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The Inefficiency of Universal Jurisdiction

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THE INEFFICIENCY OF UNIVERSAL JURISDICTION

*Eugene Kontorovich**

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Israeli-Palestinian peace negotiations have made a breakthrough. All of the previously intractable issues have been resolved, and the path seems clear to signing a final peace settlement, ending over sixty years of conflict, and establishing a Palestinian state. Only one issue remains to be resolved. A few months earlier, Israel captured the leader of Hamas's military wing. Brought before civilian courts, he was charged with genocide (incitement) and numerous grave breaches of the Geneva Conventions. As a final condition to signing the peace accord, Hamas demands he be immediately released, and given an amnesty to protect him from future prosecution. The demand causes much agonizing for the Israeli government, as the leader had been responsible for the brutal slaying of hundreds of innocent civilians. Yet none the less, Israel ultimately agrees to release him to secure a permanent peace.

However, Hamas realizes that the offenses are subject to universal jurisdiction. Israel's promise of non-prosecution would not protect the leader from indictment by the United States, or even Egypt, which, fearing rising Islamicism, has threatened to prosecute if Israel does not. Hamas asks Israel to guarantee that no other nation will prosecute. Israel says it is happy to request other countries to not prosecute, but securing the agreement of all nations is implausible, and in any case negotiating with even a few countries could take a while.

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Hamas cancels the scheduled treaty signing, and thus hopes for peace are again indefinitely deferred.

Messianic rebels in Uganda wage an extraordinarily bloody and gruesome civil war for decades. Much of the populace is terrorized by unimaginable atrocities: mass amputation of lips and limbs; mass rape; mass abduction of children who are then forced to commit these atrocities. After decades of conflict, the government is about to finalize a peace agreement with the rebels. A required condition is amnesty for the rebel leaders. Uganda agrees, in accordance with local customs favoring reconciliation. As the peace is about to be finalized, the International Criminal Court indicts the rebel leaders. Delegations of Ugandan political and tribal leaders head to The Hague to convince the ICC to cancel the indictments. As Uganda's requests continue to go unheeded, the countryside is once again threatened with war, and parents prepare to send their children once again on "night commutes" – the twilight journeys, by foot, that children take from villages to more populated areas to protect themselves from abduction.

This essay extends the economic analysis of standing in domestic law to its international counterpart – the international law of jurisdiction, focusing in particular on universal jurisdiction ("UJ"). The scenarios above – one hypothetical but plausible, the other real¹ -- show how UJ's broad distribution of prosecutorial entitlements increases the cost of settling disputes. Sometimes the increase in cost is significant enough to scuttle arrangements that would result in a net increase in global welfare.

International law can often be understood as attempting to lower transaction costs.² Several doctrines of international law seek to clearly define ownership of resources in ways that facilitates Coasean bargaining.³ The very recognition of states (as opposed to individuals or associations) as the primary and often exclusive actors in international law facilitates bargaining by reducing the number of relevant parties. The territorial sovereignty of states clearly defines property rights and responsibilities. Similarly, the narrow set of forms a geopolitical entity can take and the sovereign

¹ See Jeffrey Gettleman, *Ugandan Peace Hinges on Amnesty for Brutality*, New York Times (Sept. 27, 2006).

² William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and State Practice*, 17 U. PENN. J. INT'L ECON. L. 995, 1005 (1996) ("Customary international law . . . minimizes the problems raised by transaction costs by allowing states to forgo explicit negotiations and to function even in the absence of a formal structure.").

³ There are notable exceptions, such as the law of the high seas, which has always been treated as a global commons, and the seabed, which the Law of the Sea Treaty gives a similar status. Interestingly, the scope of the high sea commons has been shrinking as nations are allowed to claim ownership over a larger chunk of adjacent waters.

equality of states, like limited forms of real property ownership in common law, facilitates bargaining by reducing information costs to third parties. Similarly, diplomatic immunity facilitates bargaining in the most direct manner. Indeed, customary international law as an institution has been justified as a way of avoiding the potentially overwhelming transaction costs of its substitute, large multilateral treaties.⁴

The doctrine of universal jurisdiction, by contrast, greatly increases transaction costs. It makes the ownership of the relevant entitlement – the right of a state to prosecute particular conduct -- broad and hazy, and thus difficult to transact. As a result, when the price of resolving an international situation involves the non-prosecution of suspected international criminals, UJ creates a barrier to an efficient resolution because no one party can guarantee non-prosecution. Rather, to grant complete impunity, prosecutorial entitlements must be gathered up from among literally *all* nations, much as one would individually gather up parcels of land in the way of a public works project.

The tension between universal jurisdiction and local amnesties and reconciliation programs has been much discussed. (While the discussion often focuses on amnesties, there are other methods of waiving prosecutorial entitlements as part of a broad settlement, such as exile, charge bargaining, simply exercising discretion to not prosecute. For the purpose of this article, they are all analytically identical, and the terms “settlement” or “amnesty” shall refer generally to any such device.) Many scholars and activists criticize amnesties because they can be used in a self-dealing manner by those responsible for the international crimes.⁵ UJ allows disinterested third-party states to prosecute precisely because they are less likely to cut self-interested deals. But while UJ’s enlistment of all states as potential prosecutors addresses one part of the problem – self-dealing – it creates another problem. Non-prosecution is sometimes *socially* optimal, that is, increasing the net welfare of perpetrators, victims and even third-parties. Sometimes even impartial third-countries, or the “world community” may find non-prosecution optimal not for corrupt reasons, but rather for publicly-minded ones, such as ending intractable conflicts or obtaining evidence for use in other UJ prosecutions. However, UJ, which gives third-countries the right to prosecute in the first place, also severely limits their ability to reach efficient settlements.

The disruptive effect UJ can have on *domestic* settlements has been noted, but many consider this an acceptable price for avoiding the impunity created by self-serving failures to prosecute in the primarily affected states. What has been less discussed is the disruptive effect UJ can have on settlements desired by third-party states, and the global community itself. Internal amnesties may be suspect because of self-dealing. UJ creates an check on this, but an inflexible one that comes at a high cost. Even assuming the need for an international prosecutorial power, that authority should be located in one or a few clearly identified entities rather than in all states. The centralization of prosecutorial authority would, by making the ownership of the prosecutorial entitlement clear and limited, allow it to be put to its highest value use.

⁴ William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT’L L. & POL’Y 227, 287 (1997).

⁵ GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 309-10 (3rd ed 2006) (giving examples of abuses of amnesties).

Part I lays the groundwork by briefly describing the international law of state jurisdiction – in essence a standing doctrine for states -- and the role UJ plays in this system. Part II contains the core of the essay’s analysis, which shows how UJ increases transaction costs and thus can prevent the socially optimal use of prosecutorial entitlements by allowing a few states to block amnesties and similar arrangements even when the states supporting them value such an outcome more than the dissenting states value prosecution. Part III turns back to doctrine, challenging the view often articulated by international lawyers that international law *requires* states to prosecute UJ offenses, and thus any preferences states may have for non-prosecution are simply illegitimate.

I. THE INTERNATIONAL LAW OF JURISDICTION

A. Types of jurisdiction

International law regards criminal jurisdiction as a prerogative of sovereign states.⁶ As a result, the traditional limits on national criminal jurisdiction are largely coextensive with the contours sovereignty. States have what is known as *territorial jurisdiction* over offenses committed within their borders. The territorial principle encompasses extraterritorial conduct designed to cause harm within the forum states.⁷ States also have jurisdiction over offenses committed by their *nationals* abroad even if the conduct is lawful in the place it occurs.⁸

In recent decades, jurisdictional concepts have expanded and new principles have emerged, though their precise contours remain unclear. For one, the “borders” of territorial jurisdiction have been pushed to include conduct that merely causes *effects* within the forum state. A gun fired across the border is the classic and easiest case. But the more remote the extraterritorial conduct from the in-forum effects that it causes, the more tenuous the case for jurisdiction.⁹ While the U.S has repeatedly exercised jurisdiction over foreign anti-trust conspiracies based on their effects in the American market, the aggressive use of such jurisdiction could encompass a vast swath of extraterritorial economic activity, leading to conflict with overseas regulators. As a result, using such intangible effects to establish jurisdiction has been criticized by European authorities.¹⁰

A few broader bases of jurisdiction are sometimes mentioned, but rarely used and have not won the clear approval in international law. Under the “protective principle” states could punish activities committed by foreigners abroad that cause serious harm to

⁶ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998).

⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c).

⁸ *Id.* at § 402(2). The U.S. Foreign Corrupt Practices Act is an example of this kind of jurisdiction.

⁹ *Id.* at § 402 comment d (noting that extending the effects principle beyond the gunshot case is “controversial” outside the U.S.); *id.* at 402(1)(c) (requiring extraterritorial conduct to have “substantial” effects within the forum for jurisdiction to lie).

¹⁰ See MARK W. JANIS: AN INTRODUCTION TO INTERNATIONAL LAW (4th ed. 324).

certain vital security interests of the prosecuting state.¹¹ The existence and scope of the protective principle is uncertain and controversial, because under loose notions of harm and causation it could encompass a wide variety of extraterritorial conduct, far broader than even the territorial-effects jurisdiction, and ultimately shade into UJ for offenses not thought to be international crimes. In most formulations of the doctrine, it can only be exercised over offenses that threaten “the security of the state or other offenses threatening the integrity of governmental functions.”¹² The U.S., however, has applied this to offenses like drug smuggling, which may demonstrate the difficulty of cabining or defining this basis of jurisdiction.

Another jurisdictional category that has failed to achieve international acceptance is the “passive personality principle.” Unlike the former, which extends jurisdiction to offenses against the laws of the forum state committed *by* its nationals abroad, the passive personality principle extends jurisdiction to offenses committed *against* the forum state’s nationals abroad.¹³

The failure of the protective and passive personality principles to win broad acceptance means that nations asserting jurisdiction over extraterritorial conduct must show some well-defined nexus with the offense. Traditionally, this nexus has depended on the existence of concrete facts, such as the nationality of the perpetrator, or particular harms suffered within the forum state’s territory. The effect of these rules is to limit the number of states that will have jurisdiction over given conduct.

Universal jurisdiction over grave international crimes is itself a recent development.¹⁴ In a nutshell, the UJ concept is that certain international crimes, because of their outrageousness, can be punished by any state in the world. Which offenses are subject to UJ, and with what if any limitations, remains unclear, but the category is more or less congruent with *jus cogens* crimes such as torture, genocide, war crimes, and crimes against humanity. While very few states have ever exercised such jurisdiction, and only over a miniscule fraction of cases that might be subject to it, the general concept seems to have won the support of many states and almost all commentators.¹⁵ Unlike the jurisdictional rules discussed above, UJ can be exercised by a state with *no* nexus to the offense whatsoever. The forum state’s interest in the matter is indistinguishable from those of all other nations.

¹¹ See BROWNLIE, *supra* at 307; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 238- 39 (1995)

¹² See *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) cmt. f (1987).

¹³ *Id.* at. § 402 comnt. g, Reporter’s Note 3.

¹⁴ See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L. J. 183 (2004) (demonstrating that UJ first emerged in 1990s by highlighting differences between modern UJ and that which historically applied to piracy).

¹⁵ See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 88-219 (2003) (surveying UJ legislation and cases in many nations around the world and finding only twenty cases in the past ten years).

B. Jurisdiction rules and standing.

The international rules of jurisdiction function as a standing doctrine for states.¹⁶ The various jurisdictional categories define which states can litigate which offenses. Territorial jurisdiction is in effect a very narrow standing rule; nationality and passive personality represent a somewhat more flexible standing regime, and the protective principle is in effect a very loose limitation on standing. At the far extreme, universal jurisdiction means the abolition of international standing rules for certain offenses.¹⁷

Much of the logic behind standing restrictions in municipal public law translates to the international rules of standing. Thus the effects of universal jurisdiction internationally will be similar to the abolition of standing domestically. Economic analysis of standing doctrine in common law¹⁸ and in constitutional law¹⁹ shows that liberal standing rules make inalienable the underlying substantive entitlements (the right to sue for violations of particular norms). Inalienability prevents entitlements from being directed to their highest value use, and thus can result in lost social welfare.

Similarly, by creating a defined set of nations that can bring certain claims, traditional jurisdictional rules make those nations “owners” of the claim. UJ, on the other hand, transforms certain claims into a global common resource, preventing national ownership. Ownerless resources will not be put to a their socially highest valued use.

II. EFFICIENCY EFFECTS OF UNIVERSAL JURISDICTION

A. Traditional rules

The international rules of jurisdiction assign the right to litigate to certain nations based on their having a particular connection to the challenged conduct. The right to prosecute is an asset with some value. Different states may value the entitlement differently; in particular, the state to which the entitlement is initially assigned may value it less or more than other states that lack the requisite jurisdictional nexus with the offense.

A jurisdictional entitlement can be used in several different ways. First and most obviously, it can be used to prosecute the conduct. Second, the entitlement can be waived or forfeit. This is perhaps the most common use of state’s entitlements to prosecute international crimes. A nation, like an individual or a district attorney, need not bring all the causes of action it possesses, or prosecute all the conduct it has the right to prosecute.

¹⁶ See Detlev Vagts & Alfred P. Rubin, Book Review, 81 AM. J. INT’L L. 254, 261 (1987) (noting similarities between international jurisdictional rules and domestic standing limitations that prevent individuals from litigating generalized grievances).

¹⁷ See Alfred Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?*, 35 NEW ENG. L. REV. 265, 275-77 (2001).

¹⁸ See Michael C. Jensen, William H. Meckling, & Clifford G. Holderness, *Analysis of Alternate Standing Doctrines*, 6 INT’L REV. LAW & ECON. 205 (1986); Clifford G. Holderness, *Standing*, NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 505 (1998).

¹⁹ See Eugene Kontorovich, *What Standing is Good For*, 93 VIRG. L. REV. ____ (forthcoming, Nov. 2007, on file with author).

It can forgo prosecution for a myriad of reasons, such as a belief in the defendant's innocence or a difficulty in obtaining proof; to receive a defendant's cooperation; to not ignite political turmoil; or to promote reconciliation. This discretion about the optimal use of the right to prosecute is part of its value. A right that carried with it an absolute obligation to prosecute regardless of any circumstances would be worth much less; indeed, it could be a liability.

In between prosecution and waiver lie a number of settlement options. A common example of this would be charge bargaining, where the defendant is prosecuted for lesser crimes in exchange for some cooperation. In the geopolitical context of international crimes, the "consideration" from the defendant could involve abandonment of political office; participation in a conciliation or lustration process; an admission of guilt; or instructions to his followers to lay down their arms. In many international criminal contexts, the commission of international crimes is bilateral. In an internal ethnic conflict, both sides may commit universal offenses against each other. This is famously true of the Yugoslav succession wars, as well as the Rwandan genocide. In such cases, both sides (assuming they are states) could waive their prosecutorial entitlements in exchange for the other side doing the same.²⁰

Finally, and perhaps least obviously, jurisdictional entitlements can be transferred or delegated to other countries.²¹ Because states value jurisdictional rights differently,

²⁰ For example, in the aftermath of World War II, the Allies agreed to treaties with Germany and Japan waiving many potential claims held by Allied nationals, as well as agreeing to prosecute only a subset of the Axis war criminals they could have prosecuted. Naturally, given the outcome of the war, the Axis powers also would not prosecute Allied war crimes.

²¹ This point – the ability to transact jurisdictional rights -- may seem counterintuitive. Nonetheless, there are numerous examples of nations transferring their jurisdictional prerogatives to others. Sometimes this is done systematically, through treaties that assign to particular other nations the right to exercise the territorial or nationality-based jurisdiction of the assignee state, such as the 19th century anti-slave trading treaties between the United States and the Britain. Similarly, the Allied War Crimes Tribunal in Germany saw itself exercising Germany's territorial jurisdiction, ceded by the latter in its unconditional surrender. *See Kontorovich, Piracy Analogy*, 45 HARV. INT'L L. J. at 193 & n.7, 295 (discussing "delegated" jurisdiction).

Today, Latin American nations routinely delegate to the U.S. jurisdiction over their nationals and vessels apprehended with drugs on the high seas under circumstances in which the U.S. would not have jurisdiction without the home state's consent. *See, e.g., United States v. Normandin*, 378 F. Supp.2d 4, 8 (D. P.R. 2005). This is done pursuant to narcotics-enforcement treaties that contemplate but do not require such transfers of consent. *Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotics Drugs and Psychotropic Substances, with Implementing Agreement* (United States-Honduras), Art VII (1), State Dept. No. 02-4 (March 29, 2000):

Art. VII(1):

In all cases arising in the territorial sea or internal waters of the Republic of Honduras, or concerning Honduran flag vessels seaward of any State's territorial sea, the State of Honduras shall have the primary right to exercise

there is room for bargaining. State A, which has the right to prosecute under the territorial principle, may attach a low value to it. If state B attaches a higher value, it can bargain with A for the transfer of the entitlement. Alternatively, state B can induce state A to *use* the entitlement in the way that state B prefers. Thus if prosecution is worth \$10 to state A, and waiver is worth \$1; but waiver is worth \$15 to state B, the latter could bargain with the former to have it forgo the exercise of its entitlement.

An example may help make this concrete. Puritania has been plagued by a bloody ethnic civil war. Eventually, an armistice is worked out whereby both sides lay down their arms. As part of the transition to peace, the government passes a law that provides no one will be punished in connection with the conflict. Later, one of the groups comes to dominate the government, repeals the law, and seeks to prosecute members of the other group for their crimes during the conflict. The government values this prosecutorial entitlement at \$15 million (which means it would expend up to \$15 million in trial expenses). Neighboring Ruritania is not thrilled by the prospective prosecutions, which it fears will reignite the conflict, inundating it with Puritanian refugees and destabilizing the region. Dealing with the refugees will be an expensive proposition for Ruritania, one which it would pay \$100 million to avoid.²² Ruritania can negotiate with Puritania for the latter to waive its jurisdictional entitlement. Given their respective valuations, the socially optimal outcome – non-prosecution – could be reached. Such transactions will often be implicit – the currency could be diplomatic. But sometimes the waiving of prosecutorial prerogatives is even accompanied by cash payments states seeking non-prosecution for the sake of regional stability.²³

jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the State of Honduras may . . . waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel, cargo and/or persons on board.

Such jurisdictional transfers happen with universal jurisdiction offenses as well. Recently, the Sierra Leone Special Court, a mixed national/international tribunal, transferred former Leonean leader Charles Taylor to the jurisdiction of in the International Criminal Court in The Hague, a decision based on the latter's lower costs of enforcement. The United States Navy captured a band of Somalian pirates, but turned them over to neighboring Kenya for trial.

²² The notion of a neighboring state favoring amnesty even when many in the principally affected state would likely oppose it is hardly fanciful. *See* Geoff Hill, *Mugabe Amnesty Outrages Exiles*, WASH. TIMES (May 5, 2007) (describing South Africa's push for amnesty for dictator of neighboring Zimbabwe, a move unpopular with the millions of Zimbabwean refugees in South Africa).

²³ *See* Nicholas Kralev, *U.S. offers substantial aid package*, WASH. TIMES A5 (March 9, 2002).

B. Universal jurisdiction

Universal jurisdiction gives all states the prosecutorial entitlement. However, each nation still has its own valuation of the entitlement.²⁴ Some may wish to see prosecution; others may wish to see waiver or settlement for reasons discussed above. Previously, such diverse preferences could be reconciled through negotiation. However, by greatly increasing the number of states that have a right to prosecute a given offense, UJ increases the transaction costs involved in negotiating transfers of the prosecutorial entitlement. Indeed, UJ makes the class of rights-holders sufficiently large that it may entirely preclude a negotiated allocation of the rights.

Consider the following illustration. Ruritania is governed by a murderous dictator, whose principle tools of statecraft are ethnic cleansing, murder and torture. Puritania, a distant state greatly concerned with human rights, wishes to prosecute him for these universal jurisdiction offenses. It values this prosecutorial entitlement at \$15 million (which means it would expend up to \$15 million in trial expenses). Grand Fenwick, East Fenwick, and Lesser Fenwick, all neighbors of Ruritania, also have the same UJ prosecutorial entitlement. However, they would rather not prosecute, and indeed prefer granting the dictator amnesty, as this might encourage him to step down and allow a saner and thus less threatening government to take control in Ruritania. Pending prosecutions would only encourage the dictator to remain in power, where he will more likely be beyond the reach of process. The Fenwicks bear significant costs hosting Puritanian refugees, and thus apart from being prepared to waive their prosecutorial entitlements, they would be willing to pay \$100 million to Puritania for it to waive its prosecution of the dictator.

Such a deal would be socially optimal. However, it would not get off the ground. Because even if the Fenwicks make a deal with Puritania, any other country could still bring the same UJ case against the dictator. Working out an arrangement with Puritania gets the Fenwicks nothing unless they also work out a deal with all other nations. UJ has made an efficient settlement potentially unreachable, for reasons that will be elaborated in the next subpart.

If this example seems contrived, consider that the very *prospect* of UJ prosecutions has already threatened to restart civil wars in at least two countries – Macedonia, and currently, Uganda – where amnesties played a role in ending civil wars.²⁵

²⁴ UJ also creates a freerider problem – with all nations authorized to prosecute, and prosecution costly, each may defer to the other. However, the freerider problem will not counteract the holdout problem, as a freerider can opportunistically become a holdout when a deal is being cemented.

²⁵ See Jeffrey Gettleman, *Ugandan Peace Hinges on Amnesty for Brutality*, NEW YORK TIMES (Sept. 27, 2006) (describing how potential indictments by the ICC threaten to restart civil war with rebel group despite government's willingness to grant amnesty, the popularity of amnesty among locals tired of war, and the preference for reconciliation rituals in local culture); Jack Snyder & Leslie Vinjamuri, *A midwife for peace – Amnesty*, INT'L HERALD TRIBUNE 9 (Sept. 15, 2006) (“The Macedonian amnesty for Albanian rebels nearly broke down amid armed clashes when the prosecutor for The Hague war crimes tribunal asserted jurisdiction to investigate mass graves.”). The Macedonian

Neither case involves *self-serving* amnesties, that is, amnesties given by a government to itself while in office or on the way out, like in Chile under Pinochet. Rather, both involve amnesties given by governments to unsuccessful rebels as part of a comprehensive deal to end hostilities and put aside outstanding grievances for the sake of peace and social reintegration.²⁶

Similarly, third-party states could have strong preferences for amnesty which are not based entirely on coziness with the alleged criminals. For example, Nigeria took in Charles Taylor after he was given amnesty. When the Special Court in Sierra Leone sought to repeal his amnesty, Nigeria had committed a sizable peace-keeping contingent to Liberia. If the amnesty agreement were breached, it could restart the conflict, with Nigerian troops caught in the cross-fire. Not surprisingly, Nigeria strongly opposed abrogating Taylor's immunity. Similarly, South Africa has long supported amnesty for Robert Mugabe, at least in part to end the chaos he is causing in a neighboring state, and with it the flow of refugees.²⁷ These are entirely legitimate preferences. Indeed, they have recently been adopted by the Zimbabwean opposition.²⁸ Thus despite both his political enemies and friends favoring amnesty, Mugabe clings to power, perhaps precisely because he fears an amnesty/exile deal with South Africa would be mooted by an UJ prosecution. Both South Africa and Nigeria's valuation for non-prosecution might exceed the total value all other nations place on prosecution, but an optimal outcome cannot be reached. It should be noted that in the case of Mugabe, it is not clear who if anyone would seek to exercise UJ over Mugabe, but the very possibility may be preventing a deal with those most immediately affected.

C. Sources of transaction costs

In the examples above, UJ potentially blocks efficient arrangements because by increasing the number of states with the relevant entitlement, it increases transaction costs. Elsewhere, it has been shown how abolishing standing in domestic public law would significantly raise transaction cost in several ways.²⁹ For one, it would increase the absolute number of parties with whom one must negotiate. Furthermore, it makes the class of entitlement holders *open* – the number of parties with whom one must negotiate is not only large, it is not fixed. Finally, the ability of one party to nullify the entire transaction creates opportunities for holdout and threatens to make negotiation with other class member pointless. Universal jurisdiction has similar effects, though perhaps not as severe.

amnesty did not extend to war crimes, but did cover all other municipal crimes that would arise from the same conduct.

²⁶ The Macedonian amnesty was heavily favored by both the U.S. and E.U. See Nicholas Kralev, *U.S. offers substantial aid package*, WASH. TIMES A5 (March 9, 2002).

²⁷ See Tony Hawkins, *Harare scorns speculation Mugabe to quit*, FT.COM (May 1, 2003) (reporting that South Africa insists on amnesty as part of any exit package for Mugabe, but that domestic opposition opposes it).

²⁸ Geoff Hill, *Opposition mulls amnesty for Mugabe*, WASH. TIMES A1 (May 4, 2007) (reporting that leader of Zimbabwean opposition willing to give Mugabe amnesty in exchange for him leaving power).

²⁹ See Kontorovich, *What Standing Is Good For*, Part II.B.2-4.

1. Group size.

The most obvious increase in transaction costs comes from the increase in the number of entitlement holders with whom a would-be “buyer” of prosecutorial entitlements would have to negotiate. The increase represented by UJ over more restrictive international jurisdictional rules is quite significant. Consider a relatively complex international crime that affects many nations – air piracy. There would be jurisdiction for the nation of the airline, the place the plane flew from and the place it landed; the states of which the offenders are nationals, and if people were killed, perhaps a few of their states would seek to exercise passive personality jurisdiction. Assuming all of these states are different, and the offenders and victims come from several different countries, there would still be only perhaps a score of states with any kind of jurisdiction over the offense, several of which would have jurisdiction only over particular defendants.

With universal jurisdiction, all of the nations in the world – almost 200³⁰ – are given the right to prosecute. Simply conducting negotiations with each one represents a massive increase in transaction costs. The bargaining costs are surely lower than in the context of municipal public rights, where in the absence of standing there would be millions of uncoordinated entitlement holders. Clearly the set of nations is not overwhelmingly large in that all of the entitlement holders can be identified and approached. And mechanisms like the United Nations certainly lower transaction costs of the simple bargaining kind.

But the question of when transaction costs from group size become high enough to block efficient bargains is an empirical one.³¹ Despite the extensive law and economics literature on large-numbers transaction costs in private law, there is little discussion of what might constitute “large.”³² The little empirical work that has been done considers 40 parties to be a large group among which transaction costs would be considerable, suggesting that global jurisdictional bargaining would present a entirely different set of problems from traditional jurisdictional conflicts. While broad multilateral treaties show that negotiating among all nations is feasible, especially given facilitating mechanisms like the U.N., the bargaining UJ deals would require would be harder to reach. In most multilateral treaties, there are marginal benefits to existing members for getting each additional state’s membership; with UJ, the marginal benefits, if they exist, are much smaller, as holdout by any one state can frustrate the purpose of the previously consummated deals.

³⁰ See generally Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WILLIAM & MARY L. REV. 859, 897 & n. 176 (2006) (discussing different counts of nations).

³¹ See *id.* 890-891, 898 (2006) (discussing whether number of nations is “large” for purposes of forming the theory of efficient-custom formation).

³² See Elizabeth Hoffman & Matthew L. Spitzer, *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 J. LEG. STUD. 149 (1986) (concluding from experiments with students that transaction costs of negotiating amongst 38 people are not prohibitive).

2. *Open group.*

A group is closed if all of the relevant rights holders can be identified at the time the violation takes place. Transaction costs are higher when the group of rights holders is open, that is, when additional parties can acquire the relevant entitlement such that deals would have to be struck with them as well. When a group is open, the buyer cannot know the final price of a universal settlement, which may deter settlement with any single party. The group of nations with UJ prosecutorial entitlements is an open one. It is possible for new nations to come into being – indeed, the vast majority of today’s nations did not exist at the time of the Nuremberg Tribunals. A new state enjoys all the jurisdictional prerogatives of any state – there is no junior-state status. One of these prerogatives is the exercise of universal jurisdiction. Moreover, the nonexistence of a state at the time an offense occurred is no bar to its exercising universal jurisdiction over the offense. Indeed, the *Eichmann*, considered by many the first modern UJ case, was prosecuted by a state not in existence at the time of the crimes in question. Moreover, international tribunals exercising UJ can come into being suddenly and then exercise UJ over crimes committed prior to their creation.³³

3. *Holdout.*

In a UJ system, the consent of all states would be required to preclude prosecution. Imagine a context where almost all states value non-prosecution more than prosecution, and are willing to waive their prosecutorial entitlements by endorsing an amnesty. Such situations are not uncommon – in many recent conflict, the U.S., Europe and the U.N. have backed amnesty plans as part of ending a conflict and enticing a despotic leader to step down. However, if even one state makes known its refusal to waive its prosecutorial entitlement, much of the benefits of such a deal would be lost. Say the U.S., Europe and the U.N. promise to waive their prosecutorial entitlements, but Germany announces it will still consider itself free to prosecute the leader on UJ grounds, and to demand extradition from any country refusing to prosecute. (Of course the extent to which this would reduce the value of an amnesty deal depends on the likelihood of the holdout state obtaining personal jurisdiction.)

Since the point of “purchasing” prosecutorial entitlements is to avoid prosecution, UJ creates a situation where any one state can frustrate the benefit of socially desirable transaction. Of course, the ability of one party to entirely frustrate the gains from a large deal creates holdout power. In such a situation, potential holdouts have an incentive to ask for more than their pro rata share of the bargaining surplus. This can lead to bargaining break-down, or if anticipated by buyer, prevent negotiation from ever commencing. Thus even efficient deals – where the buyer would pay potential

³³ Compare U.N. Security Council Resolution 827 Art. 1 (May 25, 1993) (creating International Tribunal for the Former Yugoslavia with jurisdiction over crimes committed since 1991); and Statute of Special Court for Sierra Leone Art. 1(1) (2002) (establishing court’s jurisdiction over crimes committed since Nov. 30, 1996), *available at* > <http://www.sc-sl.org/scsl-statute.html>>; with Rome Statute of the International Criminal Court (2002) Art. 11(1) (creating jurisdiction only from time of statute’s entry into force), *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf>.

prosecuting nations more than the net value of prosecution to them – would not occur. In the international context, of course, the demands of potential holdout states would probably not be for financial compensation. Instead, they might hold out for some political concession, for a greater role in determining the content of a peace settlement. The particular form of the holdout is unimportant. What matters is that the ability of a large number of states to *entirely* negate efficient deals should encourage them to only waive their prosecutorial entitlements for consideration approaching the full value of the deal. Indeed, UJ might encourage opportunistic holdouts – nations that refuse to give up their prosecutorial entitlements not because of a sincere prior interest in bringing the particular suspects to justice, but rather to secure some consideration from the states or parties seeking a non-prosecution outcome. If such threats seem hypothetical, it is because states’ exercise of UJ itself is still more hypothetical than real.

D. Double jeopardy

One might think the problem of one state frustrating other (higher-value) states’ decision to not punish a suspect would be prevented by the rule against double jeopardy, known in international law as *non bis in idem*.³⁴ This principle precludes subsequent prosecutions by other nations or tribunals for a given universal offense as surely as double jeopardy prohibits repeated prosecutions of the same conduct by a single state. An acquittal by one state should bind others.³⁵

The principle does nothing to reduce transaction costs associated with UJ. For while a prosecution of a defendant by one state cannot be undone by others, decisions to *not* prosecute can be nullified by other nations’ decision to prosecute. Furthermore, settlements ideally occur before and instead of trial. Thus if states decide to “settle” a UJ matter through an amnesty, exile or even charge reduction, the double jeopardy prohibition has nothing to operate on.³⁶

Moreover, the exact scope of *non bis* principle in UJ cases may exclude settlements *designed* to avoid punishment in exchange for securing some other good. The Princeton Principles on Universal Jurisdiction rule out any *non bis* effect for “sham prosecutions or derisory punishment;”³⁷ presumably extra-judicial settlements like amnesty would have even less value. Similarly, under the Rome Statute of the ICC, the

³⁴ The term literally means “not twice for the same thing.” BLACK’S LAW DICTIONARY 1665 (7th ed. 1999).

³⁵ *United States v. Furlong*, 18 U.S. 184 (1820) (“[Piracy] is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.”).

³⁶ For example, the ICC statute’s *ne bis in idem* provision only restricts prosecution by the tribunal of people who have been “tried” elsewhere. Rome Statute Art. 20(3). Similarly, other courts are only prohibited (to the extent the statute can be binding on other tribunals!) from prosecuting those “convicted or acquitted” by the Court, as opposed to those who have had indictments dismissed as part of a political settlement of the kind Ugandan leaders are currently requesting.

³⁷ Princeton Principles on Universal Jurisdiction, Principle 9(1) (2001), *available at* <http://www1.umn.edu/humanrts/instree/princeton.html>.

non bis principle does not apply if in *the Court's judgment* the earlier proceeding was biased or a sham.³⁸ Even charge bargains, widely used in international criminal tribunals, may not prevent subsequent prosecution for the more serious offense. The ICC is not bound by *non bis* at all in the normal sense. Instead, it gets to “decide on a case-by-case basis whether the judgments of other courts are worthy of its respect.”³⁹ Since charge bargaining or dismissal of charges for cooperation by definition entails less than maximal prosecution, it will always be possible that subsequent tribunals will regard it as contrived or “derisory,” a maneuver to get the defendant “off” – for that is indeed the partial purpose of all criminal settlements. Canada’s UJ statute also has a similar complementarity provision, turning it into a “mini-ICC” that may conduct its own complementarity review.”⁴⁰ Thus even a judicial settlement in a UJ case may be reopened by a large number of third parties. In effect, negotiating such a settlement requires negotiating with all these parties at once.

E. Global Injury

The metaphysics of universal jurisdiction are somewhat murky. By one account, perhaps the dominant one, universal crimes are not just crimes against particular peoples and nations, but also offenses against an *international* legal order. UJ treats “the community of nations . . . as a juristic community.”⁴¹ Individual states exercising UJ are merely agents of this global interest.⁴² Given that UJ offenses are injuries to “the international community as a whole,”⁴³ the question arises as to who determines the value of the injury – and thus how and if it should be redressed. Judicially enforcing a right is not always the optimal way of using it. This is why when individual states are wronged, they can choose to waive their right to pursue remedies – because they may value the non-exercise or compromise of this right more highly. In UJ, *all* nations’ are in effect joint owners of a right to prosecute – they do not suffer separate harms, but share the same one.

³⁸ Rome Statute Art. 20(3).

³⁹ See George P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 580, 582 (2003) (noting cases where a Canadian court exercising UJ ignored previous conviction by foreign court, and Belgium in indicting Prime Minister Sharon ignored his prior domestic exoneration).

⁴⁰ Larry Charles Dembowski, *The International Criminal Court: Complementarity and its Consequences* 160, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES, JANE E. STROMSETH, ED. (2003) (arguing that Rome Statute contemplates only ICC will apply complementarity analysis, while national tribunals will simply defer to other states’ adjudications).

⁴¹ Quincy Wright, *War Criminals*, 39 AM. J. INT’L L. 257, 282 (1945).

⁴² See Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 153, 165 (1996) (arguing that the “only basis” for exercising UJ is “the assumption that the prosecuting state is acting on behalf of all states”); Wright, *supra*, at 280 (arguing that nineteenth century courts exercising UJ over pirates acted as agents of the world community).

⁴³ Draft Articles on State Responsibility.

While states may share a common interest in UJ offenses, they manifestly differ in the valuations they assign to this interest. Some nations value enforcement more highly than waiver. Usually, most prefer waiver over exercise, either because of the some particular benefits (such as ending a conflict) to be secured from waiver, or because to the administrative and political cost of exercise. The differing valuations of a joint entitlement will lead to conflicts between its de-facto co-owners. However, for the reasons discussed above, UJ allows the valuation a single state puts on the entitlement to be controlling on all other states when the one prefers prosecution and the others prefer some kind of waiver or settlement. Because of the high transaction costs created by UJ, even if the great majority of states attach a higher valuation to waiver than a few states do to non-waiver, a “buy-out” of the latter by the former may not be feasible. If international crimes truly represent a global injury, UJ perversely allows idiosyncratic valuations of that injury to triumph over the social value of the injury. If UJ is about a crime’s harm on global society, it perversely prevents the socially optimal allocation of the entitlement to deal with that harm.

III. ALIENABILITY AND THE POSSIBILITY OF EFFICIENT SETTLEMENT

The discussion above has assumed that the optimal level of prosecution is less than 100% because punishment may sometimes have to be traded for other goods. However, many commentators and human rights advocates argue that international law *mandates* the exercise of universal jurisdiction, and the punishment of perpetrators of universal offenses.⁴⁴ In this view, international humanitarian law goes beyond forbidding certain conduct: it creates a second-order affirmative obligation on all states to punish offenders of the first-order norms. Punishment cannot trade off against any other considerations, and thus amnesties and their kin are forbidden.⁴⁵ Some argue that mandatory obligation applies to all *jus cogens* crimes, and thus all universal jurisdiction offenses. A more limited version of the mandatory view focuses on genocide, torture, and certain war crimes,⁴⁶ on the theory that treaties specifically mandate prosecution for these offenses, thus leaving amnesty and similar options open for other offenses.

Because of the overwhelming state practice inconsistent with the mandatory view, some commentators stop short of saying international law currently requires prosecution, but optimistically claim to detect in some recent developments “a growing trend towards

⁴⁴ See, e.g., ROBERTSON at 291, 293, 311 (3rd ed 2006) (“[T]here is in international law a duty on states to punish crimes against humanity. . . even if this means rejecting or annulling amnesty laws and taking some risks of counter-revolution.”); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW* 507; Orentlicher, *supra* note 9, at 2585, 2593.

⁴⁵ See Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV., 955 (2006); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of A Prior Regime*, 100 YALE L.J. 2357 (1991).

⁴⁶ Prosecutor v. Delalic, Celebici Case, IT-96-21-A par. 176 (ICTY App. 2001) (suggesting in dicta that “grave breaches” of the Geneva Conventions in international armed conflicts “must be prosecuted and punished by all States”).

the prohibition . . . of amnesties for international crimes,”⁴⁷ or “crystallizing” law that regards amnesties as “*increasingly unacceptable*.”⁴⁸ Others important publicists flatly deny the existence of a duty to prosecute or ban on amnesties;⁴⁹ at the very least, the mandatory model seems far less settled than its proponents often suggest.

To the extent states have no duty to punish UJ offenses, one can be open to the notion that UJ creates inefficiencies by preventing welfare-improving settlements. Supporters of the mandatory model see the prevention of such settlements as the point, rather than a problem. In the middle view, where there is some obligation to punish but it is narrower than the range of *jus cogens* crimes, the efficiency argument still applies to many offenses.

This Part will show that UJ is not mandatory in almost all cases. The notion that less than full prosecution may be optimal does not contradict international norms. To the contrary, state practice strongly suggests that settlement rather than punishment may sometimes be optimal. An extensive literature deals with the question of mandatory prosecution versus amnesties in great depth. Given the limited scope of the project, a complete treatment of mandatory prosecution is impossible. At the same time, the question cannot be avoided given the subject of the Article. The discussion here will only give a sketch of the argument that UJ is not mandatory; more comprehensive analysis can be found elsewhere.⁵⁰ Because the strongest case for mandatory prosecution comes from several treaties, section A considers the extent to which international instruments rule out settlements. It finds that for few *jus cogens* offenses, prosecution may be mandatory, but not all treaties said to require prosecution in fact do so. Part B turns to customary international law, and finds that state practice embraces amnesties and other non-punitive settlements of *jus cogens* violations. While the scope of state practice contrary to the mandatory theory is too overwhelming to survey here, this section discusses whether, as some claim, there is a new “trend” in favor of mandatory prosecution.

⁴⁷ Carsten Stahn, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 695, 702 n.25 (2005).

⁴⁸ See Sadat at 963-65 (emphasis added); ROBERTSON at 308 (observing the “depressing number of occasions” state practice has not conformed with anti-amnesty norm, but none the less suggesting that “hand wringing quality about the excuses for amnesty by states that grant them” suggest “state practice is changing to conform with the” anti-amnesty norm).

⁴⁹ See ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 302 (2003).

⁵⁰ See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, xx BOST. U. INT’L L. REV. 107 (forthcoming 2007); Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 350-66 (2006); Michael P. Scharf, *The Letter Of The Law: The Scope of the International Legal Obligation To Prosecute Human Rights Crimes* 59-AUT LAW & CONTEMP. PROBS. 41, 61 (1996) (“Despite . . . a large collection of General Assembly Resolutions calling for prosecution of crimes against humanity, and notwithstanding the forceful arguments of several international legal scholars, state practice does not yet support the existence of an obligation under international law to refrain from conferring amnesty for crimes against humanity.”).

A. Treaties

No humanitarian treaty establishes an overarching obligation to prosecute *jus cogens* or other serious international crimes.⁵¹ Scholars point to three principal instruments that make UJ mandatory – the four 1949 Geneva Conventions, the Genocide Convention, and the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment.⁵² These treaties cover only a limited range of serious international crimes,⁵³ as they “were negotiated in the context of the Cold War,” before the drive to expand international humanitarian law that began with the collapse of the Soviet Union, and “limitations were necessary to ensure widespread adoption.”⁵⁴ However, an examination of these instruments reveals they vary significantly in their provisions on prosecution. Only the Geneva Conventions appear to mandate UJ prosecution, and then only for certain offenses; the import of the Torture Convention is unclear, and seems to leave loopholes for non-prosecution, while the Genocide Convention does not mandate UJ at all.

The Genocide Convention, at first glance, would seem the most likely candidate for establishing mandatory UJ. It certainly deals with the most severe of *jus cogens* offenses. And it succinctly creates an obligation to punish: “Persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁵⁵ The clear and unconditional mandate to punish (which goes beyond bringing charges) may stem from the extraordinary nature of the crime, which perhaps exceeds all other *jus cogens* offenses in its breadth, severity and consequences. However, Article Six of the Convention seems to limit the obligation to prosecute to the state with territorial jurisdiction over the offense, or whatever international tribunal has been given jurisdiction over by the relevant states. Thus not only does the Genocide Convention not make UJ mandatory, it does not establish UJ at all.⁵⁶ Thus while the Genocide Convention does require the exercise make *traditional* territorial jurisdiction, it does not create any UJ, let alone mandate its use.

⁵¹ See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, xx BOST. U. INT’L L. REV. 107 (forthcoming 2007, on file with author).

⁵² See also, Apartheid Convention Art. IV (requiring parties to “adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish . . . persons responsible”).

⁵³ See Trumbull, *supra* at 110 (“A large number of human rights atrocities . . . are not covered . . . specifically, crimes against humanity and war crimes committed within the context of a domestic conflict” as well as genocidal acts that lack “the specific intent to commit genocide”).

⁵⁴ See Scharf, *eXile Files*, *supra*, at 351.

⁵⁵ Convention the Prevention and Punishment of the Crime of Genocide Art. 4 (1948).

⁵⁶ Bruce Broomhall, *Towards The Development of an Effective System of Universal Jurisdiction For Crimes Under International Law*, 35 New Eng. L. Rev. 399, 403 (2001); *Universal Jurisdiction Of Spanish Courts Over Genocide In Tibet: Can It Work?* 4 J. INT’L CRIM. JUST. 595, 597 n.6 (2006) (describing holding of Spanish High Court that UJ cannot be based on Genocide Convention).

The Geneva Conventions consist of four linked treaties that establish rules for conduct towards civilians, wounded, prisoners of war; almost every nation is a party. The four treaties have common provisions on the duty to prosecute:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing... any of the grave breaches of the present Convention [described elsewhere].

High Each High Contracting Party shall be under the obligation to search for [the alleged perpetrators] . . . and shall bring such persons, regardless of their nationality, before its own courts. It may also. . . hand such persons over for trial to another High Contracting Party concerned.⁵⁷

This language certainly establishes significant prosecutorial duties. It carefully mandates each step in the prosecutorial process, from the passage of criminal legislation, through apprehension to trial. Amnesties and exiles are ruled out by the plain language. In case “any doubt still existed,” the Red Cross’s official drafting history to the Conventions notes that “the obligation to prosecute and punish the authors of infractions... is absolute.”⁵⁸ Thus the Conventions seem to create a robust obligation to punish war crimes, but limited to “grave breaches” committed by nations during external wars.

The Torture Convention, unlike the other two treaties, is less clear about whether punishment can trade off for other considerations. Art. 2 requires that parties criminalize torture and make the penalties appropriate to the crime’s gravity. Art. 5 requires states to take jurisdiction over offenses committed within its territory, by its nationals, or found within its territory (unless it chooses to extradite). If the evidence warrants, the state must then establish custody over the suspect, and then make “a preliminary inquiry into the facts.”⁵⁹ Thus far, the convention has meticulously spelled out the steps parties must take in regards to suspect torturers; the requirements thus far have been even more specific than those found in the Geneva Conventions.

Article 7 goes on to provide that the state that has established jurisdiction must either extradite or “submit the case to its competent authorities *for the purpose of prosecution*.”⁶⁰ This language seems to fall short of requiring prosecution; “for the purpose of” seems to qualify the requirement to prosecute. Charges can be submitted by a district attorney to a grand jury yet ultimately dismissed for a variety of reasons. A case can be referred to an inquiring magistrate and then dropped. The language is particularly

⁵⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Art. 490 (1949) 6 U.S.T. 311, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea Art. 50 (1949) 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129 (1949) 6 U.S.T. 3316, 75 U.N.T.S. 135; Article 148 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287

⁵⁸ Commentary pg. 373, comment to Art. 51 of the First Convention.

⁵⁹ Art. 6.

⁶⁰ Art 7(1) (emphasis added).

weak in comparison with the models available to the drafters, such as the “shall be punished” of the Genocide Convention; nor does the drafting history say anything about an “absolute” duty.⁶¹

Indeed, Art. 7 makes clear the “authorities” mentioned in Art. 7(1) still “decide” whether or not to prosecute. Art. 7(2) most clearly shows the precatory status of punishment under the Convention: the “authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”⁶² This seems squarely incompatible with the mandatory theory. The drafters surely knew that in many states, judges and prosecutors have great and unreviewable discretion to select which cases proceed to trial. They are routinely permitted to charge bargain, or to forgo prosecution altogether in exchange for cooperation or other perceived benefits. Even with offences of a “serious nature,” prosecution is decline due to victim sensitivities, lack of resources, and other subtle considerations. The Torture Convention explicitly countenances these trade-offs by state parties. Indeed, what is more extraordinary given torture’s status as a non-derogable *jus cogens* offense is that the Convention does not require a *greater* presumption in favor of prosecution than in the case of an ordinary serious domestic crime. *No* consideration that could trump prosecution for ordinary crimes is ruled inadmissible. This suggests that efficient settlement applies to universal offenses as much as to ordinary serious crime.

The negotiating history of the Convention strongly supports the view that prosecution is discretionary.⁶³ Firstly, Art. 7 was based on earlier conventions dealing with hostage taking and air piracy, which no one regarded as creating mandatory duties to prosecute.⁶⁴ The drafters of the Torture Convention recognized that it would be unrealistic to rule out standard pragmatic considerations from prosecutorial decisions.⁶⁵ The original draft, proposed by Sweden in 1978, required that parties “ensure that criminal proceedings are instituted.”⁶⁶ Some nations favored this robust language, and indeed, preferred beefing up the mandatory language by adding that proceedings must be “instituted without exception.” This language was not adopted. Both the United States and France objected that the Swedish’s draft’s language “ensure that criminal proceedings are instituted” was too strong. They sought to “chang[e] the obligation of

⁶¹ Orentlicher, *supra*, at 2604 (observing that the Convention “does not explicitly require that a prosecution take place, let alone that punishment be imposed”). *See also*, Letter of Submittal, Transmitting Torture Convention, TREATY DOC. 100-20, 1988 U.S.T. LEXIS 202, *35 (observing that even in absence of extradition “Article 7 does not require prosecution”).

⁶² Art. 7(2).

⁶³ CHRIS INGLESE, THE UN COMMITTEE AGAINST TORTURE 329 (2001) (noting that Art 7 does permit prosecutorial decisions “on the basis of expediency”).

⁶⁴ AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 217, 230-31 (1999).

⁶⁵ *See* INGLESE, *supra* at 329 n. 35 (the drafters “accepted as unavoidable” the loophole left open by Art. &).

⁶⁶ *See* J. HERMAN BRUGERS AND HANS DANIELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE 63 (1988); AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 208 (1999).

States from . . . prosecution to an obligation of mere submission of the case for the purpose of prosecution.”⁶⁷ To achieve this, France proposed replacing the phrase with “submit the case to its competent authorities for the purpose of prosecution.”⁶⁸ To secure a compromise,⁶⁹ the Swedish language was dropped from subsequent drafts, and the French language adopted, strongly suggesting that the drafters understood the opposition to mandatory prosecution was too strong.⁷⁰

Prof. Scharf has argued that the equivocal language of the Convention should not be taken as countenancing amnesties and the like, but rather to “avoid the suggestion of a predetermined outcome.” The Genocide Convention’s “shall be punished” language does seem a bit conclusory. But the idea that a mandate to punish should not trump a “fair treatment” is expressed specifically in the Torture Convention elsewhere; this safeguard is on top of the discretion given to the “authorities” in 7(1) –(2).⁷¹ Similarly, nothing in the text suggests the “decision” is limited to legal or factual innocence.⁷² Finally, Art. 7(2) was borrowed from the nearly identical provision in recent conventions on air piracy.⁷³ Those treaties were understood to *not* require UJ prosecution,⁷⁴ but during their

⁶⁷ BOULESBAA at 209. *See also* BRUGERS & DANELIUS at 67.

⁶⁸ Boulesbaa at 209.

⁶⁹ The final text was suggested by Mr. Bruggers, the rapporteur-chairman, and included the adoption of the Swedish text for Art. 5. *See* Bruggers & Danelius at 79,

⁷⁰ *Id.* At 217-18.

⁷¹ Art. 7(2). Presumably not punishing the factually innocent is the most basic aspect of fair treatment.

⁷² *Cf.* Orentlicher at n. 306 (suggesting the language reflects an understanding there might be “legitimate reasons” such as “lack of evidence” to forgo prosecution). The President’s transmittal letter seems to take Scharf’s narrower view: “The decision whether to prosecute entails a judgment whether a sufficient legal and factual basis exists for such an action.” Still, the letter goes on to suggest that the prosecution can be declined based on still other considerations not explicitly mentioned in Convention, such as diplomatic immunity, if those considerations would also apply to another “case of any ordinary offense of a serious nature”. *Id.* at 37. This could be read to suggest that the legal and factual adequacy of the case may not be the exclusive parameters of the “decision.” On the other hand, immunity may go to legal adequacy. On the whole, the Reagan Administration’s view of the convention supports Scharf’s. The principal thrust seems to be that whether evidence is sufficient can be viewed through the lens of domestic law, i.e., the beyond a reasonable doubt standard in the United States.

⁷³ *See* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, U.N.T.S. No. 14118, vol. 974, pp. 178-184 Art. 7 (1973) (“Montreal Convention”), *available at*

http://www.unodc.org/unodc/terrorism_convention_civil_aviation.html; Convention for the Suppression of Unlawful Seizure of Aircraft Art. 7 (1970) (“The Hague Convention”), *available at* <
http://www.unodc.org/unodc/terrorism_convention_aircraft_seizure.html>.

⁷⁴ *See* Jacques Hartmann, *The Gillon Affair*, 54 INT’L & COMP. L. QUART. 745, 750 (2005) (arguing that adoption of terrorism conventions’ language reinforces view that Torture Convention does not create duty to prosecute).

drafting a question arose about the scope of prosecutorial discretion. Some argued that unfettered discretion would make a sham of the treaty, while others maintained that the *popularity* of the suspect could justify non-prosecution. There is a broad middle ground that would allow discretion to not prosecute based on “public interest” considerations that are pragmatic but not strictly political.⁷⁵

Finally, the Torture Convention’s language, and the entire broader question of mandatory prosecution, must be considered in light of municipal law, with the former explicitly incorporates. In municipal law, settlement of criminal cases is common. In the United States, plea bargaining is the rule rather than the exception. Prosecutors have discretion to not indict suspects to secure their cooperation, avoid traumatizing witnesses, among many other possible considerations. The exercise of such discretion is absolute and effectively unreviewable. Such broad discretion is not unique to America. In England and Wales, prosecutors can decline prosecution when it would not serve “the public interest,” which includes considerations such as the hardship on victims and the potential harm the disclosure of information at trial could have on “national interests.”⁷⁶ Nor is broad discretion limited to common law systems. In France, the prosecutor has “broad discretion to refuse to invoke the criminal law, even in cases of provable guilt.”⁷⁷ Thus for municipal crimes, even serious ones, zero settlement or full enforcement does not seem to be the goal. Moreover, nations that allow settlement of non-international offenses extend the same treatment to defendants accused of international crimes in non-universal jurisdiction cases.

B. Customary International Law.

Customary international law recognizes the acceptability of non-prosecution of UJ crimes. A great many states have found from their own experience that justice is not the only maximand, and that non-prosecution, either on an individual or collective level, is often the price of achieving other worthwhile goals. Thus even those who oppose such measures concede that they have the overwhelming approval of states.⁷⁸ Non-prosecution can take several forms: explicit amnesties, exile, silent non-prosecution, and

⁷⁵ See BOULESBAA at 231-32 (“[T]he paragraph did not totally close the door on the influence and involvement of political considerations in the decision-making process to prosecute or not prosecute alleged offenders of hijacking and torture, it does not permit the competent authorities to make the decision with no regard whatsoever to legal grounds. The paragraph represents the best possible compromise . . . [between the various Parties’ positions].”).

⁷⁶ CRIMINAL PROCEDURE: A WORLDWIDE SURVEY, CRAIG M. BRADLEY, ED. 115(1999).

⁷⁷ *Id.* at 167.

⁷⁸ See ROBERTSON, *supra*, at 308; Sadat, *supra*, at 1021 (observing that state practice provides “less forceful” evidence than treaties of a CIL rule requiring punishment); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT’L L. 173, 175-76 (noting the “overwhelming state practice of granting and enforcing amnesties”).

charge bargaining. All of these tools have been used extensively by states in recent years, generally with the support and approbation of other states and international organizations.

1. Amnesties and exile.

The use of amnesties for *jus cogens* violations has been extensively documented elsewhere; at least twenty nations have used this one method of trading justice for peace in recent decades.⁷⁹ Indeed, even as the concepts of UJ and *jus cogens* offenses have gained currency, amnesty has become more common. More than two-thirds of wars ending since 1989 have included formal amnesties, as compared with 1/6 during the Cold War era.⁸⁰ Similarly, in several prominent recent situations, dictators have been induced to leave power with the promise of a comfortable exile in another country, which in effect amounts to a grant of immunity by the host country.⁸¹

Of course, no legal norm enjoys perfect compliance, so perhaps these amnesties are breaches of an anti-impunity norm rather than evidence of a norm allowing trading justice for other considerations. This possibility is belied by the international reaction to, and participation in, such deals. Far from being a source of international embarrassment⁸², these arrangements have been welcomed and indeed arranged by Europe, the U.S., and neighboring states.⁸³ Indeed, U.N. mediators played a key role in brokering several amnesties in recent years,⁸⁴ including, most recently the 2003 exile arrangement of Charles Taylor, and tacitly approved several others.⁸⁵ The U.N.'s practice has been schizophrenic to be sure, with U.N.-sponsored courts and leading officials declaring illegal the same amnesties that the U.N. itself secured. But given that the amnesties themselves are international instruments while the pronouncements, including the judicial ones, are *dicta*, even the U.N.'s practice leans towards accepting justice-trading.⁸⁶

Supporters of the mandatory view, while admitting the weight of contrary state practice, claim that there is an “emerging” trend in international practice towards establishing a duty to prosecute.⁸⁷ These arguments are focus on isolated and atypical cases, non-binding statements by international bodies and bureaucrats, and *obiter*

⁷⁹ See Trumbull, 116-118 (listing a dozen countries that have used amnesties for international offenses in past two decades); Scharf, *eXile Files* at 342 (listing an additional eight countries that have used amnesties in the past three decades).

⁸⁰ See Snyder and Vinjamuri.

⁸¹ See Scharf, *eXile*, at 343 & n.12.

⁸² Cf. ROBERTSON at 308 (claiming that states' attitude, if not practice, towards amnesties shows that they conflict with emerging norm).

⁸³ *Id.* at 344-45; Trumbull at 119.

⁸⁴ See Scharf, *eXile* at 343-45 (noting that UN has pushed for amnesty as a means of restoring peace in at least five recent conflicts).

⁸⁵ Trumbull at 115.

⁸⁶ *Id.* at 113-115; SCHABAS at 337.

⁸⁷ See ROBERTSON at 308; Sadat at 1021-22; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EU.R. J. INT'L L. 481 (2003) (arguing that duty “emerging” duty to prosecute exists under “emerging” CIL).

pronouncements of *ad hoc* international tribunals. For example, Prof. Sadat places great weight on the repudiation by some Latin American countries of amnesties given to prior governments. The clustering of these examples – all Latin American countries that had authoritarian governments in the 1970s whose supporters are no longer in power – suggests they may represent something other than a rejection of amnesty. None of these examples involves nations *currently* facing an ongoing conflict or incumbent oppressive regime refusing to trade justice for peace or democracy. Rather, these states traded justice for peace, and now do not want to pay the full price. To say that these nations reject the notion of amnesty is like saying a debtor who defaults on his loans objects to usury. Moreover, the clustering of cases may suggest that what is happening is simply that the new governing powers in those nations are unsympathetic to the previous ones, and happy to cause them political harm. Moreover, Prof. Sadat fails to mention that even as the countries have been setting aside old amnesties, other countries have been forging new ones.⁸⁸

2. Simple non-prosecution.

Given the number of *jus cogens* offenses and offenders, the paucity of prosecutions, national or international, shows that states do not consider themselves obligated to prosecute these offenses, and certainly not on a universal basis. That is, even without a formal amnesty in place, non-prosecution is the norm and prosecution the exception. Almost all nations pass up almost all opportunities to exercise UJ. Consider the impunity with which the leaders of China and Zimbabwe travel, to take just two examples. The number of such *sub silentio* non-prosecutions is hard to locate as it consists of doing nothing. But in one high profile incident, the German federal prosecutor refused to prosecute a complaint brought against Donald Rumsfeld and others charging them with war crimes and torture based on command responsibility for Abu Ghraib, despite clear authority under German law to do so.⁸⁹

Of course, states may not have the resources to prosecute all *jus cogens* offenders. But conversely, states' belief that prosecution can trade off with other things is evidenced by the limited, or non-existent, resources they dedicate to prosecuting *jus cogens* offenses.⁹⁰ If states thought prosecution was strictly mandatory, they would give prosecutors unlimited budgets. Instead, even the *ad hoc* tribunals created to deal with massive violations of *jus cogens* norms – which are funded by the international

⁸⁸ See Ron Synovitz, *Afghanistan: Amnesty Law Draws Criticism, Praise*, Eurasia Insight (March 17, 2007), available at <http://www.eurasianet.org/departments/insight/articles/pp0317.7.shtml>; Jeffrey Gettleman, *Ugandan Peace Hinges on Amnesty for Brutality*, New York Times (Sept. 27, 2006).

⁸⁹ Florian Jesseberger, *Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany*, 214-16. Indeed, refusing to prosecute may have been a stretch of the prosecutor's authority under the universal jurisdiction law. *Id.* at 217-18.

⁹⁰ WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 338 (2006).

community – are given budgets entirely inadequate to the comprehensive prosecution of offenders:

That is . . . what the United Nations has done with respect to the SCSL, providing it with a budget sufficient to prosecute about then prominent offenders and thereby securing impunity for many thousands of others. The acceptability of balancing the ‘duty to prosecute’ with available resources proves that the duty is not an absolute one.⁹¹

Consider whether the ICC acts as if UJ is mandatory. The ICC prosecutor has authority to investigate complaints, and to commence an investigation if “there is reasonable basis to proceed.”⁹² Yet the prosecutor has only launched investigations in three of the 23 situations referred to him that otherwise satisfied jurisdictional requirements. No investigation, to say nothing of prosecution, has been done in the 18 situations where the prosecutor has power to launch an investigation *a proprio motu* (as opposed to investigations triggered by Security Council referrals or a nation’s consent). In many of these situations, “it would not be too difficult to find crimes against humanity,” but the prosecutor has not chosen to exercise his power.⁹³

3. Charge bargains.

Plea bargaining in international criminal cases also represents a trade-off between punishment and other goals. Plea bargaining takes two forms – sentence bargaining, and the charge bargaining. In the former, the defendant pleads guilty in exchange for leniency in sentencing; this can be seen as a partial impunity. In charge bargaining, the original charged offenses are dismissed and replaced with less serious ones in exchange for some kind of cooperation, or for a guilty plea to the less charges.

Plea bargains of both kinds have become an “important aspect of prosecutorial practice” at the International Criminal Tribunal for Yugoslavia, and have also been used in Rwanda.⁹⁴ Precisely because such bargains raise the same issues as amnesties, there was strong opposition on the court and among international lawyers to using them in proceedings that would be used as a template for international justice.⁹⁵ However, practical considerations quickly lead to the abandonment of this idealistic approach, and soon the ICTY came to actively encouraging plea bargaining, an approach that other

⁹¹ *Id.*

⁹² Rome Statute Art 15(3).

⁹³ Kai Ambos, *Prosecuting International Crimes at the National Level*, in WOLFGANG KALECK, ET. AL., *EDS.* INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 57-58 (2007).

⁹⁴ See SCHABAS at 426.

⁹⁵ Nancy Amoury Combs, *Procuring Guilty Pleas For International Crimes: The Limited Influence of Sentence Discounts*, 59 VAND. L. REV. 69, 83-84 (2006) (ICTY officials at first regarded plea bargaining as “distasteful” because “the very magnitude of the international crimes at issue made the sort of back-room negotiations that characterize the plea bargaining of less serious domestic crimes seem entirely inappropriate”).

tribunals have followed.⁹⁶ In many cases, such bargaining involves dropping charges of war crimes and even genocide.⁹⁷

One might argue that such bargaining differs from amnesties because it trades justice for justice: the consideration for granting the defendant impunity is the incrimination of others, or of himself on lesser charges.⁹⁸ But this is already to say that it is acceptable in *jus cogens* offenses to seek the *optimal* level of punishment, not the maximal level. Moreover, the tribunals have not used this argument to justify their heavy reliance on deals. Instead, they have invoked purely pragmatic concerns of judicial economy,⁹⁹ saving prosecutors' time and effort, as well as preventing "retraumatizing" victims that might be forced to testify.¹⁰⁰ It is clear that the increased use of plea bargains came in response to pressure from funding nations to clear the Court's docket.¹⁰¹ Finally, nations whose domestic criminal systems allow charge bargaining regard the procedure as fully applicable to prosecutions of Geneva and Torture Convention violations,¹⁰² with little or no evident protest from other states.

CONCLUSION

With some limited exceptions, international law recognizes that welfare may be enhanced by waiving prosecutorial entitlements in exchange for other benefits. Indeed, international practice is rife with such transactions. However, the growth of UJ will make efficient transactions harder to reach because the relevant entitlements are now dispersed among nearly 200 de facto co-owners. Because those seeking a waiver of prosecutorial entitlements must now negotiate with a multitude of nations, each with holdout power,

⁹⁶ Ralph Henham & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia*, 16 CRIM. L. FORUM 49, 49-50 (2005) (noting "sharp" increase in ICTY plea bargains and that the Sierra Leone and East Timor special tribunals also "encourage plea bargaining").

⁹⁷ See Combs, *supra*, at 51-54. Professor Combs notes that in comparison to most domestic criminal codes, international crimes are broadly defined, with the same charge – say, genocide – used for conduct of widely varying severity. Thus leniency is more often applied through sentence reduction than charge bargain; the dropping of many charges may not help a defendant at all given the wide range of sentences available for any one charge. As a result, Prof. Combs maintains that there is little charge bargaining on the ICTY, and that this is also buttressed by the Tribunal's greater wariness about charge-bargaining practice's acceptability in cases of mass atrocity. See Combs at 77-79; Nonetheless, charge bargaining is not unknown, and Henham & Drumbl's account suggest it is more common than Combs does.

⁹⁸ See Henham & Drumbl at 57 (noting that it could be argued that plea bargaining may lead to more convictions).

⁹⁹ *Id.* at 56.

¹⁰⁰ *Id.* at 57.

¹⁰¹ See Combs at 84-87.

¹⁰² See, e.g. <<http://www.washingtonpost.com/wp-dyn/content/article/2005/05/02/AR2005050200295.html>> (describing plea and charge bargaining of Abu Ghraib defendants, some of whom received no jail time)

such deals become either hard to reach. Thus if one sees a decrease in the use of amnesties, it may be simply because a genuine complete waiver of claims becomes harder under UJ. Moreover, because UJ makes each state's prosecutorial entitlement less valuable, it allows states to get less of the things one can obtain by trading these entitlements – things like peace, democracy, and the conviction of senior perpetrators.. Thus under UJ one might see fewer amnesties, or one might see states granting amnesties in return for smaller concessions, because the amnesty itself has become less valuable.

At the same time, the concerns that lead to the emergence of UJ are also quite serious. Nations are often unable or unwilling to deal with their own *jus cogens* crimes. Thus international prosecution can be valuable. However, international prosecution can be had without the high transaction costs entailed by UJ if instead of each nation having a prosecutorial entitlement, there were a single, centralized criminal tribunal that could exercise jurisdiction over such offenses. This would be akin to the solution some U.S. states have found to standing problems – allowing the attorney general to proceed with suits involving broad injuries for which there would not be standing under traditional limits. However, the ICC is not such a tribunal: its jurisdiction is *in addition to* rather than instead of the jurisdiction of the several states, thus exacerbating the problem rather than relieving it. Nor is it clear that the ICC has the democratic accountability of municipal prosecutor, and thus it may not internalize costs and benefits in a way that would lead it to make the proper trades between justice and other considerations. Thus both UJ and the existing international criminal courts threaten to impose significant welfare losses when socially desirable settlements cannot be reached.