierra Leone for prosecution. Bruce Zagaris, *European Parliament Passes Resolution Calling for Action to Ensure Taylor's Court Appearance*, 21 INT'L ENFORCEMENT L. REP. 200, 200 (2005). On November 11, 2005, the U.N. Security Council unanimously adopted Resolution 1638, which expanded the mandate of the U.N. force in Liberia to include apprehending Charles Taylor in the event that he returns to Liberia and to transfer him to the Special Court for Sierra Leone for prosecution. Although the resolution did not require Nigeria to revoke Taylor's asylum, it did pointedly refer to Taylor's asylum as a "temporary stay" in Nigeria. S.C. Res. 1638, pmbl., ¶ 1, U.N. Doc. S/RES/1638 (Nov. 11, 2005).