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International Law and Practice: Dealing With the Past in the South African Experience

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THE SECOND ANNUAL GROTIUS LECTURE *

INTERNATIONAL LAW AND PRACTICE: DEALING WITH THE PAST IN THE SOUTH AFRICAN EXPERIENCE

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INTRODUCTION	1211
I. KOSOVO AND PINOCHET: SAME DAY, WORLDS AWAY	1215
II. MILITARY INTERVENTION ON ITS OWN TERMS AND IN CONTEXT	1218
III. JUDICIAL INTERVENTION FOR THE THIRD WORLD	1221
CONCLUSION	1229

INTRODUCTION

My subject tonight is “International Law and Practice: Dealing with the Past in the South African Experience.”¹ This way of putting

* *Editor's Note:* The following is a revised version of a lecture presented at the American Society of International Law's ("ASIL") 94th Annual Meeting on April 5, 2000. The Grotius Lecture Series is co-sponsored by the American University Washington College of Law, the ASIL, and the International Legal Studies Program. The purpose of the Grotius Lecture Series is to open the ASIL forum to distinguished scholars for discussion about new and important voices that might not be heard in international law and to create expanded space and opportunities to explore the intellectual underpinnings of international law and the issues of our time.

** Minister of Education, Republic of South Africa. I am grateful for the assistance of Ronald Suresh Roberts and Nicole Fritz in preparation of this lecture.

1. Those who seek a traditional, footnote-heavy approach to the issues that I

it might make you think that international law is something apart and distinct from practice. This way of speaking follows from the natural rhythms of the legal mind. Lawyers have a long tradition of dichotomy. We constantly talk of theory versus practice, law versus morality, jurisprudence versus legislation. We insist that the black letter law in the books must be carved away from debates about what the law ought to be, and how it ought to operate in social and political reality.

Now, of course, law has come a long way in the last hundred years. The wisdom of legal realism and critical legal studies has made lawyers increasingly self-conscious, even a little embarrassed, about these inherited dichotomies. And nowhere should this be more so than in the arena of international law. Practice in and of itself is a fundamental constituent of what counts as customary international law. In the vocabulary of the international law illuminati—in the language that James Joyce would say carries the “true scholastic stink”—practice is the “usus,” which requires only that it be met by “*opinio juris*,” for a norm to enter the international law canon. But we should need no fancy Latin tags to tell us that international law must actually work in the real world, or else be laughed at. Law, as I like to say, is a form of congealed politics. Law always does political work anyway; lawyers must ensure that it is work well done. This, then, is the aspiration.

Yet, law's moral and political realities seldom in fact match its practical impacts—and this is as much the case in international law as in law more generally. Here is one locus of disillusion, one space of the ferment, which is your over-arching theme in this lecture series. The prominence of ferment in international law now is perhaps ironic at the end of a decade in which the world's aspirations for international law have been so much larger than at any other time, bar the ending of the Second World War. I know that it is the current fashion, in academia particularly, to celebrate perpetual ferment—to abhor certainties (which are usually called “false” certainties), and to revel in nuance and uncertainty. But does this help save lives?

So I repeat: the collapse of a bipolar world order made us hope for

address more broadly are invited to consult my Chorley Lecture. *See* Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 MOD. L. REV. 1 (2000).

an international community undivided; for debates less tendentious; for a more cohesive approach to international conflicts; for a more coherent international practice guided by a more definitive international law, more definitive because now all nations might agree in good faith, rather than continuing to snarl at each other behind tiresome Cold War barricades.

Has this happened in fact? The establishment of the two ad hoc international criminal tribunals this decade and the talk of an International Criminal Court ("ICC") now can be seen as a reflection of a growing consensus. But these tribunals have attracted a certain controversy. They have been unable to apprehend many of those indicted because of an absence of political will. So too the ICC, which, without a U.S. signature and ratification, is never likely to command the political backing required to act effectively. And the United Nations ("UN") itself, ostensible overseer of international law, has had to acknowledge in two recently commissioned reports that its failures contributed to two of the most egregious events of the 1990s—the genocide in Rwanda and the massacre in Srebrenica. The chasm between practice and principle seems cause for a check on our faith in international law.²

In my speech this afternoon I want to focus on international intervention—PRACTICE—in the domestic jurisdiction of nation states. The international intervention in South Africa against apartheid took many forms. There were economic, cultural and military sanctions—although there was direct international military intervention. Yet in many of our debates about international human rights intervention, many analysts make a beeline for military intervention, as though it were the only relevant option for an international response. Military intervention commands too much of the spotlight. It is therefore gratifying to see in the evolving human rights approaches to transitional justice that a range of options is receiving serious analysis. These alternatives include fact-finding and denunciation, use of the media, sanctions, dialogue and related remedies, developing codes of practice and offering technical assistance.³

2. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999) (presenting a thoughtful review of enforcement issues).

3. See INTERNATIONAL COUNCIL ON HUMAN RIGHTS, ENDS AND MEANS:

So while I will spend some time addressing military intervention, I do so only to highlight another, perhaps equally powerful form of action—judicial intervention. The imposition of prosecution and punishment by a national or supra-national judicial authority, although very welcome in many instances, can also pose a host of difficulties for those societies that have undergone political transition and in so doing have enacted amnesty arrangements which foreclose the possibility of prosecution. South Africa is one such society.

In brief, the South African democracy born in 1994 succeeded nearly a half-century of racial discrimination, raised to the level of being a constitutional principle. It was a period of brutal oppression, hit squads, violent attacks on neighboring states, and even research into chemical warfare and eugenics. The new and democratic Parliament chose to confront this terrible past through the establishment of a truth and reconciliation commission (“TRC”), a body established by an Act passed in mid-1995.⁴ The objective of this Act was to deepen our country’s factual and interpretative grasp of its terrible past, going back to 1960.⁵ The Commission was mandated to pronounce on what had been done by whom, to whom, why, and what was to be done about these past abuses in our calmer present times.

Unlike many truth commissions that preceded it,⁶ our own was not solely concerned with granting amnesty to perpetrators of human rights abuses. It, in addition, gave a voice to the victims⁷ and provided for reparation to and rehabilitation of victims.⁸ Furthermore, while it indeed conferred amnesty in respect of criminal and civil liability for human rights abuses, it was subject to various important criteria, notably requirements that there be full disclosure of the facts

HUMAN RIGHTS APPROACHES TO ARMED GROUPS (forthcoming fall 2000).

4. See Promotion of National Unity and Reconciliation Act, No. 34 (1995) (S. Afr.) [hereinafter Reconciliation Act] (providing for the establishment of a truth-seeking commission to investigate violations of human rights law).

5. See *id.* § 3 (stating the objectives of the Commission).

6. Cf. Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 LAW & CONTEMP. PROBS. 173 (1996) (discussing the minimal requirements for truth-seeking commissions and examining the growing number of such commissions).

7. See Reconciliation Act, *supra* note 5, § 11 (detailing the guiding principles for dealing with victims).

8. See *id.* ch. 5 (governing the reparation and rehabilitation of victims).

surrounding the abuse;⁹ that the abuse be associated with a political objective (as opposed, for instance, to motivation for personal gain); and that the abuse was proportionate to the political goal that it sought to advance.¹⁰

We South Africans are proud owners of a brand new democracy. We have our house in order, our economy as well. But as a house-proud nation, we must guard against developing our own African variant of manifest destiny: the belief that our solutions must automatically be Africa's solutions too. More broadly, it is tempting to believe that our human rights experience should be the starting point of all discussions, whether in relation to Africa or beyond. Too many speeches by South Africans begin with the TRC process and use it in order to extrapolate for other circumstances. I want this evening to try to do the reverse—looking globally to situate the South Africa experience within this global context.

I. KOSOVO AND PINOCHET: SAME DAY, WORLDS AWAY

On 24 March 1999, two events signified a new international resolve towards intervention. In London, the Appeals Chamber of the House of Lords, after a second hearing on the matter, announced its decision that, in principle, Chilean ex-president Augusto Pinochet could be extradited to Spain.¹¹ The request for his extradition had been handed to British authorities by Spanish prosecutor Baltazar Garzon, in order that he might be tried in Spain for crimes against humanity allegedly committed during his rule. Although some of the alleged crimes had been committed against Spanish nationals, thus allowing Garzon to rely on the jurisdictional principle of protection, many of the crimes for which his extradition was requested had no direct link to Spain, and the Spanish prosecutor therefore relied on the principle of universal jurisdiction. It was the first time that a for-

9. See *id.* § 20(1)(c) (providing for amnesty in the event that the Commission determines that an applicant has made full disclosure of all relevant facts).

10. See *id.* § 20 (outlining the rules for reviewing amnesty applications).

11. See Adam Roberts, *NATO's "Humanitarian War" Over Kosovo*, 41 SURVIVAL 3, 102 (1999) (noting that this decision was a landmark in the evolution of human rights law).

mer head of state was subjected to extradition proceedings in a country of which he was not a national in response to a request for extradition from a country of which he was not a national and where his own State had granted him amnesty from prosecution during its transition. This particular event has been characterized as judicial intervention in another State's internal affairs and an attack on sovereign immunity. It is seen as an attack on a principle said to be central to international law – the principle of national sovereignty.

On the same day, 24 March 1999, NATO launched its Operation Allied Force against the Federal Republic of Yugoslavia. The justification given was that “there are some [international] crimes so extreme that the state responsible for them . . . may properly be the subject of military intervention.”¹² In Kosovo, Milosevic was accused of having systematically withdrawn, since 1989, the limited rights of self-governance granted the Kosovars in the 1974 national constitution, and having escalated the oppression in recent years through killings, torture, and mass evictions.

The Kosovo Campaign was the first time that a sustained use of force had been directed at a state for allegedly perpetrating atrocities within its own borders. Much of this development could be foreseen in the evolution of anti-apartheid doctrine in international law over the years, as my co-authors and I argue in greater detail in our book on South Africa and transitional justice.¹³ Much of the battle for mobilization of international opinion and action against apartheid was a battle against the view that the apartheid state, like states in general, had a sovereign right to determine its own internal affairs, without harassment by nosy human rights outsiders.¹⁴

As to Kosovo, no one refuted the claim that there had been a violation of national sovereignty as traditionally configured. Instead, those who supported the action argued that the principle of national sovereignty is trumped by the importance of the human rights agenda, by our abhorrence of gross human rights abuses. When per-

12. *See id.* at 103.

13. *See* KADER ASMAL ET AL., RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL JUSTICE 176 (2d ed. 1997) (examining apartheid in the international community).

14. *See id.* at 177-78 (emphasizing the shift in focus to the rights of the individual and away from the rights of the State).

secuted individuals and national groups have exhausted all remedies and stand defenseless before the aggression of their home state, they have the right to demand and receive international humanitarian and even military assistance. These internationalist (as opposed to Westphalian) advocates were quick to explain, however, that military intervention should always be an instrument of last resort. They urged that it should only be deployed where human rights abuses reach the level of a systematic attempt to expel or exterminate in large numbers individuals who are unable to defend themselves; where the abuses constitute an international threat to peace; where all diplomatic attempts have been exhausted and, finally, where military effort stands a real chance of stopping the abuses and restoring peace.¹⁵

It is interesting that both the actions of 24 March 1999, representing initiatives that impact fundamentally on international law, occurred outside the ambit of the United Nations. Although future heads of State accused of Pinochet-style crimes will be liable to be prosecuted before the United Nations' International Criminal Court, provided their crimes are committed after the entry into force of the Rome Statute,¹⁶ Pinochet will be immune from the ICC's jurisdiction, as the Statute has no retrospective effect.¹⁷ On the other hand, military intervention in Kosovo might have occurred under the aegis of the United Nations' Security Council had there been a determination of an act of aggression, a breach of the peace or a threat to the peace under the Chapter 7 powers of the UN Charter. Both actions are tes-

15. See Robert Skidelsky & Michael Ignatieff, *Is Military Intervention Over Kosovo Justified?* PROSPECT (June 1999) <<http://www.prospect-magazine.co.uk/highlights/military-kosovo/index.html>>.

16. Prosecution of future heads of State before the ICC will also depend on a host of other factors – e.g., where the leader's own country has not prosecuted or has decided not to prosecute. See *Rome Statute of the International Criminal Court*, U.N. GAOR, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 2, art. 17(1)(b), U.N. Doc. A/CONF.183/9 (1998) [hereinafter 1998 Rome Statute] (providing that the Court shall determine that a case is inadmissible where "the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute").

17. However, the ICC could adopt the reasoning of a recent Chilean High Court, holding that "disappearances" for which no information exists constitute continuing crimes.

timony to the present-day reality of the international rule of law as the rule of plenty, operating through many different legal orders, composed at a variety of levels—national, regional and international—often making for apparently fragmentary and arbitrary choices.

The same-day launch of the Kosovo Campaign and the delivery of the Pinochet judgment threw into sharp relief the paradox of having a State prosecute a violator regime when the same State could not have acted against the atrocities at the time they were being committed. Neither Spain nor any other country was entitled to military intervention in Chile in order to remove the authoritarian regime. Nor was it imaginable that Spain, or any other country, would have indicted Pinochet while he was President of Chile. The juxtaposition of Kosovo and Pinochet makes ironic judgment premised on the principle that a wrong had been done to all of humanity when, at the time that the wrongs were committed, the right to resist was not generally construed as universal. It suggests that punishment of the perpetrator is more important than protection of the victim.¹⁸

II. MILITARY INTERVENTION ON ITS OWN TERMS AND IN CONTEXT

So must we then applaud the Kosovo intervention for removing this contradiction? Not too quickly. NATO's operations have forced us to question the validity of military intervention. In particular, we must ask whether and when a military campaign itself can be called humanitarian, which is a question to be addressed, not begged. We must, therefore, be extremely cautious about the suggestion made by Robin Cook, the British Foreign Secretary, that "the United Nations should adopt new rules allowing the international community to intervene in sovereign states to halt 'an overwhelming humanitarian catastrophe.'"¹⁹ There is a real risk that the United Nations might, in this picture, become an errand boy for NATO. The democratization of the international arena is essential for the credibility of interna-

18. See P. Kahn, *The End of the Post-War Compromise?* 8 (unpublished manuscript, on file with author).

19. Andrew Parker, *Cook Calls for UN Rules to Allow State Intervention*, FIN. TIMES, Jan. 29, 2000, at 3.

tional law and institutions in general, let alone for the legitimacy of specific acts of military intervention. As one critic of Aryeh Neier has forcefully complained, too often "[t]here is no attempt to link international authority to the political consent of the global population, to find true democratic legitimization."²⁰

An ancillary question, which, although not undermining the project of military force for humanitarian purposes, nevertheless discredits those who would wield such force, is whether double standards are applied. The first question relates to an assessment of the NATO campaign on its own terms; the latter requires that the Kosovo crisis be placed in context. Severe criticism has been directed at the NATO military intervention. NATO's high altitude, casualty-free strategy precluded precision bombing and foreseeably increased the scale of civilian casualties on the ground. That there were many Serbs who were neither Milosevic nor his militia got lost in this show of force.²¹ From analysts such as Noam Chomsky, there were even more hard-hitting attacks on the NATO campaign—that the war had been attempted to boost NATO's credibility as an arch-demonstration of power against the one state which had most frustrated its efforts to ensure substantial control of Europe and that the war in Kosovo had been staged as a very visible warning to other states which might be similarly disinclined to conform.²² It is undeniably odd to see NATO, a politically accountable, partisan, and also military organization, occupying the fundamentally separate roles of complainant, judge, jury, and executioner in Kosovo.

But even if all the discrediting voices could be discounted—if the war had been completely successful in stopping abuses and restoring peace, if we could readily accept the motivations of the intervention as benevolent, even if Milosevic and his military forces had been the

20. See John R. Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, FOREIGN AFF., Jan.-Feb. 1999, at 157, 158 (arguing that without a constitution, international law has no mechanism for dispute resolution, compliance, or enforcement short of warfare).

21. See NOAM CHOMSKY, *THE NEW MILITARY HUMANISM: LESSONS FROM KOSOVO* 92-93 (1999) (describing the outburst against the Serbs as "virulent race-hatred and jingoism, a phenomenon I have not seen in my lifetime since the hysteria whipped up about 'the Japs' during World War II").

22. See *id.* at 81-103 (detailing justifications for NATO's intervention).

sole targets—we would still need to confront another question: why have conflicts in Africa or Asia never merited this type of humanitarian assistance? Why did nobody smart-bomb P.W. Botha? Bombing aside, why have international humanitarian interventions in my continent always been half-hearted and faltering?

Six years ago, as the U.S. sustained casualties in Somalia in a professed humanitarian mission, American journalist Robert Kaplan wrote an influential essay describing “an increasing lawlessness [in Africa] that is far more significant than any coup, rebel incursion, or episodic experiment in democracy.”²³ An Africa, he said, where “criminal anarchy emerges as the real ‘strategic’ danger,”²⁴ characterized by “the withering away of central governments, the rise of tribal and regional domains, the unchecked spread of disease, and the growing pervasiveness of war.”²⁵ The article captured all the ennui felt by European and American policy-makers towards conflict in Africa and which most tragically reverberated in the minds of those responsible for official UN positions. Less than a year after the bombing of Mogadishu by UN troops, approximately 800,000 people were slaughtered in Rwanda over the course of about 100 days. A report commissioned by the Secretary-General on the genocide in Rwanda blamed the United Nations system as a whole for failing to prevent and subsequently stop the slaughter.²⁶ Institutional deficiencies, a lack of resources and an absence of political commitment all contributed to the reprehensible passivity.

In 1998, during President Clinton’s tour of Africa, he publicly apologized for the past failures by the West to intervene. And yet in early 1999, as NATO readied itself for intervention in Kosovo, Sierra Leone was a virtually forsaken place. As atrocities were carried out, Nigeria, under the aegis of an ECOMOG peacekeeping mandate,

23. Robert Kaplan, *The Coming Anarchy*, ATLANTA MONTHLY, Feb. 1994, at 44, 45.

24. *See id.* at 46.

25. *See id.* at 48.

26. *See Letter Dated 15 December 1999 From the Secretary-General Addressed to the President Of The Security Council*, U.N. SCOR, at 3-59, U.N. Doc. S/1999/1257 (1999) (containing the *Report of the Independent Inquiry Into the Actions of the United Nations During the 1994 Genocide in Rwanda*, which discusses the inadequacy of the United Nations’ response to the Rwandan genocide).

sent in its troops. However, weaponry, funding, communications and intelligence promised by the United States and Britain did not materialize. Instead, the Sierra Leone President was pressured to open peace talks with the Revolutionary United Front just weeks after they had massacred thousands in the capital Freetown. Amnesties along the lines of those granted to Renamo militants in Mozambique were negotiated.²⁷

III. JUDICIAL INTERVENTION FOR THE THIRD WORLD

So, for much of the world, effective intervention at the time at which the atrocities are committed still seems a far-off eventuality. Judicial intervention does not seem a similarly distant mirage. While the Western world chose to turn its face from the genocide in Rwanda, it saw in Rwanda's request for an International Criminal Tribunal, similar to that which had been convened for the former Yugoslavia, an opportunity to regain some credibility. So insistent was it on meeting this request that it failed to be deterred when Rwanda finally rejected the idea and voted against its establishment in the Security Council. When Haile Mariam Mengistu entered South Africa for medical treatment, many demanded that South Africa prosecute or extradite him to a country willing to prosecute. Most recently, Hissein Habre, styled Africa's own Pinochet, has been indicted by a court of the country in which he sought asylum: Senegal.

Prosecutions and punishment of systematic human rights abuses seem to have little deterrent effect. The International Tribunal for the former Yugoslavia, convened at the time of war within Bosnia, seems to have had little impact on the scale of atrocities committed within Kosovo, despite the fact that these crimes fell within the jurisdiction of the Tribunal. That judicial action alone can have little deterrent effect was recognized as far back as Nuremberg, when U.S. Chief Prosecutor, Justice Robert Jackson, observed in his opening address:

Judicial action always comes after the event. Wars are started only on the

27. See Steve Coll, *The Other War*, WASH. POST, Jan. 9, 2000 (Magazine), at W08 (comparing the treatment of human rights violations in Sierra Leone with those of Kosovo).

theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible.²⁸

Yet prosecution and punishment serve another purpose—justice. They allow the victims some sense of redress, of equanimity. My suggestion is not therefore that where prevention is disabled, prosecution and punishment should be foregone. On the contrary, it becomes essential that the reverse happen. And where the state, site of the violations, is itself unable to prosecute, then prosecution and punishment on the basis of universal jurisdiction becomes the task of the international community.

Yet, we must also go a step further. Where, as in Chile and in South Africa, a state declines to prosecute past despots as a result of a democratic, conscious, public decision widely seen as fundamental to the implementation of democracy, I doubt that other states are, or ought to be, free to take up the task. So how are we to distinguish between those cases in which the international community may validly prosecute and punish on the basis of universality and those instances in which other states and international bodies should defer to the particular state's wishes to forego prosecution and punishment?

Part of the answer, I think, lies in formulating requirements similar to those demanded of military intervention by internationalists. Firstly and most obviously, that the crimes for which conviction is sought reach a certain threshold, this being those crimes to which the jurisdictional principle of universality attaches—genocide, crimes against humanity, and war crimes. Secondly, we should require that those who were victims of the atrocities support outside measures to prosecute and punish. How to measure this support will remain an intriguing question. Thirdly, the State in which the atrocities occurred must be seen to have no credible plans to prosecute and punish those responsible for the human rights abuses. Finally, prosecutions must stand a real chance of working—that is, of delivering justice. These requirements, you will notice, are well within the one

28. See 2 THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOV. 1945-1 OCT. 1946, at 153-54 (1947).

currently under debate in relation to the Rome Statute and the establishment of the International Criminal Court.

The first and third of these indicators are easiest to assess. Only those crimes to which the principle of universal jurisdiction applies are liable to be prosecuted and punished. The principle flows from an appreciation that genocide, crimes against humanity and war crimes are offensive to all of humanity, and therefore of concern to all states and not just the responsibility of the state in which they are committed.²⁹ The principle was developed to ensure that perpetrators of the most egregious crimes not escape justice. According to Grotius, our guiding spirit tonight (to whom of course I had to get in at least one reference or else fear that you might rescind your hospitality)—Grotius wrote in 1625:

The fact must be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person who-soever.³⁰

A caveat must be added to this understanding of global responsibility: while the responsibility to address these crimes may be the responsibility of all of humankind, most importantly the responsibility lies with the state in which the crimes are committed.

It is only when that state is unable or unwilling to prosecute and punish that the responsibility becomes that of the international community—an understanding which is taken account of by the Rome Statute for the International Criminal Court.³¹ Ascertaining that a state is unwilling or unable to prosecute requires more than a cursory examination of the situation. It requires a reading of all the factors and dynamics particular to that society in which the atrocities took place. Are there plans to institute such proceedings if none have, as

29. See 1 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 15-17 (2d ed. 1999) (stating the basic tenets of human rights law).

30. See Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez*, in *WAR CRIMES LAW COMES OF AGE* 124 (Theodor Meron ed., 1998).

31. See 1998 Rome Statute, *supra* note 17 (delineating the limits of the ICC's jurisdiction).

yet, been instituted? Has the society other arrangements in place for addressing the crimes of the past? Has a transition taken place or is one currently underway?

A related question, but so important it requires a category all of its own, is whether victims themselves support outside measures to prosecute and punish perpetrators of the past. In a context in which a society has enacted arrangements to address the past, such as the Truth and Reconciliation Commission in South Africa, consideration must be given to the support the initiative received. It requires more than that the process be a result of democratic decision-making, that it receives the affirmation of a referendum or be enacted through the processes of a democratically-elected legislature. There is always the danger that those who were persecuted in the past are a minority within the national population and that rule by the majority merely entrenches their oppression. In South Africa, the Promotion of National Unity and Reconciliation Act³² establishing the Truth and Reconciliation Commission was passed by the first democratically elected Parliament in which the African National Congress, a party banned under apartheid, held the majority of seats. Nevertheless, dissent has been expressed, most notably, in the challenge before the Constitutional Court of the TRC process brought by three families of victims of apartheid.³³ Dissent, however much in the minority, should always be taken seriously particularly when it is expressed by victims against so traumatic a choice. But, the dissent of individuals should not ultimately prevent new democracies from deciding democratically how they wish to deal with their respective shameful pasts. Should the international community really have wished to dictate to the Mandela administration in the immediate post-1994, how it should deal with P.W. Botha or F.W. de Klerk?

Finally the most taxing question is whether prosecution and punishment will work—that is, will trials deliver justice? In most contexts, prosecution and punishment can and do provide a sense of justice being done—that justice being an acknowledgement in a public

32. See Reconciliation Act, *supra* note 5 (noting the Act's historic nature).

33. See Azanian Peoples Org. (AZAPO) and Others v. President of the Republic of South Africa and Others, 1996 (2) SALR 43 (CC). See also Azanian Peoples Org. (AZAPO) and Others v. Truth and Reconciliation Commission and Others, 1996 (4) SALR 562 (CC).

space of the crime committed, punishment meted out in accordance with the responsibility for the crime and some sort of compensation awarded to the victim for the suffering inflicted.

But justice is not offered merely by the staging of formalistic practices of prosecution and punishment. It is very much a context-based concept and this is nowhere more true than in relation to transitional societies. Here, justice is both constructive of and foundational to the transition. What counts as justice, going forward, is determined by the depth and scope and nature of the particular injustices in the particular society in the past. Justice in political transitions is always contextual: its meaning is conditioned and created by the particular contours of the prior injustice suffered in the particular country in question.³⁴

Thus in South Africa, justice must necessarily include establishing a basis for a nation-wide acknowledgement of the illegitimacy of apartheid. It might seem too obvious to need emphasis that South Africa's past was illegitimate, yet given the thought-inhibiting impact of the Cold War ideological divide, we still hear in South Africa the idea that apartheid was bad, but its supposedly "terrorist" opponents (meaning, such as yours truly) were worse.

In South Africa, justice must, in addition, include a decriminalization of the anti-apartheid resistance (Nelson Mandela, remember, was an apartheid-era political convict), an acknowledgement of the need for corrective action, a concept broader than your affirmative action notion here in the United States, including affirmative action but also aiming at broader goals of redistribution. We also need to establish equality before the law in a country with no history of that. And to place property rights on a legitimate footing, since apartheid was certainly no Lockean property rights paradise, where ownership followed merit or was the fruit of legitimate effort.

Thus in South Africa, as elsewhere, the requirements of transitional justice are drawn from the particular history that the society in transit is leaving. This is evident even in the arguments made by those who most vociferously advocate prosecution and punishment as a uniform solution, regardless of context. Their most powerful argument is that trials draw a bright line between a past notorious for

34. See RUTI TEITEL, *TRANSITIONAL JUSTICE* 6 (forthcoming 2001).

state criminality and a future based on the rule of law; between old injustice and new beginnings. Their point ultimately is that trials may actually serve political ends, by re-establishing faith in the rule of law. In demonstrating that no individual, however powerful, is immune from law's reach once democracy takes root. In this picture, prosecutions and punishment are not seen as intrinsically expressive of justice; rather, they are harbingers of justice. They demonstrate something profound about the transition, about the new beginning. Trials, according to this argument, represent a disavowal of the predecessor regime's atrocious political ends, and so construct a new legal order.

There are other contexts, conditioned by different experiences of prior injustice, in which trials cannot play the role of distinguishing the old from the new. In societies such as South Africa's, which have experienced prolonged periods of authoritarian rule, involving massive violation of entire groups' rights, there has been a collective experience of abuse and victimization. Conversely, these periods of abuse were supported and sustained in a systematic fashion by a large portion of South Africa's white population. Our own brand of transitional justice, therefore, required the treatment of inter-generational injustice. It required that individuals and groups who were neither perpetrators nor victims in any uncomplicated sense had to be involved in this process. If you never pulled a trigger nor held a smoking gun, but yet you benefited from the societal system defended by the violence—if all you did was loaf around a poolside in an opulent white apartheid suburb—you still needed to be involved in the process. Trials could not do that.

In countries emerging from periods of authoritarian rule, in which many of the abuses were committed in silence and secrecy, truth becomes paramount. In the construction of collective memory, of nation-building, the reality of an oppressive past gives content and direction. For individuals tormented by uncertainty, truth brings some kind of peace. The South African amnesty process is one of individualized amnesty whereby perpetrators making full disclosures of acts or omissions associated with a political objective are eligible to receive amnesty. This incentive scheme—a give and take arrangement, useful for a society aimed at reconciliation—is the TRC's most powerful means of delivering truth. Many of apartheid's perpetrators, grasping at the possibility of amnesty in exchange for truth, broke

ranks. And the fullness of these disclosures compelled other villains of the apartheid era to come forward, lest they be prosecuted. So a small pool of truth grew and grew, unlike what would have occurred with the fragmentary and defensive narratives—"you have the right to remain silent," as every TV watcher knows which trials and prosecutions tend to generate.

If international law is not to be beside the point for new democratic governments which have come to power not by absolute defeat of past oppressors but by negotiated settlement, it must take account of political constraints. In South Africa the ANC did not come to power at gunpoint. In the negotiations, the National Party pushed hard for the enactment of a blanket amnesty of the type it had periodically awarded its own officials and reminiscent of the Latin American transitions during the 1980s. The ANC, if not quite faced with Pinochet-style threats to its political longevity, was nevertheless sensitive to the danger posed by opposition from within the security forces—which Helen Suzman had called a 'creeping coup d'état by consent'—should a policy of systematic prosecutions be pursued. Moreover, there were limited resources available to prosecute and punish, coupled with the danger that these limited resources, if directed at prosecutions and punishment, would be misspent, sabotaged by those working within the judicial and policing spheres. Thus, in the most important attempt at prosecution in the new South Africa, the old apartheid general Magnus Malan and twenty-one others were acquitted in 1996. As a recent human rights discussion document on universal jurisdiction points out, "there is no point in encouraging prosecution, whether abroad or at home, where there is a lack of reliable evidence to support the charge."³⁵

You might say: "if the costs to the particular society of prosecution and punishment are prohibitive, why not allow the international community to do so?" But there is in fact no easy and inexpensive hand-over of responsibility because if the despots are put in the dock, their supporters will not draw fine distinctions about the process (whether domestic or international) by which this result is attained.

35. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD – A GUIDE TO UNIVERSAL JURISDICTION* (1999) (available at <http://www.international-council.org/publication1.html>).

The consequences will impact on domestic politics—and domestic stability—whatever the details of the prosecution process. Moreover, the manner in which the new transitional regime engages with the crimes of the past will be fundamental to its legitimacy and credibility. In establishing the South African TRC process we required all sides of the struggle to apply for amnesty, allaying potential fears that ours was a pursuit of victors' justice. Moreover, the tempering of the force of law is and was, in our case, as much a demonstration of where power lies in the new order as the infliction of law's power. Usurping the transitional initiative from the domestic society would undo much of the foundation-laying, critical for democracy.

There are other arguments often bracketed in the same category—that TRC processes provide the space for victims to be heard and acknowledged, a space denied them under the oppressive regime and within the courtroom; that the process allows for a meeting between perpetrator and victim in a non-hostile environment enabling the reintegration of both perpetrator and victim into the community and the restoration of relationships of social equality severed by the wrongdoing. These arguments are properly marshalled as a justification for the decision to forego prosecution and punishment. They are arguments for the establishment of a TRC, not against prosecution and punishment. A TRC process and the delivery of the ends highlighted in these arguments might very easily run parallel to the more orthodox procedures of prosecution and punishment without either process ever undermining the other. But, the specific context can never be ignored.

Nevertheless, I hope that I have said enough to suggest that those who advocate the prosecution of human rights abusers in all contexts as an absolute rule³⁶ mis-state the actual requirements of international law.³⁷

36. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2548-49 (1999) (advocating a general requirement of prosecution in an effort to eliminate the application of political discretion). M. Cherif Bassiouni also advocates this position, and in doing so scathingly criticizes any process that would allow political considerations to prevent full-scale prosecutions:

[T]he practice of impunity has all too frequently been the result of *realpolitik*. At times it is rationalized as a necessary evil, which is indispensable to achieving peace. While this is true in some cases, in most cases it is a cynical

CONCLUSION

The nature of the crimes committed, the domestic processes in place to deal with past injustice, the support received for these processes by victims themselves and whether these processes have delivered justice—these are the factors any institution outside of the particular society would have to sort through before deciding to initiate prosecutions. These considerations do not constitute a checklist but are to be assessed qualitatively. Of course, where a State such as Britain, which itself was the site of many of apartheid's crimes, decides to prosecute, it may validly do so without heeding any of the dynamics specific to the South African arrangement. It would then, however, be prosecuting on the basis of the jurisdictional principle of territoriality—for its own sake and not because it seeks to stand in the place of the violated State.

Deference should be accorded the domestic society's transitional arrangements, on the basis, I would suggest, of the principle of national sovereignty. But not a principle of "national sovereignty" premised on outdated notions that states are the only actors on the international stage, but because the principle in recent times has been reconfigured. Where states "are democratic, their sovereignty is also an expression of their people's right to self-determination."³⁷

The alternative is chaos in which the domestic prosecution authorities of a country are able to do and undo democracy itself – to make and unmake the fragile compromises on which the sunrise of democracy often rests. Don't you shudder when I read the following: "A Russian prosecutor announced yesterday that a criminal case had been opened against Aslan Maskhadov, the democratically elected Chechen leader, complicating any attempts to reach a negotiated set-

manipulation by governments of people's expectations that both peace and justice can be attained.

M. Cherif Bassiouni, *Introduction*, 59 LAW & CONTEMP. PROBS. 4, 5 (1996).

37. See Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 4, 41 (1996) (presenting an excellent recent article on the absoluteness or otherwise of the duty to prosecute).

38. See Skidelsky & Ignatieff, *supra* note 15.

tlement to the Chechen conflict.”³⁹ This is not an excerpt from some awful fiction, but a recent report in the London Financial Times of actual events. According to the article, “the move to brand Mr. Maskhadov a terrorist was immediately criticized by a senior Russian negotiator who helped bring an end to the 1994-96 war.”⁴⁰

In every democracy there will be factions, or legitimate differences of opinion on sensitive questions of foreign policy, including international justice. Domestic prosecutorial authority, which tends by its nature to be parochial, will be partial in its perspective. The right to prosecute or to use force is only one arrow in liberty’s quiver. And it is not inherently and always on target—we must help it along by other means.

39. John Thornhill, *Chechen President Faces Criminal Prosecution*, FIN. TIMES, Feb. 19, 2000, at 5.

40. *See id.*