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

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

The question may remain academic because in practice, many judges have already imposed quite severe limits. Contrary to claims of rampant judicial imperialism raised both in the media and by scholars such as Jack Goldsmith and Stephen Krausser, judges have actually been very aware of the problems raised by exercising universal jurisdiction, both in terms of the basis of their own judicial power and the potential for interfering in the affairs of other nations. Indeed, as Cherif Bassiouni demonstrates so conclusively in his contribution to this volume, the exercise of pure universal jurisdiction is actually very rare. Justice Michael Kirby provides a firsthand insight into the precise reasons behind this judicial reluctance, listing fourteen distinct causes for concern at least among common-law judges.

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

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

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

The purpose here is not to evaluate the relative merits of these two accounts. The point is rather to understand how each account gives rise to a different set of practical and theoretical problems that judges have had to struggle with. The standard account highlights the notion of an international policy determining what is right. Here, tying universal jurisdiction to crimes under international law is potentially quite expansionist and subject...
to abuse, raising the specter of a small group of nations taking it upon themselves to prosecute officials from other nations based on their partic-
ular conception of customary international law. It also creates substantial
problems of retroactivity for individual defendants and raises a host of
difficult procedural questions as the prosecution goes forward. Reliance on
the universality principle, by contrast, ameliorates some of these problems
but then decouples universal jurisdiction from the limiting concept of
extraordinary crimes so grave that they merit punishment by the commu-
nity of nations and indeed humankind. This account suggests a bottom-up
view of international law, stressing the domestic origins of international law.
Taken to its extreme, however, it risks losing sight of the necessary role
of international law in determining when a state may go beyond its traditional
jurisdictional boundaries.

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

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

Discussion of the two dominant accounts begins by focusing on the
Canadian prosecution in 1992 of Ivan Finta for war crimes and crimes
against humanity allegedly committed during World War II. The judge-
m ents in the Finta case appear as the "purest" forms of the two accounts; dis-

cussion of the two leading opinions in Finta therefore provides a useful
framework for considering other judicial opinions regarding universal juris-
diction. Other judges dealing with universal jurisdiction tend to be more
explicit and less self-conscious about the account of universal jurisdiction
on which their decision may be based. Indeed, judges frequently refer to
elements of both accounts in the course of their judgments. Yet a clearer
understanding of both accounts, and the differences between them, clarifies
the work of judges applying universal jurisdiction and will help in the defi-
nition of universal jurisdiction. In the second and third parts, therefore,
the protection of individuals, property, and liberty, and the creation of a just legal system. These cases are generally brought about by the infringement of the rights of individuals or by the violation of the laws of the state. The cases are usually brought by the state or by the individual who has been wronged.

The Standard Account of Crimes under International Law

These cases and situations suggest a general discussion with the notion of jurisdiction. That is to say, that States can prosecute anyone for the commission of crimes regardless of any limitation on the traditional laws. Indeed, one commentator has stated that it is true that States do have jurisdiction over their own citizens, even when those citizens have committed crimes outside their territory. However, there are certain limitations to this jurisdiction. The list of exceptions to this jurisdiction is not exhaustive but includes:

1. Crimes against international law.
2. Crimes for which the United Nations has established a special court or tribunal.
3. Crimes for which the International Criminal Court has jurisdiction.
4. Crimes that are too serious to be dealt with by the domestic courts.
5. Crimes that are too serious to be dealt with by the domestic courts and that are of a nature to warrant the exercise of international jurisdiction.

The exercise of international jurisdiction is subject to the consent of the State concerned. The consent of the State concerned may be given either by express or tacit consent. Express consent is given by the State concerned in writing. Tacit consent is given by the State concerned by ratifying or acceding to an international treaty or convention.

The exercise of international jurisdiction is subject to the control of the United Nations. The United Nations has the right to intervene in the exercise of international jurisdiction in order to prevent the abuse of such jurisdiction and to ensure that it is exercised in accordance with international law.

The exercise of international jurisdiction is subject to the control of the International Court of Justice. The International Court of Justice has the right to intervene in the exercise of international jurisdiction in order to prevent the abuse of such jurisdiction and to ensure that it is exercised in accordance with international law.
jurisdiction over war crimes and crimes against humanity committed outside Canada by non-Canadians. In 1992, forty-eight years after the deportation of Hungary’s Jews, Imre Finta stood trial in Canada for war crimes and crimes against humanity for his role in the process of “dejudasification” of Serzed in the spring of 1944, pursuant to the Hungarian Ministry of the Interior’s “Baky Order.” Finta was charged by the Crown with having overseen the removal of the Jews from ghettos to a concentration center, keeping them in a brickyard where they were stripped of their valuables, loaded onto boxcars, and transported, mostly to Auschwitz-Birkenau. In keeping with the requirement under the Canadian statute that the offenses charged be crimes under both international law and domestic law, he was charged with two counts each of unlawful confinement, robbery, kidnapping, and manslaughter under the Canadian Criminal Code. For each offence, there were alternative counts alleging that the offense committed constituted a crime against humanity and a war crime.

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

Despite clear and ample evidence of brutal and inhumane acts, the jury acquitted Finta. So overwhelming was the evidence against Finta that the author of the Trial Brief for Finta (the lead counsel in the case, a separate article, described the case as an example of jury nullification. The case is striking as an example of how, notwithstanding the best intentions and assiduous government efforts, the exercise of universal jurisdiction can go awry. It is also significant as an example of an exhaustive and carefully reasoned analysis of the foundations of universal jurisdiction by both the majority and the dissent.

Perhaps most important, however, Finta stands for a more ordinary exercise of universal jurisdiction than the highly publicized and politicized cases against former leaders such as Pinochet. More ordinary also than the cases brought against alleged perpetrators of war crimes in Bosnia, in which grim media images and the existence of a special international tribunal focus both public and judicial attention on the importance of prosecution. Finta involved the kind of defendant who would likely become far more frequent if universal jurisdiction were genuinely institutionalized: a perpetrator of unspeakable acts living far in time and space from the place of their commission, hoping to bury his past forever. Of this kind of defendant David Matas writes: “[W]hen the accused is old, when he has been a quiet friend and neighbour for decades, when the crime was committed a long time ago and far away in another country, and when the victim is a stranger and a foreigner, there are many people . . . who have little or no interest in a prosecution.”

Defining the Limits

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

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

Inherent Limits

The principal advantage of this account is that it captures the commonsense intuition that universal jurisdiction is a potentially fearsome power that should only be exercised in extraordinary circumstances. The inherent limits built into this account flow from the combination of the degree of depravity or fundamental inhumanity necessary to classify certain acts as international crimes and the necessity of agreement on that classification by a considerable majority of sovereign states. A related safeguard is the often unstated but very deep assumption that international law typically regulates only relations among states and recognizes only states as subjects. Typically, therefore, states can be held responsible for failing to prevent the commission of acts by their subjects, but how
they choose to designate and regulate such acts is up to them. Only acts that require an extra measure of condemnation, by the international community as a body, merit designation as international crimes, with the accompanying specification of their perpetrators as owing independent duties under international law.

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

A further limit inherent in the international crimes account of universal jurisdiction concerns the problem of retroactivity. Assuming that the crime is defined under international law, then the prohibition on retroactive criminalization requires that international law enumerate and list the act at the time of its commission. This limit is even more restrictive if the requirement is read to mean that international law must have prohibited the act as committed by an individual rather than by a state. Hans Kelsen, for instance, accepted that international law recognized the crimes committed by the Nazis at the time they were committed, but argued that international law up to that point had provided only for collective rather than individual responsibility.53

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

Imposed Limits

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

Punishing Immorality

The first problem grows out of a particular response to the apparent limit of retroactivity.54 As noted above, Justice Cory in Finta could have argued that Finta’s alleged crimes were crimes under international law at the time of commission,55 but he appears to have accepted that international law did not prohibit war crimes and crimes against humanity on an individual basis prior to the Second World War.56 He nevertheless found that the principle of non-retroactivity was trumped by a higher principle of morality—the international morality that underlies the definition of crimes under international law.

Cory relies on an account found in the writings of Kelsen and Georg Schwarzenberger.57 Kelsen believed that the Nurenberg and Tokyo Charters created new law, an exception to the prohibition on ex post facto laws. He recognized that the rule against retroactive legislation is a principle of justice but concluded that justice also required punishment of the accused, who were aware of the "mnimal character" of the acts they committed. Kelsen continues, "Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails, and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions."58

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

It is in this light that Cory’s concern with strict procedural protections, in the form of an emphasis on jury decision making, can be better understood. He insists that the defendant can be convicted only if the jury finds that he knew subjectively that his acts were of the serious nature of war crimes and/or crimes against humanity. The defendant must be found to know "that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right-thinking people."59 Why raise the mens rea bar so high? Because "[t]he degree of moral turpitude attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter and robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence."60 If prosecution and punishment is to be based on international morality, then the defendant must have subjectively understood the precise degree to which his or her actions...
A second account of universal jurisdiction seeks to recognize the crimes committed by
international law in a number of jurisdictions. It is based on the fact that certain crimes, such as

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[Elaboration of the argument about the dual-criminality principle and the impact of the
extradition law on the applicability of universal jurisdiction.]

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[Conclusion on the limitations of universal jurisdiction and the need for a more nuanced
approach to address the global nature of certain crimes.]
domestic law. The offenses underlying crimes against humanity and war crimes—offenses such as murder, kidnapping, confinement, and robbery—are prohibited by the domestic laws of virtually all nations. Defendants charged with such crimes are thus charged and prosecuted under domestic law. Such prosecutions cannot take place, however, for crimes committed outside the territory of the prosecuting state unless international law authorizes extraterritorial jurisdiction. International law thus provides the procedural trigger for such prosecutions; domestic law defines the substance.19

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

La Forest begins from the proposition that the Canadian legislation simply extends Canadian jurisdiction for crimes already recognized in Canadian law, creating the legal fiction that the crimes were committed in Canada.20 The legislation thus “remove[s]...the obstacle of extraterritoriality and... [enables] Canada to serve as a forum for the domestic prosecution of these offenders.”21 When, however, may this obstacle of extraterritoriality be overcome? When the acts are committed under “conditions [that tie] them to international norms.”22 For instance, crimes against humanity “are aimed at giving protection to the basic human rights of all individuals throughout the world, and notably against transgressions by states against these rights.”23 In the Canadian definition, they include as part of the offense an “act or omission that is committed against any civilian population or any identifiable group of persons,...”24 This definition, itself borrowed from international law and embedded in the Canadian statute, is the “jurisdictional link grounding prosecution for the underlying Canadian offense.”25

This is a "bottom-up" view of universal jurisdiction, in which it can be exercised for acts or omissions prohibited under national law around the world, as long as such acts or omissions have an "international aspect" sufficient to overcome the normal presumption of territorial jurisdiction and thus to provide a jurisdictional link to a non-territorial court.26 But La Forest complicates matters still further by combining this account with a different "top-down" account from that adopted by the majority. He also recognizes that war crimes and crimes against humanity "are crimes under international law. They are designed to enforce the prescriptions of international law for the protection of the lives and the basic human rights of the individual, particularly... against the actions of states.”27 They fall into a particular category of international crimes, however, in which pragmatic considerations dictate overcoming the normal presumption that such crimes will be prosecuted by the territorial state.28

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

It would be pointless to rely [for prosecution] solely on the state where [a war crime or crime against humanity] has been committed, since that state will often be implicated in the crime; particularly crimes against humanity. Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute, following the cessation of hostilities or other conditions that fostered their commission, but individuals who perpetrated them tend to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect.29

For a Canadian court to prosecute war crimes and crimes against humanity under the Canadian legislation, therefore, a determination must be made as to whether the acts alleged constitute war crimes or crimes against humanity under international law. This determination must be made by the judge, however, not the jury, as a jurisdictional determination.30 It is then up to the jury to make the substantive determination whether the defendant has committed the offenses charged under the Canadian Criminal Code.

Inherent Limits

The La Forest account has a number of advantages. First, it overcomes the retroactivity problem without relying on international morality. The defendant cannot claim retroactivity because the crimes with which he is charged were already illegal under domestic law in every legal system and were therefore already illegal at the time of their commission.31 In the Belgian proceedings regarding an extradition request for Pinochet, Judge Vandermeersch similarly refers to domestic law when discussing the claim of retroactivity.32 While he fully accepts that crimes against humanity are part of Belgian law by virtue of incorporation of customary international law, he reinforces this argument with reference to the existence of the criminal elements of crimes against humanity in both Belgian and Chilean law.33 These approaches to claims of retroactivity may not be convincing to everyone.34 However, the acceptance of the idea that these acts were criminal in domestic systems throughout the world, particularly in the systems of the territory where the offense was committed and the territory where the prosecution is being held, tends to reduce unease about the application of these laws, even if they are, technically, retroactive.35
A. Somalia S. Alston

A major advantage of the La Forest approach is that it facilitates the application of the norms of international criminal law. The approach recognizes the State as the primary actor in the enforcement of international law. The State is responsible for investigating, prosecuting, and punishing breaches of international law. The approach also recognizes the concept of universal jurisdiction, which allows States to exercise jurisdiction over crimes committed by nationals of other States, regardless of where the crimes were committed.

One of the criticisms of the La Forest approach is that it is over-simplistic and fails to take into account the complexity of international law and the role of the international community. Critics argue that the approach is too rigid and fails to take into account the varying legal systems and practices of different States.

Another criticism of the La Forest approach is that it is too focused on individual accountability and fails to address systemic and structural accountability. Critics argue that the approach is too focused on追究个别人的责任，而忽视了追究系统和结构责任的重要性。Court, the Special Court for Sierra Leone, and the International Criminal Court, are all examples of tribunals established to address systemic and structural accountability.

For example, the International Criminal Court (ICC) is a permanent international court established to prosecute individuals for genocide, crimes against humanity, and war crimes. The Court has jurisdiction over these crimes regardless of where they occurred and regardless of the nationality of the accused.

However, the Court's jurisdiction is limited to crimes committed in situations of armed conflict. This means that the Court cannot prosecute individuals for crimes committed in situations of domestic law enforcement. Furthermore, the Court's jurisdiction is limited to crimes committed in situations of armed conflict. This means that the Court cannot prosecute individuals for crimes committed in situations of domestic law enforcement.

The Court's jurisdiction is also limited by the requirement that the alleged perpetrator be present in the territory of the Court or that the crime be committed in the territory of the Court. This means that the Court cannot prosecute individuals for crimes committed in situations where the perpetrator is not present in the territory of the Court.

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These limitations make it difficult for the Court to address systemic and structural accountability. Critics argue that the Court's jurisdiction is too narrow and fails to take into account the complex and systemic nature of international crimes.
Moving from the domestic to the international level, states can be understood to be the main actors regulating in the field of international criminal law. However, recent developments in international criminal law have shared the characteristics of a "new" international criminal law, as evidenced by the expanded scope and reach of international criminal law. This has led to a debate on the effectiveness of the international criminal law in combating crimes against humanity, genocides, and war crimes.

The principle of jurisdiction under international law is generally based on the concept of "universal jurisdiction," which allows states to exercise jurisdiction over certain crimes committed anywhere in the world, regardless of the nationality of the perpetrator or the victim. However, this principle has been challenged by the"principle of non-territorial jurisdiction," which limits the exercise of jurisdiction to crimes committed within the territory of the state.

Moreover, the International Criminal Court (ICC) has been established to complement the efforts of national courts in enforcing international criminal law. The ICC is a unique legal entity that has the power to investigate and prosecute individuals for crimes such as genocide, war crimes, and crimes against humanity.

In conclusion, the international criminal law has played a significant role in promoting international cooperation and the prosecution of individuals responsible for serious crimes. However, the effectiveness of the international criminal law remains a subject of debate, and further developments are needed to strengthen the legal framework and enhance the enforcement of international criminal law.
Courts may have to take the lead in the absence of legislative action, but legislatures should then respond to judicial action and canvas both international law and the laws of other countries on universal jurisdiction before adopting a national statute. National judges will then be much more comfortable in building on the initial precedent. Principle 9 explicitly exhorts states to take this step.

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

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

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

The synthesis offered here instead recognizes a distinct and critical role for the international legal system, one that buttresses and builds on domestic legal systems rather than potentially undermining domestic judicial legitimacy. The international law version of the crime is based on the consensus of as many nations as possible, a consensus that may water down what any one nation would want but that adds the imprimatur of the international community. The words of Judge Moore, dissenting in the _Lotus_ case, are particularly apposite here in reference to piracy, which he, unlike many others, defines as an international crime: "... in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come..." The words of Judge Moore, dissenting in the _Lotus_ case, are particularly apposite here in reference to piracy, which he, unlike many others, defines as an international crime: "... in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come..." The words of Judge Moore, dissenting in the _Lotus_ case, are particularly apposite here in reference to piracy, which he, unlike many others, defines as an international crime: "... in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come..."

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

**A Process Solution: Global Judicial Dialogue**

The revised standard account of universal jurisdiction developed above inevitably leaves many specific questions unanswered. However clear and compelling the underlying principles, they cannot generate clear and simple rules for courts grappling with many different cases in many different national legal systems. Different states have different constitutional structures. Further, despite the concentration in this article on the role of courts, courts are only one of the set of domestic actors involved in prosecutions based on universal jurisdiction. Consider the role of the prosecution—which in some countries comprises part of the executive branch and in others part of the judiciary—of other members of the executive branch and of the legislature.
In *Finne*, the executive may have been far more willing to prosecute than the court’s final decision allowed. However, in most cases it is far more likely that the executive will be less willing to prosecute on the basis of universal jurisdiction than the judiciary. The legal procedure for initiating and pursuing criminal prosecutions may, therefore, affect the likelihood of such prosecutions. In Spain, the prosecuting judge responsible for the Pinochet extradition request was acting against the wishes of the Spanish government. Cases in France and Belgium have been initiated by victims of the alleged offenders and pursued by investigating judges with a central role in the case. By contrast, prosecutions in the United Kingdom are dependent on the independent Crown Prosecution Service, bound by the alternative principles of public interest and the likelihood of success. Decisions are discretionary and need not be explained.77 The executive branch in all States is frequently faced with different pressures and issues, some of which are legitimate in the political arena but cannot be taken into account in the courtroom.78

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

The alternative to generating uniform and determinate rules to address the myriad questions courts will inevitably face is a process solution. The revised standard account of universal jurisdiction assumes and thereby constitutes a community of domestic and international judges who bear equal responsibility for making universal jurisdiction operational.79 In this context, judges can legitimately look to what other national judges are doing as well as to the decisions of international tribunals. The jurisprudence that is emerging is fact-based, contextual, and case-specific. At the same time, however, all judges seeking to exercise universal jurisdiction grapple with common problems. All would benefit from a more institutionalized process of transjudicial communication and consultation.

Principle 4 provides a doctrinal framework for this institutionalized process. Under the heading “Obligation to Support Accountability,” it requires states “to provide[] other states investigating or prosecuting [crimes under international law] with all available means of administrative and judicial assistance.”80 This provision of course applies to prosecutors and other members of the executive branch engaged in criminal investigations; it could also apply to legislators, where national legislation authorizing such assistance is required. But it is most likely to apply to judges, and can be read as encouraging them to seek assistance from one another. The next step is to encourage them to see themselves as part of a broader community and common enterprise serving the ends of both national and international justice.

Courts should also be encouraged to take account of other courts’ decisions, recognizing the accounts that form the basis for decisions and working toward answers to some of the most difficult issues. To some extent, this process has already begun, as the number of cases has grown in recent years.81 The need for this dialogue and the likelihood of it happening will only increase as states enact legislation to implement the Statute of the International Criminal Court, with its provisions on complementary jurisdiction. This substantive interaction will contribute substantially to the international legislative process. In Diane Orentlicher’s phrase, the judges involved will be “constructing a genuinely common code of humanity.”82

Since domestic structures play such an important role, complete convergence is both impossible and undesirable. Rather, what is sought is a constructive dialogue that will take into account international law, comparative law and domestic law. Judges looking outside their own legal system can borrow one another’s approaches and solutions to specific problems only as persuasive authority. It could be immensely valuable, however, even for judges to consider and reject approaches adopted by their foreign, regional and international counterparts, at least to the extent that they provided reasons for the rejection. The result could be a process of thoughtful convergence and informed divergence that provides for plenty of experimentation, including mistakes and rethinking.83

As judges participate in this global judicial dialogue, they will enhance their own legitimacy and create a sphere in which they are seen to operate within a legal rather than a political context.84 This legitimacy will enable courts to expand their recognition of universal jurisdiction and develop constraints on the exercise of this jurisdiction that do not cut it off completely as a basis for prosecution. At the same time, the principles and approaches on which they converge will renew and invigorate the domestic sources of the international lawmaking process.

A process solution is a solution that has the potential to transform the imposition of multiple limits on universal jurisdiction by multiple national courts into a common global search for solutions to the problems that the exercise of such jurisdiction inevitably poses. As stated at the outset, universal jurisdiction is an awesome power that inevitably calls for limits. In fact, however, an equally pressing need is to find ways to overcome many of the limits that have already been imposed. The aim is to construct a process
to help courts strike a balance among considerations that too often appear to conflict with each other: the desire to prosecute heinous international crimes versus the need to ensure that the defendant receives a fair and just process; international legal obligations versus domestic legal requirements; and the pragmatic versus the moral foundations for the exercise of universal jurisdiction.

Appendix:
Guidance for National Judges

Principle 1
Privacy of Domestic Law

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

Principle 2
Applying Universal Jurisdiction

1. Judges should be guided by relevant international law when presiding over a case involving universal jurisdiction in their national courts, insofar as that international law does not directly conflict with the domestic law of the forum State.

2. For the purposes of this principle, relevant international law should be understood to include conventions that deal with crimes subject to universal jurisdiction and customary international law. In recognition of the role of international and foreign national courts in the elaboration of international law regarding universal jurisdiction, relevant international law should also be understood to include decisions of such courts addressing equivalent questions in cases involving universal jurisdiction.

3. In determining the content of relevant international law for the purposes of this principle, judges are encouraged to consult with international law experts.

4. In deciding whether or not to draw on or rely on decisions of foreign national courts, judges should take account of any relevant differences between the legal system of the forum State and the legal system of the foreign court concerned.
Chapter 10
Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable
Leila Nadya Sadat

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

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