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The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations

Roman Boed*

Introduction

A look at post-transitional societies in recent history shows that as part of the bargain for political change, many nations have acquiesced to

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33 Cornell Int'l L.J. 297 (2000)
an amnesty\textsuperscript{1} for perpetrators of past serious human rights abuses. In the last two decades, amnesty measures have existed in eleven Latin American countries, including Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Peru, Suriname, and Uruguay.\textsuperscript{2} Outside Latin America, South Africa and Cambodia, for example, have also enacted amnesties for perpetrators who committed serious abuses during the previous regimes' rule.\textsuperscript{3} While the amnesties use various modalities,\textsuperscript{4} each gives rise to the same question. Namely, what effect does a domestic amnesty have on the capacity of States with no connection to the offense to prosecute alleged perpetrators of serious human rights violations who are hiding behind the amnesty's shield? As the recent case of General Pinochet's requested extradition from Great Britain to Spain illustrates, this question surfaces not only in academic debates, but also in practice.\textsuperscript{5}

Rather than explore the intricacies of various amnesty measures or study a particular case, this Article develops an analytical framework for answering the question whether States with no connection to the given offense may prosecute the alleged offender despite the fact that he received an amnesty from the State where the offense took place. This question can only be answered after determining whether the prosecuting State has a sufficient jurisdictional basis for proceeding against the alleged offender and, if so, whether the amnesty measure nevertheless disables prosecution. Section I argues that the answer to the first question turns on whether the offensive conduct in the case at hand gives rise to universal jurisdiction,

\textsuperscript{1} Norman Weisman described amnesty as "an act of sovereign power granting forgiveness for a past offense...." Norman Weisman, A History and Discussion of Amnesty, 4 COLUM. HUM. RTS. L. REV. 529 (1972). He observed that "[t]he history of amnesty dates back to 404 B.C., when Thrasybulus, an Athenian general, forbade any punishment of Athenian citizens for political acts committed before the expulsion of the tyrants." Id. at 530.

\textsuperscript{2} See Douglass Cassel, Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities, 59 LAW & CONTEMP. PROBS. 197, 200-01 (1996); see also Alejandro M. Garro, Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?, 31 COLUM. J. TRANSNAT'L L. 1, 10-11 (1993) (describing amnesty and similar measures in Latin America).


\textsuperscript{4} While the amnesty measures generally provide a shield to accountability, the South African model, which couples amnesty granting with truth seeking, allows the amnesty-granting body to withhold an amnesty from a person if, because of the egregious nature of the offense, the grant of an amnesty would not serve the objective of reconciliation. See Diane F. Orentlicher, Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes, 3 ILSA J. INT'L & COMP. L. 713, 714 (1997); see also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 55-57 (1998) (describing the South African amnesty model).

assuming arguendo that no other jurisdictional basis could apply. Section II argues that the answer to the second question depends on whether the amnesty measure is valid under international human rights law. The relevant consideration in assessing the validity of the amnesty measure is whether international law requires prosecution for any of the offenses to which the measure extends. If so, the amnesty measure cannot be considered valid on the international plane with respect to those offenses. In conclusion, Section III suggests an analytical framework for the discrete enquiries that are necessary in determining the effect of a domestic amnesty on the ability of foreign States to prosecute alleged perpetrators of serious human rights violations.

I. The Validity of the Exercise of Universal Jurisdiction

A. Prelude: Erga Omnes Obligations and Legal Interests of States

In general, States have granted amnesties in situations of internal conflict involving mass violations of human rights. Yet basic human rights, whether protected by conventions or custom, impose upon States an obligation not to violate them. In common understanding, States owe human rights obligations to all other States, or erga omnes. In a well-known dictum, the International Court of Justice in the Barcelona Traction case stated that erga omnes obligations derive, for example, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a uni-

6. The other bases for extraterritorial jurisdiction are (i) the nationality principle (entails jurisdiction over acts committed by a State's nationals abroad), (ii) the protective principle (acts against a State's security interests committed by aliens abroad), and (iii) the passive personality principle (acts against a State's nationals committed by aliens abroad). See generally Roman Boed, United States Legislative Approach to Extraterritorial Jurisdiction in Connection with Terrorism, in II INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 145, 146-50 (M. Cherif Bassiouni ed., 2d ed. 1999) (discussing these bases for extraterritorial jurisdiction).

7. See, e.g., Cassel, supra note 2, at 197-98.

8. Claudia Annacker identified an erga omnes obligation as a duty with a "non-bilaterlizable structure." Claudia Annacker, The Legal Regime of Erga Omnes Obligations in International Law, 46 AUSTRIAN J. PUB. INT'L L. 131, 136 (1994). An erga omnes obligation "can only be fulfilled or breached vis-à-vis all States belonging to a community . . . of all States which are bound by a norm of treaty or customary international law . . . ." Id. (emphasis in original) (footnote omitted). Clearly, human rights obligations have this character. If a State breaches human rights protected by a treaty to which it is a party or by custom, that State breaches its express (in case of a treaty) or implicit (in case of custom) promise to protect those rights vis-à-vis all other States similarly bound. The injury from the breach thus reaches all States in the community. See LAURI HANKINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 282-83 (1988) (identifying basic human rights obligations as owed to the community of States); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. o (1987) (noting that violations of certain customary human rights obligations "are violations of obligations to all other states") [hereinafter RESTATEMENT (THIRD)].
The Court said that these *erga omnes* obligations are "[b]y their very nature... the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection..."  

This raises a question as to the effect of a State's legal interest created by breach of an *erga omnes* obligation.  

Upon consideration of this question, Oscar Schachter concluded that where a party to a multilateral treaty breached its *obligatio erga omnes* under the treaty, any other party to that treaty could seek redress for the breach, even if that other State sustained no material injury from the breach and the breach did not affect its nationals.  

In effect, under such a view, the legal interest that flows from the breach of an *erga omnes* obligation enables *actio popularis*. However, proceeding as *actio popularis* depends on whether the breaching State consented to the jurisdiction of the tribunal from which redress is sought.  

The legal interest that other States have as a result of an *obligatio erga omnes* breach does not overcome the breaching State's refusal to accept a tribunal's jurisdiction. This control over jurisdiction tempers the practical effect of the legal interest that flows from the breach of an *erga omnes* obligation.

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10. Id. Lauri Hannikainen found that in addition to the views of the International Court of Justice, the work of the International Law Commission and the writings of supporters of the "view that there exist obligations of States towards the international community of States in the observance of which all States have a legal interest." Hannikainen, *supra* note 8, at 274, 276.

11. Hannikainen observed that while the prevailing view is that "there exist obligations towards the international community of States in the vindication of which all States have a legal interest," it is uncertain how the vindication of such obligations "can be realized in contemporary international law." Hannikainen, *supra* note 8, at 276. Hannikainen suggested that vindication of such obligations may be through *actio popularis*, but stated that "*actio popularis* can be realized properly only as an exercise of the right to institute proceedings in international juridical bodies." Id.

12. See Oscar Schachter, *International Law in Theory and Practice* 209-10 (1991). An *erga omnes* obligation can arise not only under a treaty, but also under custom. See Louis Henkin, *International Law: Politics and Values* 216-17 (1995) (stating that customary law of human rights "recognizes the interests of all states in the human rights of all human beings"); Annacker, *supra* note 8, at 135 ("An *erga omnes* obligation can be an obligation towards all the parties to a multilateral treaty... an obligation vis-à-vis a community of States bound by a rule of regional customary international law or an obligation towards the international community.").

13. The breach would enable *actio popularis* at least to the extent that nearly all States are parties to the treaties that create the *erga omnes* obligations recognized by the Barcelona Traction opinion. See Schachter, *supra* note 12, at 210; see also *supra* text accompanying note 9 (noting the sources of *erga omnes* obligations).


15. See A. J. J. de Hoogh, *The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective*, 42 Austrian J. Pub. Int'l L. 183, 196 (1991) ("It is obvious that even if a State possesses a legal interest, it still cannot dispense with the requirement of a jurisdictional link under art. 36 of the Statute [of the International Court of Justice]."); see also Hannikainen, *supra* note 8, at 280 ("It appears that *actio popularis* can be realized only among those parties to the Statute which have accepted the compulsory jurisdiction of the ICJ.").
obligation.\textsuperscript{16} As a further complication, any such legal interest is opposable to the breaching State, not to its nationals.\textsuperscript{17} Consequently, this legal interest cannot be the foundation for jurisdiction over individuals. Moreover, in the \textit{Barcelona Traction} case, the International Court of Justice discussed \textit{erga omnes} obligations in the context of a civil matter between two States\textsuperscript{18} without reference to criminal jurisdiction.\textsuperscript{19} Accordingly, \textit{erga omnes} obligations do not create universal jurisdiction over crimes.\textsuperscript{20} Therefore, the validity of the exercise of universal jurisdiction over alleged human rights violations by individuals cannot be based on a showing that the alleged violations breach rights that States have an \textit{erga omnes} obligation to protect.\textsuperscript{21}

B. Universal Jurisdiction

Instead, the validity of an exercise of universal jurisdiction depends on whether a treaty or custom recognizes universality as an appropriate jurisdictional basis for regulating or proscribing the given conduct\textsuperscript{22} and whether it is reasonable to extend jurisdiction to conduct that has no par-

\begin{enumerate}
\item See Hannikainen, supra note 8, at 282; Schachter, supra note 12, at 210-11.
\item \textit{Restatement (Third)}, for example, sets out as remedies for violations of human rights obligations the following:
\begin{enumerate}
\item A state party to an international human rights agreement has, \textit{as against any other state party violating the agreement}, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the agreement.
\item Any state may pursue international remedies \textit{against any other state} for a violation of the customary international law of human rights.
\end{enumerate}
\textit{Restatement (Third),} supra note 8, § 703 (emphasis added) (citation omitted). Any remedy for a breach of an \textit{erga omnes} human rights obligation lies against a State, not against an individual.
\item See Barcelona Traction, Light and Power Co., Ltd. (Belg. v Spain), 1970 I.C.J. 3 (Feb. 5); see also supra note 10 and accompanying text.
\item See Rosalyn Higgins, \textit{Problems and Process: International Law and How We Use It} 57 (1994). Higgins noted that the Court's dictum in \textit{Barcelona Traction} "is often incorrectly used as authority for more than it can sustain." \textit{Id.} Higgins continued:
\begin{quote}
It is spoken of... as if the Court was affirming universal jurisdiction in respect of each of these offences. Of course, the Court was doing nothing of the kind. Its dictum was made in the context not of the assertion of jurisdiction but of an examination of the law relating to diplomatic protection.
\end{quote}
\textit{Id.}
\item See \textit{id.}; see also Schachter, supra note 12, at 269.
\item \textit{But see} Amnesty International, supra note 5, sec. II.B ("The legal interest \textit{erga omnes} permits any state to exercise universal jurisdiction over persons suspected of committing crimes against humanity."); Kenneth C. Randall, \textit{Universal Jurisdiction Under International Law}, 66 Tex. L. Rev. 785, 830 (1988) (arguing that the concept of \textit{erga omnes} obligations "may subsidiarily support the right of all states to exercise universal jurisdiction over... individual offenders [who violate rights that States are under an \textit{erga omnes} obligation to protect]").
\item See Higgins, supra note 19, at 58 ("The right to exercise jurisdiction under the universality principle can stem either from a treaty of universal or quasi-universal scope, or from acceptance under general international law."); see also Steven R. Ratner & Jason S. Abrams, \textit{Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy} 141 (1997).
ticular connection with the prosecuting State.\textsuperscript{23} Universality has been accepted as a valid basis for the exercise of jurisdiction in cases of extraterritorial conduct considered to be of universal concern by the international community.\textsuperscript{24} The assumption behind the universality principle of extraterritorial jurisdiction is that the prosecuting State acts on behalf of all States in suppressing conduct deemed abhorrent or harmful to the international community.\textsuperscript{25}

Historically, it has been accepted that piracy\textsuperscript{26} and slave trade\textsuperscript{27} con-

\begin{enumerate}
\item Restatement (Third) lists, inter alia, the following factors as relevant in determining whether exercise of jurisdiction over a person or activity is reasonable:
\begin{enumerate}
\item the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
\item the existence of justified expectations that might be protected or hurt by the regulation;
\item the importance of the regulation to the international political, legal, or economic system;
\item the extent to which the regulation is consistent with the traditions of the international system;
\item the extent to which another state may have an interest in regulating the activity; and
\item the likelihood of conflict with regulation by another state.
\end{enumerate}
\end{enumerate}

\textbf{Restatement (Third), supra note 8, § 403; see also Iain Cameron, The Protective Principle of International Criminal Jurisdiction 333-37 (1994) (discussing the application of the rule of reasonableness); Henkin, supra note 12, at 242-46 (discussing the principle of reasonableness); Ratner & Abrams, supra note 22, at 141 (stating that under the rule of reasonableness, "even where a state enjoys a recognized basis for asserting jurisdiction, its exercise of that jurisdiction will not be proper if another state has a more profound interest in exercising jurisdiction over the offender").

\textbf{24. Restatement (Third), for example, states that "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . . ." Restatement (Third), supra note 8, § 404 (emphasis added).}

\textbf{25. See, e.g., M. Cherif Bassioumi, International Extradition: United States Law and Practice 298 (2d ed. 1987) (identifying, as the core of universality, conduct that "constitutes a violation against mankind") ("Any state, if it captures the offender, may prosecute and punish that person on behalf of the world community. . . . [Universal jurisdiction] allows states to protect universal values and the interests of mankind."); Ian Brownlie, Principles of Public International Law 304 (4th ed. 1990) (describing universality-based jurisdiction as "jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy" (emphasis added)); Higgins, supra note 19, at 58 (noting that States apply universality to conduct which they treat as criminal and which "they perceive also as an attack upon international order"); Christopher C. Joyner, Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability, 59 Law & Contemp. Probs. 153, 165 (1996) ("This principle is grounded in the assumption that the prosecuting state is acting on behalf of all states."); F. A. Mann, The Doctrine of Jurisdiction in International Law, 111 Recueil des Cours 1, 95 (1/1964) (stating that the exercise of universal jurisdiction "is founded upon the accused's attack upon the international order as a whole").}

stitute conduct over which any State may exercise jurisdiction. The motivation for permitting the exercise of jurisdiction by any State over piracy stemmed from the realization that "[p]iracy may comprise particularly heinous and wicked acts of violence or depredation, which are often committed indiscriminately against the vessels and nationals of numerous states."28 Extension of universal jurisdiction over piracy was justified, in part, by States' perception that their nationals were at risk of violent attacks on the high seas where the perpetrators could flee quickly without the injured parties' State having an opportunity to apprehend them.29 Another part of the rationale for extending universal jurisdiction to piracy was States' appreciation that piracy was a menace to sea transport, an important means of enabling intercourse between States at the time.30 Therefore, to some extent, piracy threatened the functioning of the international community, and empowering any member of that community to tackle it was a reasonable and practical response to the threat, especially in view of the perpetrators' easy escape.

By comparison, universal jurisdiction over slave trade on the high seas appears to have been motivated by States' determination that slave trading was an activity particularly "worthy of condemnation and international response," not by any concern that the activity interfered with interstate intercourse.31 The international community's disgust with certain forms of conduct, rather than practical reasons, seems to be the principal motivating factor justifying universal jurisdiction in the present era.

Other forms of conduct, such as war crimes,32 apartheid,33 and

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27. See, e.g., RESTATEMENT (THIRD), supra note 8, § 404 (listing slave trade among offenses subject to universal jurisdiction); Bassiouini, supra note 25, at 301; Higgins, supra note 19, at 58; Ratner & Abrams, supra note 22, at 141, 144; Schachter, supra note 12, at 267; Randall, supra note 21, at 798-800.
28. Randall, supra note 21, at 794 (footnotes omitted).
29. See id. at 795.
30. See id.
31. Id. at 800.
32. War crimes refer to grave breaches of the Geneva Conventions and like custom.
33. See, e.g., RESTATEMENT (THIRD), supra note 8, § 404 (listing war crimes among offenses subject to universal jurisdiction); Geoffrey Best, WAR AND LAW SINCE 1945 165-66 (1994); Higgins, supra note 19, at 59; Ratner & Abrams, supra note 22, at 143; Schachter, supra note 12, at 268; Willard B. Cowles, UNIVERSALITY OF JURISDICTION OVER WAR CRIMES, 33 CAL. L. REV. 177, 216-18 (1945) ("In the light of practice . . ., every independent State has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or the place where the offense was committed."); Lori Fisler Damrosch, Enforcing International Law Through Non-Forcible Measures, 269 Recueil Des Cours 9, 218 (1997); Joyner, supra note 25, at 170 ("Every state under international law thus retains permissible jurisdiction to punish war criminals, regardless of the nationality of the victim or the offender, or the place where the offense was committed."); Orentlicher, supra note 3, at 705; Randall, supra note 21, at 800. But see Bowett, supra note 26, at 12. Derek Bowett argues:

The view that the 1949 Geneva Conventions provide for universal jurisdiction, though sometimes asserted, is probably incorrect. For the obligation imposed
against humanity, genocide, and torture, arguably have come within the States' universal jurisdiction. The remainder of this Section will consider universal jurisdiction over the last three offenses, crimes against humanity, genocide, and torture, because they address conduct likely to be included in the scope of domestic amnesty measures.

1. Universal Jurisdiction over Crimes Against Humanity

Crimes against humanity most recently have been defined in the Statute of the International Criminal Court adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998. Article 7 casts crimes against humanity as:

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

This detailed encapsulation of crimes against humanity represents the
latest evolutionary phase of the concept, which debuted in the 1945 Charter of the International Military Tribunal for the Trial of Major War Criminals (IMT). While the catalog of included acts has expanded since the 1945 definition, the prohibition of crimes against humanity always has encompassed acts of a very serious nature aimed at any civilian population during an international or internal conflict.

The understanding that universal jurisdiction extends over crimes against humanity seems well-established in doctrine and State practice.


37. Article 6(c) of the IMT Charter defined crimes against humanity as:
- murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.


38. Compare supra note 37 (containing the 1945 definition) with supra text accompanying note 35 (1998 definition). The 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) defines crimes against humanity in article 5 as:
- the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
  (a) murder;
  (b) extermination;
  (c) enslavement;
  (d) deportation;
  (e) imprisonment;
  (f) torture;
  (g) rape;
  (h) persecutions on political, racial and religious grounds;
  (i) other inhumane acts.


39. See ICTY Report, supra note 36, ¶ 47, at 13; see also ICC Statute, supra note 34, art. 7(2); L. C. Green, Low-Intensity Conflict and the Law, 3 ILSA J. Int'l & Comp. L. 493, 516 (1997) ("Even if we ignore the existence of the two specially created tribunals [ICTY and ICTR], it may probably be said that it is now well established that crimes committed during a low-intensity or non-international armed conflict which amount to crimes against humanity are . . . subject to universal jurisdiction . . . ." (emphasis added)).

40. As for doctrine, the following authorities, among others, indicate that States have universal jurisdiction over crimes against humanity: RESTATEMENT (THIRD), supra note 8, § 404 reporters' note 1; Higgins, supra note 19, at 61, Ratner & Abrams, supra note 22, at 143 ("[C]rimes against humanity today are subject to universal jurisdiction."); Bas-
A recent study found that twenty-four States have enacted legislation enabling their courts to exercise universal jurisdiction over crimes against humanity. The same study also noted a number of domestic prosecutions for crimes against humanity where jurisdiction was founded on the universality principle. The best known of these trials, of course, is that of Adolf Eichmann in Israel.

Eichmann was a former Gestapo officer responsible for sending Jews and others to Nazi concentration camps during the Second World War. In 1960, he was abducted from Argentina, where he had been living since the end of the war. Eichmann was brought to Israel where the government charged him with crimes against the Jewish people, crimes against humanity, and war crimes under Israel’s Nazis and Nazi Collaborators (Punishment) Act. The District Court of Jerusalem found Eichmann...
guilty of the crimes charged and sentenced him to death. The Israeli Supreme Court affirmed.

With respect to Israel's assertion of jurisdictional competence over crimes that Eichmann, an alien, committed outside Israel (which at the time of their commission did not exist as a State), the Supreme Court of Israel stated:

[T]here is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes against humanity' (in the wide meaning of the term) dealt with in this case is no longer in doubt, while the unprecedented extent of their injurious and murderous effects is not to be disputed at the present time. In other words, the basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences—notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence (the high seas) and the offender is a national of another State or is stateless—applies with even greater force to the above-mentioned crimes.

Upon thus justifying universal jurisdiction over crimes against humanity, the Court concluded:

Not only do all the crimes attributed to the appellant [Eichmann] bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.

Even prior to the Eichmann case, some States relied on universal jurisdiction to extend their jurisdictional competence over extraterritorial acts by aliens that amount to crimes against humanity. Randall surveyed cases

... [caused] the murder, extermination, enslavement, starvation and deportation of civilian Jewish populations in Germany, the Axis countries and the occupied areas ... .
... [caused] persecution of Jews on national, racial, religious and political grounds.
... [caused] spoliation of the property of Jews in Germany and in Axis and occupied and de facto controlled territories ... .
... caus[ed] the ill-treatment, deportation and murder of Jewish inhabitants of States occupied by Germany and other Axis States.
... [committed] crimes against humanity in [his] capacity as officer in charge of the 'evacuation' of civilians: deporting more than half a million Polish civilians during the period from 1940 to 1942; deporting more than 14,000 Slovenes in 1941; deporting tens of thousands of gypsies to extermination camps in German-occupied regions in Eastern Europe, deporting 100 children of the village of Lidice, in Czechoslovakia, to Poland and their murder there.

Munkman, supra note 44, at 8-9.
49. Id. at 299.
50. Id. at 304. While commentators generally view Israel's exercise of universal jurisdiction in this case as justified, see, e.g., Mann, supra note 25, at 95 n.188, Bowett opined that "the exercise of jurisdiction by Israel in the Eichmann case stands out as highly unusual, and probably unfounded." Bowett, supra note 26, at 12 (footnote omitted).
illustrative of early post-World War II recognition by U.S. and British military tribunals that war crimes and crimes against humanity were subject to the universality principle. Recently, in connection with the conflicts in the former Yugoslavia and Rwanda, several States initiated criminal proceedings against aliens present in their territories for the alleged commission of extraterritorial crimes, including acts within the ambit of crimes against humanity. Thus, it is tenable to suggest that a State's exercise of jurisdiction over an offense correctly characterized as a crime against humanity would be perceived as valid even where the offense was committed by aliens abroad and the State lacked any link to it.

2. **Universal Jurisdiction over the Crime of Genocide**

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defined the crime of genocide for the first time. Before this Convention, humanitarian law prohibited some of the acts included in it, but that law was limited to acts committed during a war. The Genocide Convention expressly applies to included acts committed during war or peace. The Convention defines genocide as:

- any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
  - (a) Killing members of the group;
  - (b) Causing serious bodily or mental harm to members of the group;
  - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  - (d) Imposing measures intended to prevent births within the group;
  - (e) Forcibly transferring children of the group to another group.


52. See Amnesty International, supra note 5, sec. II.B; see also Damrosch, supra note 32, at 219.


54. See SUNGA, supra note 53, at 65.

55. See Genocide Convention, supra note 53, art. 1.

56. Id. art. II. The ICC Statute includes genocide in its catalog of crimes and uses a definition identical to the Convention's definition. See ICC Statute, supra note 34, art. 6. Also, the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia and the 1994 Statute of the International Criminal Tribunal for Rwanda contain the same listing of acts constituting genocide. See ICTY Report, supra note 36, art. 4, para. 46, at 12; ICTR Statute, supra note 38, art. 2.
In addition to this conventional foundation, the prohibition of the crime of genocide is also part of customary international law.57

While the prohibition of genocide is widely accepted, the extension of universal jurisdiction over this offense is less certain.58 This uncertainty probably derives from the text of the Genocide Convention itself. With respect to national prosecutions under the Convention, Article VI states that alleged perpetrators of genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed.”59 In other words, Article VI of the Genocide Convention provides for jurisdiction based on territoriality.60

It has been argued, however, that while the Convention provides for territoriality-based prosecution, it does not preclude the possible exercise of extraterritorial jurisdiction over the crime of genocide. Steven Ratner and Jason Abrams, for example, noted that at the time of the Genocide Convention's drafting, “most member states appear to have interpreted the territorial state's jurisdiction as non-exclusive and, in particular, did not regard the Convention as precluding states from exercising jurisdiction based on the nationality and passive personality principles.”61 However, at the same time, member States rejected the proposal for including universality-based jurisdiction in the Convention.62

57. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28) ("[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."); see also ICTY Report, supra note 36, para. 45 at 12; Restatement (Third), supra note 8, § 702 (listing the prohibition of genocide as customary law); HANNIKAINEN, supra note 8, at 458-66; SUNGA, supra note 53, at 73 ("Evidence of opinio juris and general State practice supports the conclusion that the rule against genocide is part of international customary law, and perhaps of jus cogens."); Meron, supra note 40, at 558 ("Genocide is a crime under both customary law and a treaty.").

58. See, e.g., Bowett, supra note 26, at 12. Theodor Meron intimated uncertainty that genocide is subject to universal jurisdiction when he wrote: "[I]t is increasingly recognized by leading commentators that the crime of genocide . . . may also be cause for prosecution by any state." Meron, supra note 40, at 569 (emphasis added) (footnote omitted).

59. Genocide Convention, supra note 53, art. VI (emphasis added).

60. John Murphy wrote that “the Convention does not create a system of universal jurisdiction.” John F. Murphy, International Crimes, in 2 United Nations Legal Order 993, 1010 (Oscar Schachter & Christopher C. Joyner eds., 1995). On the other hand, article I of the Genocide Convention recognizes genocide as a crime under international law. See Genocide Convention, supra note 53, art. I. Writing about this provision's purpose, as a judge of the International Court of Justice in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Élihu Lauterpacht stated: “The purpose of this . . . provision is to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime of genocide – that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 443 (Sept. 13) (sep. op. Lauterpacht). For a discussion of article VI's drafting history, see NEHEMIAH ROBINSON, THE GENOCIDE CONVENTION: A COMMENTARY 80-86 (1960).

61. RATNER & ABRAMS, supra note 22, at 142.

62. See id.
Kenneth Randall observed that the Genocide Convention's requirement that States prosecute alleged perpetrators of genocide on the basis of territorial jurisdiction did not deprive them of their preexisting customary right to exercise universal jurisdiction over genocide. This view appears to prevail among commentators and States, a number of whom have genocide legislation based on the universality principle of extraterritorial jurisdiction. Thus, even without any link to the offense, a State would likely be considered acting within its authority in proceeding against an alleged perpetrator of genocide.

3. Universal Jurisdiction over the Crime of Torture

The prohibition of torture is the subject of several conventional provisions and is regarded as part of customary law. In 1948, the Universal Declaration of Human Rights proclaimed: "No one shall be subjected to torture . . .." Since that time, the prohibition of torture has been included in at least seven international or regional instruments. The later instruments reflect a broad consensus that torture is a crime that justifies universal jurisdiction. The principle of universal jurisdiction over the crime of torture is now universally accepted as a fundamental principle of international law.

63. See Randall, supra note 21, at 836. The District Court of Jerusalem expressed this view in the Eichmann case:

   It is the consensus of opinion that the absence from [the Genocide] Convention of a provision establishing the principle of universality . . . is a grave defect in the Convention, and is likely to weaken the joint effort for the prevention of the commission of this abhorrent crime and punishment therefor, but there is nothing in this defect to lead us to deduce any rule against the principle of universality of jurisdiction with respect to the crime in question. It is clear that the reference in Article 6 to territorial jurisdiction . . . is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law, and accession of a State to the Convention does not involve the waiving of powers which are not mentioned in Article 6. It is in conformity with this view that the [Israeli] Law for the Prevention and Punishment of Genocide provided in Section 5 that 'any person who has committed outside Israel an act which is an offence under this Law, may be prosecuted and punished in Israel as if he had committed the act in Israel.'

64. See, e.g., Restatement (Third), supra note 8, § 404 reporters' note 1 ("Universal jurisdiction to punish genocide is widely accepted as a principle of customary law."); Ratner & Abrams, supra note 22, at 142 ("[G]enocide likely carries universal jurisdiction under customary international law."); Damrosch, supra note 32, at 216 ("[T]he right approach . . . is to view genocide as having attained the status of a crime entailing universal jurisdiction."); Green, supra note 39, at 519; Orentlicher, supra note 3, at 705; Randall, supra note 21, at 836-37; Ratner, supra note 40, at 254.

65. See Damrosch, supra note 32, at 216.


The Convention against Torture defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The definition's key elements are that the act intentionally cause severe suffering and that it have official sanction. Similarly, the customary law's prohibition against torture likely includes these elements.

Some commentators suggested that the Convention against Torture provides for the exercise of universal jurisdiction in its aut dedere aut judicatum provision, which it shares with several modern treaties. The Convention prescribes that a State party that does not extradite the alleged offender establish its jurisdiction over him and the acts prohibited by the Convention for the purpose of prosecution. Nevertheless, Rosalyn Higgins argued that a treaty requirement to extradite or prosecute is not a foundation for the exercise of universal jurisdiction since it only applies to States parties that have custody of the alleged offender and lack other juris-

69. See id. preamble, at 1027.
70. Id. art. 1(1), at 1027.
71. Manfred Nowak suggested that this definition can help give content to the prohibition of torture prescribed in Article 7 of the ICCPR. See MANFRED NOWAK, U.N. Covenants on Civil and Political Rights: CCPR Commentary 129 (1993).
72. See RESTATEMENT (THIRD), supra note 8, § 702 (listing torture as part of generally accepted customary law). Judicial opinions of U.S. courts adhere to this view. For example, the Ninth Circuit said: "There is no doubt that the prohibition against official torture is a norm of customary international law . . . ." Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 716 (9th Cir. 1992); see also, e.g., In re Estate of Marcos, Human Rights Litigation (Hilao v. Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994); In re Estate of Marcos, Human Rights Litigation (Trajano v. Marcos), 978 F.2d 493, 499 (9th Cir. 1992); Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

The Restatement (Third) notes that the prohibition of official torture is enshrined in the constitutions and laws of many States and thus may also constitute "a general principle [of law] common to major legal systems." RESTATEMENT (THIRD), supra note 8, § 702 reporters' note 5.

73. See RESTATEMENT (THIRD), supra note 8, § 702 reporters' note 5 (linking prohibition of torture to state policy).
74. See, e.g., RESTATEMENT (THIRD), supra note 8, § 404 reporters' note 1 ("The Convention . . . in effect provides for universal jurisdiction."); RATNER & ABRAMS, supra note 22, at 144-45; Ososfsky, supra note 26, at 197.
75. See Convention against Torture, supra note 68, arts. 5(2), 7(1).
Schachter considered the relationship of treaty-based aut dedere aut judicare provisions to the recognition of universal jurisdiction and offered two possible views. One is that the States parties recognize that "universal jurisdiction exists for the crime in question and consequently States may oblige themselves to exercise it." If so, then States not party to the treaty would not be bound by the duty to exercise jurisdiction over the offense, but would be free to do so on the theory that universality is a recognized jurisdictional basis for the offense. The other possibility is that the duty to prosecute or extradite is merely an "advance waiver[ ] of jurisdictional claims among the parties," that is, in other words, an agreement among the States parties not to object to any State party's exercise of jurisdiction under the treaty. If the aut dedere aut judicare provision in the treaty is only an advance waiver among the parties to the treaty, it says little about the existence of universal jurisdiction for the given offense and would not validate a non-party's exercise of jurisdiction on the basis of universality.

Whichever view is correct with respect to the aut dedere aut judicare provision of the Convention against Torture, it is clear that at least any State party to the Convention may exercise jurisdiction over an alleged perpetrator of torture whether or not that State has any link to the offense, and no other State party can be heard to complain about this jurisdictional exercise. Accordingly, under the Convention, a State party may exercise universal jurisdiction over torture, at least as far as other States parties to the Convention are concerned. As the Restatement (Third) recognized, however, universal jurisdiction founded upon "punish or extradite" provisions of treaties is "effective only among the parties, unless customary law comes to accept these offenses as subject to universal jurisdiction," and the Restatement (Third) did not list torture among the offenses subject to universal jurisdiction as a matter of customary law. Consequently, exercise of universal jurisdiction over torture by a State not party to the Convention or against the interests of a State not party to the Convention

76. See HIGGINS, supra note 19, at 64-65.
77. See SCHACHTER, supra note 12, at 268.
78. Id.
79. See id.
80. Id.
81. For example, the U.S. implementing legislation for the Convention provides for extraterritorial jurisdiction where "(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or the alleged offender." 18 U.S.C. 2340A (1999) (emphasis added). While this discussion focused on the Convention against Torture, any binding aut dedere aut judicare provision of a treaty prohibiting torture would produce the same result. Without identifying all treaties that may authorize the exercise of universal jurisdiction over torture, it suffices for present purposes to establish the effects of the aut dedere aut judicare provision of one relevant treaty and note that the same analysis would apply to any identical provision.
82. RESTATEMENT (THIRD), supra note 8, § 404 reporters' note 1.
83. See id. § 404 & cmt. a.
would have uncertain validity.84

4. Concluding Observations About the Validity of the Exercise of Universal Jurisdiction

The foregoing discussion shows that a State could exercise valid extraterritorial jurisdiction based on the universality principle as a matter of customary law over crimes against humanity85 and genocide.86 However, with respect to torture, it is not evident that the exercise of universal jurisdiction has been recognized by States as valid outside the context of the Convention against Torture or another applicable treaty.87 Therefore, a State may only exercise universality-based extraterritorial jurisdiction over torture if it is a party to the Convention against Torture and only against the jurisdictional interests of other States parties to the Convention.

Answering the question of validity of universal jurisdiction over a given offense solves the first part of the issue addressed in this Article, that is whether States with no connection to the given offense may prosecute an alleged offender despite the fact that he may be the beneficiary of an amnesty measure in the State where the offense was allegedly perpetrated. The second part of the issue concerns the domestic amnesty measure’s validity under international law.

II. The Validity of a Domestic Amnesty Under International Human Rights Law

The validity of an amnesty measure under international law88 depends on whether the measure extends to offenses for which convention or custom requires prosecution.89 A domestic amnesty measure cannot disable prosecution of an alleged offender in another State for conduct that must be prosecuted under international law. This Section examines whether international law requires prosecution for the crimes discussed with reference to universal jurisdiction, namely crimes against humanity, genocide, and torture.

84. Although, some commentators suggest that customary law permits all States to exercise universal jurisdiction over torture. See Ratner & Abrams, supra note 22, at 145; Randall, supra note 21, at 790-91; Ratner, supra note 40, at 255.
85. See supra Part II.B.1.
86. See supra Part II.B.2.
87. See supra Part II.B.3.
88. See Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2553 (1991) (noting that “an amnesty law or an exercise of prosecutorial discretion that is valid under domestic law may nonetheless breach a state’s international obligations”).
89. See Christopher C. Joyner, Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, 26 Denver J. Int’l L. & Pol’y 591, 613 (1998) (noting that “[t]he duty to prosecute certain grave human rights violations, derived from international criminal law, clearly implies that criminal acts subject to such a duty cannot at least in principle be amnestied”; see also Michael P. Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?, 31 Tex. Int’l L.J. 1, 19 (1996) (“The prerogative of a state to issue an amnesty for an offense can be circumscribed by treaties to which the state is a party.”).
A. Amnesty over Crimes Against Humanity

Crimes against humanity, unlike genocide or torture, are not the subject of a specialized convention compelling States to take particular action. Consequently, any duty to prosecute alleged offenders of crimes against humanity must be based on custom. Commentators like M. Cherif Bassiouni and Diane Orentlicher have argued that customary international law includes the duty to prosecute alleged perpetrators of crimes against humanity. Other commentators like Michael Scharf argue that since State practice is hardly uniform, it could not be said that the duty to prosecute the alleged offenders exists as a matter of customary international law.

Proponents of the duty to prosecute alleged perpetrators of crimes against humanity ground their conclusion in the existence of several U.N. General Assembly resolutions and a few international conventions and declarations. Nevertheless, none of these documents creates a binding obligation on States to prosecute alleged perpetrators of crimes against humanity. As an example, the proponents point to the International Law Commission's Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal that provide as the first Principle: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment." The sixth Principle identifies crimes against humanity as crimes under international law. On their face, these provisions suggest the existence of personal criminal liability for crimes against humanity and perhaps allow for an exercise of universal jurisdiction over such crimes. Yet, the Principles do not speak of, much less create, a duty for States to prosecute alleged perpetrators of crimes against humanity. On this point, Orentlicher stated:

Despite this focus [on permissive international jurisdiction], the law is fairly interpreted to require, and not merely to authorize, states to punish crimes against humanity when committed in their own jurisdiction. Correctly understood, the emphasis on permissive international jurisdiction signifies

90. See generally Bassiouni, supra note 36.
91. See id. at 480-81; Orentlicher, supra note 88, at 2593-94; see also Carla Edelenbos, Human Rights Violations: A Duty to Prosecute?, 7 LEIDEN J. INT'L L. No. 2, Autumn 1994, at 5, 15-16.
93. See, e.g., Bassiouni, supra note 36, at 480-81; Orentlicher, supra note 88, at 2593-94.
94. See Scharf, supra note 92, at 52-59; Scharf, supra note 89, at 35-39.
95. See Orentlicher, supra note 88, at 2593 n.248.
97. See id. at 14.
98. While Orentlicher seems to have acknowledged as much, she pointed out that Ferencz understood these Principles to "confirm[ ] that international law required international crimes to be punished." Orentlicher, supra note 88, at 2593 n.248 (quoting 2 B. Ferencz, AN INTERNATIONAL CRIMINAL COURT 22 (1980)).
the strength of international law's insistence that crimes against humanity must be punished . . . .

Nevertheless, another interpretation of permissive international jurisdiction is that an exercise of extraterritorial jurisdiction over crimes against humanity is deemed valid in international law without creating a duty to prosecute for the State where the offense was perpetrated. 100

A much clearer recognition of States' obligation to prosecute alleged offenders of crimes against humanity is contained in the 1971 U.N. General Assembly resolution on the question of the punishment of war criminals and of persons who have committed crimes against humanity101 and the 1973 U.N. General Assembly resolution on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. 102. In the 1971 resolution, the General Assembly urged States "to ensure the punishment of all persons guilty of [war crimes and crimes against humanity]."103 The 1973 resolution set out as a principle of international cooperation that "[w]ar crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment."104 Although the latter provision seems to use permissive terms,105 the 1971 resolution unambiguously "urges" States to ensure that perpetrators of crimes against humanity are punished. 106 The trouble with relying on these General Assembly resolutions to support a State duty to prosecute alleged perpetrators of crimes against humanity is that the resolutions are not binding on States.

Also relevant to ascertaining the duty of States to prosecute crimes against humanity are two treaties intended to bind States parties: the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity107 and the 1974 European Conven-
tion on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes. These Conventions prescribe that States parties shall not apply any statutory limitation to crimes against humanity. While these instruments do not obligate States parties to prosecute alleged offenders of crimes against humanity, they evince a conviction among States parties that perpetrators of such crimes should not escape punishment. Even if read in this light, however, the effect of these instruments on ascertaining the duty of States to prosecute crimes against humanity is diminished by the fact that the first instrument is not widely adopted and the second instrument is not yet in force, having only four signatories and one ratification. Nevertheless, it should be noted that the preamble to the recently adopted Statute of the International Criminal Court, which includes crimes against humanity in the Court's subject-matter jurisdiction, proclaims that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

In sum, no binding instrument prescribes a State duty to prosecute alleged perpetrators of crimes against humanity. The materials suggesting a duty to prosecute show, at best, that there exists among States opinio juris sufficient to create a custom. Of course, international customary law is created only when opinio juris is shown to exist and such opinio stands alongside the uniform practice of States. It must be considered whether the practice of States regarding the duty to prosecute crimes against humanity could be regarded as sufficiently uniform to sustain the claim that custom exists.

Scharf reviewed the practice of States with respect to prosecutions for crimes against humanity and found that "[t]o the extent any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit crimes against humanity." Propo-

109. See id. art. 1 at 540; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, supra note 107, arts. I(b), IV, at 75, 76.
110. See Orentlicher, supra note 88, at 2594.
111. As of December 31, 1997, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity had 43 States parties. See United Nations, Multilateral Treaties Deposited with the Secretary-General 165 (1998).
112. This treaty requires three ratifications before taking effect; as of April 9, 2000, it had only two ratifications (the Netherlands and Romania) and two other signatories (France and Belgium). See Council of Europe, Chart of Signatures and Ratifications of a Treaty (visited Sept. 4, 2000) <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.
113. See ICC Statute, supra note 34, art. 7.
114. ICC Statute, supra note 34, preamble, para. 6. Of course, the ICC Statute only has three out of the 60 ratifications necessary to become effective, and, in any event, it does not create an obligation for States to prosecute alleged offenders of any crimes included in it. Nevertheless, it is another, more recent, demonstration of the importance that the international community attaches to prosecuting crimes against humanity.
115. See, e.g., BROWNLIE, supra note 25, at 4-11.
116. Scharf, supra note 92, at 57; see Scharf, supra note 89, at 36.
ments of the existence of the duty to prosecute crimes against humanity sometimes concede that "in practice prosecution does not always occur," but they propose that

"[In the light of the existing treaties, declarations and the practice with regard to war crimes and crimes against humanity committed during the Second World War, one can conclude that the international community of states has accepted the obligation to prosecute those suspected of having committed war crimes and crimes against humanity . . . ."

With amnesties granted or impunity otherwise condoned in several relatively recent cases where crimes against humanity prosecutions would seem warranted, the practice of State prosecutions probably cannot be regarded as sufficiently uniform to support the claim that customary law exists as to the States' duty to prosecute crimes against humanity.

While customary international law presently does not require States to prosecute alleged perpetrators of crimes against humanity, human rights law contains treaty obligations for States to ensure that people within their jurisdictions enjoy fundamental rights, such as the right to life, freedom from torture, and freedom from arbitrary detention and arrest. Human rights law thus prohibits many of the offenses considered within the ambit of crimes against humanity, even when their commission is limited to a single instance. Moreover, the duty "to ensure" fundamental rights has been generally interpreted to mean "that states are obliged to take specific steps to redress the wrong committed by each violation of a right."

The bodies charged with supervising implementation of the treaty provisions, like the U.N. Human Rights Committee and the Inter-American Commission on Human Rights, have stated that blanket amnesty laws and similar impunity measures are inconsistent with States parties' obligations to ensure the enjoyment of human rights, including the right to an effective

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117. Edelenbos, supra note 91, at 16.
118. Id. at 15.
119. See supra notes 2-3 and accompanying text (noting situations where amnesties were granted); see also Joyner, supra note 89, at 593 (noting that despite the fact that at least 220 non-international conflicts generating about 86 million deaths have taken place since World War II, "there have been relatively few prosecutions and only scarce accountability"); Scharf, supra note 92, at 57-59; Scharf, supra note 89, at 36-37 (noting several instances where amnesties rather than indictments were issued, including cases with the support of the United Nations, for example Cambodia, South Africa, and Haiti).
120. See, e.g., ICCPR, supra note 67, arts. 2(1) (duty to respect and to ensure recognized rights), 6 (right to life), 7 (freedom from torture), 9 (freedom from arbitrary arrest or detention); ACHR, supra note 67, arts. 25 (duty to promote, respect, and ensure recognized rights), 4 (right to life), 5 (freedom from torture), 6 (freedom from arbitrary arrest or detention); ACHR, supra note 67, arts. 1 (duty to respect and to ensure recognized rights), 4 (right to life), 5(2) (freedom from torture), 7(3) (freedom from arbitrary arrest or detention); ECHR, supra note 67, arts. 1 (duty to secure human rights), 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security).
Thus, while these instruments do not expressly create a duty for States parties to prosecute alleged perpetrators of human rights violations, the treaties have been interpreted to preclude grants of absolute impunity with respect to breaches of the rights enumerated in them. Developments in the treaty bodies suggest that the States parties' duty to ensure fundamental rights has flowered into a minimum obligation to investigate the violation and leave open possible prosecution of alleged perpetrators.

Still, human rights law under the treaties has not developed to the point where prosecution of alleged perpetrators would be required for human rights violations that constitute component offenses of crimes against humanity. Thus, neither treaty-based human rights law nor international customary law entails a legal duty to prosecute crimes against humanity. Nevertheless, States parties to the general human rights conventions may well be precluded from exercising their prerogative to grant amnesties given the treaty bodies' interpretation of the duty to ensure the enjoyment of human rights.

122. See Edelenbos, supra note 91, at 8 (referring to statements of these bodies in cases involving torture and disappearance); Méndez, supra note 121, at 259 n.11 (referring to Comments of the Human Rights Committee, in 1995 and 1996, on periodic reports submitted by Argentina and Peru, respectively); Orentlicher, supra note 88, at 2561 ("Bodies that monitor compliance with several human rights treaties that are textually silent about punishment have made clear that investigation and prosecution play a necessary part in States Parties' fulfillment of certain duties under the conventions."); Scharf, supra note 92, at 51 (noting that the Inter-American Commission on Human Rights determined that amnesties were incompatible with the obligations of States parties to ensure protection of ACHR rights); Robert O. Weiner, Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties, 26 St. Mary's L.J. 857, 867 (1995) (same).

123. Orentlicher noted that the proposal to include in the ICCPR the duty to prosecute violators of the rights contained in that Covenant "was rejected without significant discussion" during the drafting of the instrument. Orentlicher, supra note 88, at 2569-70; see also Scharf, supra note 89, at 25 (noting that the ICCPR and the ACHR "are silent about a duty to punish violations of the rights they were designed to protect"). However, Orentlicher observed that while the duty to prosecute was not provided for in the text of the Covenant, "nothing in the drafting history is inconsistent with such a duty." Orentlicher, supra note 88, at 2571.


In addition to a growing domestic court practice, international bodies continue to clarify the extent of a state's international law obligations to investigate, prosecute, and compensate victims of international crimes and serious human rights violations. The general tenor has been to reaffirm and expand on duties to investigate, prosecute, and compensate, and to be critical of amnesties that preclude any of these things.

Id. at 95; see also Scharf, supra note 92, at 48-52. In 1997, Juan Méndez identified the following as "emerging principles": "1. to investigate, prosecute, and punish the perpetrators; 2. to disclose to the victims, their families, and society all that can be reliably established about those events; 3. to offer the victims adequate reparations; and 4. to separate known perpetrators from law enforcement bodies and other positions of authority." Méndez, supra note 121, at 261. Méndez noted that referring to these principles as "emerging principles" and not as binding international law obligations signifies their present status: only in part do they find justification in existing norms of universal applicability." Id.
B. Amnesty over the Crime of Genocide

The crime of genocide is the subject of a specialized convention that compels States parties to prosecute persons responsible for committing acts of genocide in their territory. The Genocide Convention provides that "[p]ersons committing genocide . . . shall be punished,"\(^\text{125}\) that "[t]he Contracting Parties undertake to enact . . . the necessary legislation to give effect to the provisions of the . . . Convention and, in particular, to provide effective penalties for persons guilty of genocide,"\(^\text{126}\) and, specifically, that "[p]ersons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed."\(^\text{127}\) Thus, it is clear that under the Genocide Convention, States parties are bound to prosecute and punish persons charged with committing genocide in their territory.\(^\text{128}\) Although the Convention is widely adopted, with 124 States parties,\(^\text{129}\) it is not universally accepted, and "no person has been prosecuted in accordance with its terms."\(^\text{130}\)

The question then arises whether the duty to prosecute alleged perpetrators of genocide exists in customary international law apart from the Genocide Convention. The Restatement (Third) sets out that "[a] state violates customary law if it practices or encourages genocide, fails to make genocide a crime or to punish persons guilty of it, or otherwise condones genocide."\(^\text{131}\) Thus, the Restatement (Third) identifies the duty to prosecute alleged perpetrators of genocide as part of customary law, although it does not elucidate how the reporters arrived at this conclusion.

Orentlicher wrote that "there is substantial support for the view that customary law requires states to prosecute acts of genocide committed in their territory."\(^\text{132}\) To support this proposition, she referred to the Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide\(^\text{133}\) and the Restatement (Third).\(^\text{134}\) In the relevant part of the Advisory Opinion, the International Court stated that the principles underlying the Genocide Convention "are recognized by civilized nations as binding on States, even without any conventional obligation."\(^\text{135}\) Orentlicher argued that

\(^{125}\) Genocide Convention, supra note 53, art. IV, at 280.
\(^{126}\) Id. art. V, at 280.
\(^{127}\) Id. art. VI, at 280-82.
\(^{128}\) This conclusion is the universally accepted view among commentators. See, e.g., Robinson, supra note 60, at 84; Joyner, supra note 89, at 603-04; Orentlicher, supra note 88, at 2564-65.
\(^{129}\) See United Nations, supra note 111, at 84 (information current as of December 31, 1997).
\(^{130}\) Murphy, supra note 60, at 1011.
\(^{131}\) Restatement (Third), supra note 8, § 702 cmt. d (emphasis added).
\(^{132}\) Orentlicher, supra note 88, at 2565. But see Ratner, supra note 40, at 254 ("[C]ustomary international law clearly recognizes the right (though not the duty) of a state to prosecute for genocide committed anywhere." (emphasis added)).
\(^{133}\) 1951 L.C.J. 15 (May 28).
\(^{134}\) See Orentlicher, supra note 88, at 2565-66.
although the International Court did not expressly establish the duty to prosecute genocide as one of the customary principles underlying the Convention, it is "surely" included in the International Court's understanding of customary law's content with respect to genocide since the duty to prosecute is central to the Convention. On the other hand, no State practice seems to shore up the view that customary law includes the duty of States to prosecute alleged perpetrators of genocide committed in their territory. Therefore, although the customary duty to prosecute may be less than clear, States parties to the Genocide Convention have accepted the obligation to prosecute genocide perpetrated in their territory, and a grant of amnesty for genocide would be clearly contrary to the Convention's requirements.

C. Amnesty over the Crime of Torture

The prohibition of torture is part of several international and regional instruments, including the Convention against Torture. The Convention against Torture enumerates duties States parties have with respect to combating torture, including taking "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," ensuring "that all acts of torture are offences under its criminal law . . . punishable by appropriate penalties which take into account their grave nature," and taking necessary measures "to establish its jurisdiction" over torture. Moreover, by acceding to the Convention, each State party bound itself to take into custody an alleged perpetrator of torture committed within its territory, to investigate the facts of the alleged offense, and to "submit the case to its competent authorities for the purpose of prosecution" unless it extradites the offender for prosecution elsewhere.

Orentlicher found that "[t]he explicit duty to institute criminal proceedings against alleged torturers precludes adherents to the Convention Against Torture from enacting, or at least applying, an amnesty law that forecloses prosecution of torturers." On the other hand, Christopher Joyner considered the language of the Convention somewhat weak with respect to requiring criminal prosecution of alleged perpetrators of torture. He lamented that, compared to the Genocide Convention, the Convention against Torture "fails explicitly to mandate that prosecution must occur for

136. See Orentlicher, supra note 88, at 2565. Carla Edelenbos adopted Orentlicher's view on this matter. See Edelenbos, supra note 91, at 6-7.
137. See supra note 67 and accompanying text (citing the instruments).
138. See supra note 68.
139. Convention against Torture, supra note 68, art. 2(1), at 1028.
140. Id. art. 4(1)-(2), at 1028.
141. Id. art. 5(1), at 1028.
142. See id. art. 6(1), at 1029.
143. See id. art. 6(2), at 1029.
144. Id. art. 7(1), at 1029.
145. Orentlicher, supra note 88, at 2567.
all alleged cases of torture. The provision underlying this critique is Article 7(1) of the Convention that requires States parties to "submit" cases to prosecution rather than, as the Genocide Convention mandates, to try and punish offenders. Scharf dismissed such criticism, arguing that the more careful language of the Convention results from the drafters' desire "to avoid the suggestion of a predetermined outcome of the judicial proceedings," rather than reflecting any notion that prosecution under the Convention against Torture would not be required.

The Convention against Torture requires States parties to investigate, prosecute, and punish instances of torture perpetrated in their territory. Granting a blanket amnesty that precludes taking these steps to combat torture would likely be inconsistent with the States parties' obligations under the Convention. This inconsistency would also exist under the prohibition of torture set out in the International Covenant on Civil and Political Rights (ICCPR). Although the ICCPR does not explicitly require prosecution of alleged perpetrators of torture, the U.N. Human Rights Committee stated in its first General Comment on the Covenant's prohibition of torture that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control.

Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible.

This comment makes clear the Committee's stance that persons guilty of having committed torture must be held responsible. Moreover, in 1992, the Committee issued its second General Comment concerning the prohibition of torture with which it meant to further develop its first Com-

146. Joyner, supra note 89, at 606.
147. See id.
148. Convention against Torture, supra note 68, art. 7(1), at 1029.
149. See Genocide Convention, supra note 53, arts. IV, VI, at 280-82.
150. Scharf, supra note 89, at 24.
151. While a blanket amnesty would seem incompatible with the States parties' obligations under the Convention, Orentlicher suggested that "a State Party might [nevertheless] be allowed to enact a statute of limitations covering prosecutions for torture, provided the torture did not constitute a crime against humanity." Orentlicher, supra note 88, at 2567 n.126.
152. See ICCPR, supra note 67, art. 7, at 175 (prohibition of torture).
153. See supra note 123 and accompanying text.
155. See Orentlicher, supra note 88, at 2572. However, Orentlicher acknowledged that it is not clear that the Committee's opinion that torturers must be held responsible necessarily means that they must be held criminally responsible. See id. at 2573.
ment. In the latter Comment, the Committee noted that some States have amnestied acts of torture and said: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future." While the Committee's views strongly suggest that amnesties covering torture would be incompatible with States parties' obligations under the Covenant, Scharf observed that the Committee qualified this view by saying this incompatibility would be true generally, which could be read to mean that not every case of amnesty would be at odds with the State's duty to ensure freedom from torture. In any event, it seems likely a blanket amnesty measure that precludes any accountability of perpetrators of torture would meet with the Committee's disapproval. Blanket amnesty measures have also been held to violate the American Convention on Human Rights. Thus, the relevant conventions seem to preclude a State party from lawfully granting broad amnesty measures that would allow absolute impunity with respect to acts of torture.

It remains to be considered whether customary international law extends this prohibition of blanket amnesties for torture to situations the conventional law does not reach. The Restatement (Third) implies that a government that takes "no steps" to prevent repeated or notorious acts of torture or to punish the perpetrators violates customary law. The view that States have a customary duty to punish torturers has also been supported by dictum from a decision of the Committee Against Torture, the body established to monitor implementation of the Convention against Torture and review alleged breaches. The Committee Against Torture stated that "even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of

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156. See United Nations Human Rights Committee, General Comment 20, Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7) para. 1 (written Apr. 10, 1992) <http://www.unhchr.ch/tbs/doc.nsf/>.
157. Id. para. 15 (emphasis added).
158. See Scharf, supra note 89, at 27.
159. Scharf suggested that an amnesty measure with provisions for investigation, removal of the perpetrators from positions of authority, and victim compensation would be acceptable under the Committee's view. See Id.
160. See, e.g., Edelenbos, supra note 91, at 9-10 (noting cases); Scharf, supra note 89, at 28 (same).
161. See RESTATEMENT (THIRD), supra note 8, § 702 cmt. b. This view is apparent from the fact that paragraph 702(d) lists the prohibition of torture as part of customary law and comment b states that "violations of human rights cited in this section . . . are violations of customary international law only if practiced, encouraged, or condoned by the government of a state as official policy." Id. Comment b further states that "[a] government may be presumed to have encouraged or condoned acts prohibited by this section if such acts . . . have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators." Id.
162. See, e.g., Edelenbos, supra note 91, at 8.
163. On the functions of the Committee, see Convention against Torture, supra note 68, arts. 17-24, at 1031-36.
torture." Nevertheless, Scharf warned that this dictum “should not be mistakenly construed as suggesting that amnesties for persons who commit torture are invalid under customary international law.” Scharf’s view stems from the Committee’s use of the word “should,” indicative of an aspiration, rather than a statement of a duty.

However one reads this dictum, it does not change the fact that although the Restatement (Third) suggests that States are under a customary duty, at least, to take steps to punish perpetrators of repeated or notorious acts of torture, it is difficult to identify any State practice supporting the existence of such a duty in custom. It must be noted also that the Restatement (Third) refers to a customary duty to punish acts of torture, but not to a duty to prosecute alleged offenders. This formulation would seem to allow punishment of offenders by means other than the criminal process, such as dismissing them from positions of authority. In any event, as in the case of genocide, the customary duty of States to prosecute torture is less clear than the conventional obligation of States parties not to preclude accountability of perpetrators of torture by domestic amnesty measures.

D. Concluding Observations About the Validity of Domestic Amnesties

Although the customary duty of States to prosecute alleged perpetrators of crimes against humanity, genocide, and torture is not clearly established in international law, the relevant conventional instruments impose on States parties duties that the granting of amnesties with respect to those offenses would breach. For example, conventions like the Genocide Convention, the Convention against Torture, and the ICCPR may properly be read to preclude States parties from mandating impunity over crimes against humanity, genocide, and torture.

Amnesties granted by States in violation of their conventional duties cannot be considered valid on the international plane and cannot have any effect on the prerogatives of other States. Consequently, such amnesties do not extinguish the prerogative of other States to exercise their jurisdiction over alleged perpetrators of crimes against humanity, genocide, or torture on the basis of the universality principle. However, amnesties granted by States that are not parties to the conventions discussed or States parties’ amnesty measures that were coupled with investigation of allegations, imposition of some punitive measures on perpetrators, and compensation

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165. Scharf, supra note 89, at 25.
166. See id.
167. See supra note 161 and accompanying text.
168. Again, the practice of States in granting amnesties covering acts of torture undermines the thrust of the claim that States are under a duty to prosecute torture. See supra note 2 and accompanying text (referring to various amnesty measures).
169. See supra Parts III.A (crimes against humanity), III.B (genocide), III.C (torture).
of victims are valid under international law.170

Thus, the question of the validity of amnesties yields two possible answers. The question of validity of universal jurisdiction also yielded two answers. Under customary law, any State may exercise universal jurisdiction over crimes against humanity and genocide,171 but with respect to torture, universal jurisdiction may only be exercised in the context of the Convention against Torture.172 It now remains to merge the possible answers from the foregoing enquiries into a framework that can serve as the analytical foundation for determining whether a foreign State without any connection to the given offense may prosecute an alleged offender despite the fact that the offender is the beneficiary of an amnesty in the State where the offense took place.

III. Analytical Framework

Taking into account only prescriptions of international law and leaving domestic law considerations aside, the analytical framework grows out of two distinct enquiries: the validity of exercising jurisdiction and the validity of the domestic amnesty. Since it is assumed that the foreign State seeking to prosecute the alleged offender lacks any connection to the offense, except possibly custody of the alleged offender, jurisdiction must be founded on the principle of universality.173 Theoretically, the exercise of universal jurisdiction over a given offense could either be valid and prosecution in the foreign State permissible or invalid and prosecution in that State impermissible under international law. In the amnesty enquiry, international law could either require prosecution, in which case the grant of an amnesty over the given offense would be invalid, or not require prosecution, in which case the grant of an amnesty would be valid. The following matrix represents these possibilities schematically.

<table>
<thead>
<tr>
<th>Validity of Jurisdiction/</th>
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<tbody>
<tr>
<td>Validity of Amnesty</td>
</tr>
<tr>
<td>----------------------------</td>
</tr>
<tr>
<td>Prosecution Not Required</td>
</tr>
<tr>
<td>Prosecution Required</td>
</tr>
<tr>
<td>Grant of Amnesty Valid</td>
</tr>
<tr>
<td>Grant of Amnesty Not Valid</td>
</tr>
</tbody>
</table>

Exercise of Universal Jurisdiction Valid = Prosecution in a Foreign State Permitted

Exercise of Universal Jurisdiction Not Valid = Prosecution in a Foreign State Not Permitted

A. Valid Jurisdiction/Invalid Amnesty

A situation where the exercise of universal jurisdiction would be valid and international law requires prosecution presents the easy case. In that

170. See, e.g., supra notes 154-60 and accompanying text.
171. See supra notes 85-86 and accompanying text.
172. See supra note 87 and accompanying text.
173. See supra text accompanying note 6 (making this assumption); supra Part II.B (discussing universality as a basis for extraterritorial jurisdiction).
situation, prosecution could proceed in the foreign State against an alleged offender who is covered by a domestic amnesty in the State where the offense was committed. Since international law requires prosecution for the particular offense, the domestic amnesty need not be recognized as valid on the international plane. Furthermore, given that universal jurisdiction is recognized as valid with respect to the offense, any State is free to proceed against the alleged offender despite the amnesty. Genocide is an example in this category.

Genocide is subject to universal jurisdiction in customary law, so any State may exercise jurisdiction with respect to it. Furthermore, a State party to the Genocide Convention and possibly, as a matter of custom, every State is required to prosecute alleged perpetrators of genocide committed in their territory. Consequently, a State's grant of an amnesty in such circumstances would be contrary to its duty to prosecute, and the amnesty would not be recognized on the international plane. Thus, any State could proceed against an alleged perpetrator of genocide despite a domestic amnesty.

B. Valid Jurisdiction/Valid Amnesty

A more difficult situation arises when the exercise of universal jurisdiction would be valid, but prosecution is not required under international law. Theoretically, in those circumstances, both States are competent to act, one by exercising jurisdiction, the other by granting an amnesty, and a clash of competence arises. Crimes against humanity are an example in this category.

The validity of universal jurisdiction over crimes against humanity is generally recognized, so any State may exercise jurisdiction. At the same time, customary law has not developed to the point that custom requires States to prosecute perpetrators of crimes against humanity. As a consequence, a State may grant an amnesty with respect to crimes against humanity, and this amnesty would be valid as a matter of international law.

The problem of dual competence, to exercise universal jurisdiction and to grant amnesty, could be approached under the rule of reasonableness normally applied in jurisdictional conflicts. The rule of reasonableness suggests that even when a State could validly exercise jurisdiction over a given matter, it should nevertheless refrain from doing so if another

174. See supra Part II.B.2.
175. See supra notes 125-28 and accompanying text.
176. See supra notes 131-36 and accompanying text.
177. See supra note 89 and accompanying text.
178. See supra notes 40-52 and accompanying text.
179. See supra notes 92-119 and accompanying text.
180. It would be a different situation if the amnesty-granting State were also a party to a general human rights convention, like the ICCPR or the ACHR, that has been interpreted to preclude absolute impunity measures, or “blanket” amnesties, and the measure granted were a blanket amnesty. See supra notes 120-24 and accompanying text.
181. See supra note 23 and accompanying text (discussing the rule of reasonableness).
State has connections to the matter that make the first State’s exercise of jurisdiction unreasonable. Accordingly, when the State that wishes to exercise universal jurisdiction over crimes against humanity lacks any connection to the offense, its jurisdictional exercise may well be considered unreasonable given the connection of the amnesty-granting State to the offense and the validity of its grant of an amnesty. In such a case, the State seeking to exercise universal jurisdiction over the offense should refrain from prosecution in order to give effect to the other State’s legally valid amnesty.

This conclusion would be consistent with the principle of sovereign equality of States, which implies that States pay due respect to each other’s jurisdictional rights. From the perspective of States’ sovereign equality, the amnesty-granting State should be able to expect that its valid grant of amnesty will be respected by other States. Any breach of this expectation by another State would weigh against the reasonableness of its jurisdictional exercise under the universality theory.

As a practical matter, however, it is hard to imagine that a State wishing to proceed against an alleged perpetrator of crimes against humanity would abstain on grounds that the exercise of jurisdiction would be unreasonable. Schachter noted that in cases involving States with differing political policies, “it becomes almost impossible for the courts in either country to balance the conflicting interests in terms of what is reasonable.” Still, applying the rule of reasonableness provides a way out of the competence clash when the political will or need to look for a way out exists.

182. See Restatement (Third), supra note 8, § 403(1); see also supra note 23 (listing some of the factors considered in the “reasonableness” evaluation). It is not settled whether the rule of reasonableness is a rule of international law or manifestation of comity. The Restatement (Third) takes the position that it is a rule of international law. The Restatement states:

This section states the principle of reasonableness as a rule of international law.

The principle applies regardless of the status of relations between the state exercising jurisdiction and another state whose interests may be affected. While the term “comity” is sometimes understood to include a requirement of reciprocity, the rule of this section is not conditional on a finding that the state affected by a regulation would exercise or limit its jurisdiction in the same circumstances to the same extent.

Restatement (Third), supra note 8, § 403 cmt. a. Commentators take a more guarded approach, though they support the rule. See, e.g., Cameron, supra note 23, at 336 (“Obliging state organs... to balance interests and make only reasonable assertions of jurisdiction, even if this cannot be said to be a requirement de lege lata, is undoubtedly a good idea de lege ferenda.”); Henkin, supra note 12, at 246 (“I believe that the principle of reasonableness to adjust the traditional bases of jurisdiction to prescribe has arrived, and by some name, in some guise or guises will be recognized.”).

183. See, e.g., U.N. Charter art. 2, para. 1 (recognizing this principle).
184. See Bowett, supra note 26, at 15-16.
185. See Cameron, supra note 23, at 336.
186. Schachter, supra note 12, at 264.
C. Invalid Jurisdiction/Valid Amnesty

A third situation could arise where the exercise of universal jurisdiction would not be valid and the grant of an amnesty would be valid because international law does not require prosecution for the particular offense. This situation would exist with respect to crimes not rising to the level of universal concern, such as common domestic offenses like murder not committed as part of a widespread or systemic attack on a civilian population. It is clear that in such cases, the foreign State's prosecution would be legally unjustified.

D. Invalid Jurisdiction/Invalid Amnesty

The final scenario is a situation where the exercise of universal jurisdiction would not be valid, but prosecution is required as a matter of international law, making the amnesty invalid on the international plane. Such a situation could arise when a State party to the Convention against Torture grants an amnesty over acts of torture and a State not party to the Convention contemplates prosecuting the alleged torturer covered by the amnesty.

As discussed, the Convention against Torture requires prosecution of acts of torture. A State party to the Convention is not at liberty to grant an amnesty over torture committed in its territory. If it does so, that amnesty need not be recognized as valid on the international plane by other States parties to the Convention. Pursuant to its terms and in the context of the Convention, the other States parties may exercise jurisdiction over extraterritorial acts of torture. Nevertheless, this prerogative does not extend to States that are not party to the Convention because universality of jurisdiction over torture has not yet been established as a matter of customary law. Consequently, a non-party State would not be legally justified in proceeding against the alleged perpetrator of extraterritorial torture, despite the fact that the amnesty intended to shield the accused person is invalid because of the amnesty-granting State's obligations under the Convention against Torture.

This result is unsatisfactory because it precludes States not party to the Convention from combating impunity with respect to extraterritorial torture. If a non-party State wished to take action against impunity over extraterritorial torture, it could challenge the amnesty measure as a breach of an *erga omnes* obligation of the amnesty-granting State. This course of action may be possible because torture is prohibited in customary law, in addition to its prohibition in various conventions. Louis Henkin wrote that:

187. See supra notes 137-51 and accompanying text.
188. See supra notes 74-81 and accompanying text.
189. See supra notes 82-84 and accompanying text.
190. See supra Part II.A (discussing *erga omnes* obligations).
191. See supra note 72 and accompanying text.
192. See supra notes 67-68 and accompanying text (noting the relevant conventions).
Obligations of customary law in respect of human rights are *erga omnes* and all states can act (by non-forcible means) to induce compliance. They can protest, make claims, and even bring suit if the parties had consented to the compulsory jurisdiction of the International Court of Justice or to some relevant system of arbitration.\(^{193}\)

The extent to which a non-party State could challenge an amnesty over torture would depend, in part, on the State's ability to show that extending an amnesty over torture amounts to dereliction of a customary duty to prevent repeated or notorious acts of torture or to punish the perpetrators.\(^{194}\) Persuasive views exist to buttress this argument, including the position taken in the *Restatement (Third).*\(^{195}\) However, a major determinative factor for success in such a challenge would be the possibility of adjudicating the claim against the amnesty-granting State, which would obviously depend on that State's willingness to submit itself to the jurisdiction of an adjudicatory body.\(^{196}\)

E. Concluding Comments About the Analytical Framework

These conclusions can be inserted into the proposed matrix with the following result.

<table>
<thead>
<tr>
<th>Validity of Jurisdiction/Validity of Amnesty</th>
<th>Prosecution Not Required = Grant of Amnesty Valid</th>
<th>Prosecution Required = Grant of Amnesty Not Valid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercise of Universal Jurisdiction Valid = Prosecution in a Foreign State Permitted</td>
<td>Clash of competence, possibly apply rule of reasonableness to resolve</td>
<td>Foreign state prosecution legally justified</td>
</tr>
<tr>
<td>Exercise of Universal Jurisdiction Not Valid = Prosecution in a Foreign State Not Permitted</td>
<td>Foreign state prosecution legally unjustified</td>
<td>Foreign state prosecution legally unjustified (lack of jurisdictional competence), but foreign state may possibly challenge the amnesty as a breach of an <em>erga omnes</em> obligation to prosecute</td>
</tr>
</tbody>
</table>

Although the present analytical approach is designed from the perspective of a foreign State that wishes to proceed against an alleged offender, it does not consider only whether the foreign State has the capacity to proceed as a matter of jurisdiction or only whether the amnesty-granting State had the capacity to mandate impunity. Rather, this approach considers the capacities of both States through discrete enquiries and seeks to combine the results.

This article is not about whether domestic amnesties are good or bad

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193. *Henkin,* supra note 12, at 216-17 (footnote omitted).
194. See *supra* note 161 and accompanying text.
195. See *supra* notes 161-68 and accompanying text.
196. See *supra* notes 14-16 and accompanying text.
as a matter of policy.\textsuperscript{197} Rather, it proceeds from the recognition that, under the current practice in negotiations for a transition of power from an oppressive regime, an amnesty always seems to be "an option on the table;"\textsuperscript{198} indeed, an option that is often invoked.\textsuperscript{199} The proposed analytical framework merely seeks to assist in evaluating the effect of a domestic amnesty on efforts to combat impunity by prosecution in foreign States.

\footnotesize
\begin{itemize}
  \item 197. For a policy-oriented discussion on amnesties, see, for example, \textit{Ratner & Abrams, supra} note 22, at 134-38; Garro, \textit{supra} note 2, at 9-10, 22-23; Orentlicher, \textit{supra} note 88, at 2595-612.
  \item 198. Scharf, \textit{supra} note 92, at 60 (quoting David J. Scheffer, U.S. Ambassador-at-Large for War Crime Issues).
  \item 199. See \textit{supra} note 2 and accompanying text (naming recent amnesty measures).
\end{itemize}