Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles

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TABLE OF CONTENTS

I. INTRODUCTION ........................................ 1058

II. DEMOCRACY ACROSS BORDERS ....................... 1067
   A. TRANSNATIONAL LAWMAKING PROCESSES .......... 1067
   B. SHOULD TRANSNATIONAL LAWMAKING PROCESSES BE
      DEMOCRATIC? .................................. 1068

III. RECASTING INTERNATIONAL LAW: THE PINOCHET PROCEEDINGS IN
     EUROPE ........................................... 1070
     A. THE LEGAL PROCEEDINGS AGAINST GENERAL PINOCHET: FROM
        SPAIN TO CHILE ................................ 1070
     B. THE BRITISH PROCEEDINGS: PROCEDURAL OVERVIEW ........ 1075
     C. UNIVERSAL JURISDICTION AFFIRMED, NARROWLY .......... 1077
     D. FORMER HEAD OF STATE IMMUNITY .................. 1080
     E. THE DEVIL IN THE DETAILS . . . THAT WERE OMITTED FROM THE
        TEXT .......................................... 1086

IV. JUDGE-MADE LAW ACROSS BORDERS ................... 1089

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I. INTRODUCTION

It took only an instant to reverse centuries of diplomatic practice and unsettle the deepest foundations of international law. With the arrest of former Chilean President Augusto Pinochet in London’s exclusive Marylebone district in October 1998, the law seemed to lunge forward rather than advance at its more usual plodding pace.\(^1\) For centuries, international law and the practice of states had affirmed a bedrock principle of mutual restraint among nations: courts of one state would not judge the sovereign acts of another. Now, a former Chilean head of state had been arrested by British authorities at the request of a Spanish magistrate on charges that were, at their core, about how the accused had

governed Chile a quarter of a century before. Defying the predictions of seasoned experts, Pinochet's arrest was upheld by England's highest court.\textsuperscript{2}

In this way, an obscure concept with an ungainly name—universal jurisdiction—ended its long exile in the precincts of legal arcana, where it had languished largely unnoticed since Israel's prosecution of Adolf Eichmann in 1961.\textsuperscript{3} In brief, the principle of universality allows any state to prosecute certain offenses, even when the prosecuting state has no link to the alleged perpetrator, his victims, or the actual crime. Until recently, states rarely exercised this extraordinary jurisdiction; when they did, the target was usually a suspected Nazi-era war criminal.

In the years since Pinochet's arrest, a raft of countries have walked through the door the Pinochet case opened.\textsuperscript{4} Inspired by the Pinochet precedent, victims of human rights violations in Chad instituted criminal proceedings against former leader Hissène Habré in Senegal and Belgium.\textsuperscript{5} In June 2001, a Belgian jury broke new ground when it convicted four Rwandans for their roles in the 1994 genocide in Rwanda in a case that relied on universal jurisdiction.\textsuperscript{6} In the past decade, criminal complaints or investigations have been instituted before courts in Austria,\textsuperscript{7} Canada,\textsuperscript{8} Denmark,\textsuperscript{9} France,\textsuperscript{10} Germany,\textsuperscript{11} the Netherlands,\textsuperscript{12}

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2. See infra text accompanying notes 111–51.

3. In addition to the principle of universality, Israel's prosecution of Eichmann relied on two further grounds of jurisdiction. See infra note 93.

4. See Mark Lattimer & Philippe Sands, Introduction to Justice for Crimes Against Humanity 1, 9 (Mark Lattimer & Philippe Sands eds., 2003); see also Mark Lattimer, Enforcing Human Rights through International Criminal Law, in Justice for Crimes Against Humanity, supra 387, 412.


6. See Keith B. Richburg, Rwandan Nuns Jailed in Genocide; Belgian Jury Also Sentences Two Others, WASH. POST, June 9, 2001, at A1. The trial reportedly was the first in which “a jury of ordinary citizens was asked to sit in judgment” of international crimes committed in another country. Marlise Simons, Mother Superior Guilty in Rwanda Killings, N.Y. TIMES, June 9, 2001, at A4.


10. See In re Munyeshyaka, 1998 Bull. Crim., No. 2. For a brief summary of more recent cases in France, see Redress and Federation Internationale des Ligue des Droits de l'Homme, Universal
Senegal, Spain, Switzerland, and the United Kingdom for atrocities in Europe, Africa and South America. And while the United States has been reluctant to institute prosecutions based on universal jurisdiction, its courts have seen a surge in civil litigation based on this principle. More controversially, criminal complaints have been filed in Belgium—until recently, the world capital of universal jurisdiction—against current or former leaders of Chad, Cuba, Iraq, Iran, the Democratic Republic of Congo, the Ivory Coast, the Palestinian Authority, Israel, the United States and other countries.


13. See supra note 5.

14. See, e.g., Sentencia del Tribunal Supremo sobre el caso Guatemala por genocidio [Judgment of the Spanish Supreme Court Concerning the Guatemalan Genocide Case], STS, Feb. 25, 2003 (No. 327/2003) (Spain), translated in 42 I.L.M. 686 (2003); Sentencia del Tribunal Supremo sobre el caso Perú por genocidio [Judgment of the Spanish Supreme Court Concerning the Peruvian Genocide Case], STS, May 20, 2003 (No. 712) (Spain), translated in 42 I.L.M. 1200 (2003). In a more recent decision, the Supreme Court of Spain upheld jurisdiction for claims of torture of Spanish nationals allegedly committed by a former Chilean defense minister. See Bruce Zagaris, Spanish Supreme Court Uphold Jurisdiction over Chilean Former Defense Minister, 20 INT‘L ENFORCEMENT L. REP. 268, 268–69 (2004). Earlier Spanish criminal proceedings against Chilean and Argentine suspects are described below in Part II.A.


16. See id. at 92.

17. See generally Anne-Marie Slaughter & David Bosco, Plaintiff’s Diplomacy, FOREIGN AFF., Sept.–Oct. 2000, at 102. The Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, has been the principal vehicle for these law suits since the Second Circuit’s decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). The incorporation of international human rights law into the ATCA in Filartiga and its progeny was challenged in a case that came before the Supreme Court during its 2004 Term, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004). The Court effectively affirmed Filartigna but indicated that the ATCA could open the door to enforcement of comparatively new human rights norms only when they fall within “a narrow class of international norms.” Id. at 2764.

18. See supra note 5.


22. Belgium’s issuance of an international arrest warrant against the incumbent Foreign Minister of the Democratic Republic of Congo (DRC) led the DRC to institute a case against Belgium before the International Court of Justice. The Court ruled that Belgium’s action violated international legal principles concerning official immunity. See infra note 129.


25. In June 2001, twenty-three survivors of the 1982 massacres in the Sabra and Shatila refugee camps in Lebanon filed a criminal complaint in Belgium against Israeli Prime Minister Ariel Sharon and several others for their roles in the massacres. In June 2002, a Belgian appeals court ruled that the
For some, these trends herald a long-overdue era of enforcement of the law derived from Nuremberg. In their view, the task ahead is to dismantle remaining barriers to the use of universal jurisdiction. States must be lobbied to enact laws granting their courts a global remit, governments must be pressed to enforce laws already on the books, and concerted efforts should be made to track down potential defendants and bring them before the bar of justice. But for others, recent trends raise troubling questions. Do courts of bystander states have either the wisdom or standing to pass judgment on crimes committed a world away—crimes that affect the deepest interests of the nation where they occurred? In the view of some critics, prosecutions based on universal jurisdiction are politically imprudent, if not downright dangerous. They warn that universal jurisdiction may “provoke domestic unrest or international conflict.”

While these worries are surely overblown, several recent attempts to invoke universal jurisdiction have provoked a diplomatic tempest. When a Belgian court ruled that a criminal investigation of Israeli Prime Minister Ariel Sharon and other Israeli and Lebanese suspects could not go forward because the accused were not present in Belgium. “If a person is not found on the territory,” the court ruled, “we find it inadmissible.” Belgium Bars Sharon War Crimes Trial, BBC News, June 26, 2002, at http://news.bbc.co.uk/1/hi/world/europe/2066808.stm; Yossi Melman, Belgium Amending Law to Enable Sharon Trial, Ha’aretz, Jan. 16, 2003. The Court of Cassation later ruled that the presence of the accused in Belgium was not necessary for prosecution of grave violations of international law but suspended the case against Sharon on grounds of official immunity. H.S.A. v. S.A., No. P.02.1139.F/1, at 6–8 (Belg. Cour de Cassation Feb. 12, 2003) (ruling on the indictment of defendant Ariel Sharon, Amos Yaron and others), available at http://www.indictsharon.net/12feb2003dectrans.pdf; Marlise Simons, Sharon Faces Belgian Trial After Term Ends, N.Y. Times, Feb. 13, 2003, § A, at 12. The case was dismissed in September 2003 as a result of amendments to Belgian law. See Glenn Frankel, Belgian War Crimes Law Undone by Its Global Reach; Cases Against Political Figures Sparked Crises, WASH. POST, Sept. 30, 2003, at A1.

26. On March 18, 2003, relatives of Iraqi civilians killed by American bombs in 1991 filed a criminal complaint against former U.S. President George H.W. Bush, former Chairman of the Joint Chiefs of Staff (and current Secretary of State) Colin Powell, and former U.S. Defense Secretary (and current Vice President) Richard Cheney. See Belgian Senate Guts “Genocide Law”, GUARDIAN (London), Apr. 6, 2003. In May 2003, a separate complaint was filed against retired U.S. General Tommy Franks, who had recently commanded U.S. forces during the 2003 war in Iraq. Both cases were dismissed. See Frankel, supra note 25.

27. Under Belgian criminal procedure, private parties can initiate cases before an investigating judge. See Ratner, supra note 21, at 890. As noted below, the Belgian Parliament has virtually eliminated universal jurisdiction since these cases were filed. See infra note 35 and text accompanying notes 33–35.

28. For a thoughtful exposition of these concerns, see Michael Kirby, Universal Jurisdiction and Judicial Reluctance: A New “Fourteen Points”, in UNIVERSAL JURISDICTION, supra note 5, at 240, 246–48.


could proceed once he left office, Israeli authorities denounced the decision as a “blood libel” and recalled the new Israeli Ambassador to Belgium. The American response to a complaint filed in Belgium against senior U.S. officials was even more forceful. Secretary of State Colin Powell, one of the officials named in the complaint, warned that Belgium risked losing its status as the headquarters of the North Atlantic Treaty Organization (NATO). The Belgian response was swift. The government rushed through Parliament legislation that radically reduced the reach of Belgium’s law on universal jurisdiction. In the view of the incumbent U.S. administration, the amendments did not go far enough. In June 2003, Secretary of Defense Donald H. Rumsfeld warned that the United States would withhold further funding for a new NATO headquarters building in Brussels and that senior U.S. officials may stop visiting Belgium unless it repealed its already diminished law on universal jurisdiction. Bowing to U.S. pressure, the Belgian Parliament amended its law once again, this time leaving scant scope for universal jurisdiction.

It is not hard to fathom why many government officials opposed Belgium’s previously expansive law. After all, victims with ready access to Belgian courts had set their sights on national leaders the world over. Yet it is not only senior officials who entertain misgivings about the exercise of universal jurisdiction.

The most trenchant challenge to universal jurisdiction—and the subject of this article—has been framed in terms of democratic principles. The central
claim of this critique is that, in exercising universal jurisdiction, courts and prosecutors "are completely unaccountable to the citizens of the nation whose fate they are ruling upon." In consequence, it is said, courts exercising universal jurisdiction "will invariably be less disciplined and prudent than would otherwise be the case." In the view of critics, two features of the body of international law supporting universal jurisdiction compound this risk. First, while classic international law regulated relations between states, contemporary international law intrudes deeply into matters of internal governance. This transformation has special significance for the law establishing universal jurisdiction: In an earlier age, the principle of universality was confined to piracy and the slave trade—conduct that by its nature transpires beyond any nation’s exclusive province. Since World War II, however, the principle of universality has expanded to include crimes, like genocide, that usually occur within the boundaries of sovereign states. When a court exercises universal jurisdiction over these crimes, it judges conduct that took place within another country in light of law that was developed through processes that transcend both states’ lawmaking institutions. Second, skeptics charge that since there is no consensus about what crimes are subject to universal jurisdiction and how they are defined, courts exercising universal jurisdiction are not even constrained by widely-accepted legal interpre-

38. Goldsmith & Krasner, supra note 29, at 51.
39. Id.
42. See Kirby, supra note 28, at 250. Fresh evidence in support of this concern can be found in the decisions of judges who addressed the scope of universal jurisdiction in separate opinions in Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 ICJ 194 (Feb. 14) (Merits), available at http://www.icj-cij.org/cijweb/idocket/icOBE/icobejudgment/icobe_ijudgment_20020214. PDF. In the view of one judge, “international law does not accept universal jurisdiction” except in respect of piracy and, on a subsidiary basis, in respect of certain offenses proscribed by various treaties. Id. ¶ 16 (separate opinion of Judge Gilbert Guillaume). In the view of another, “universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide,” as well as piracy. Id. ¶ 9 (separate opinion of Judge Abdul G. Koroma). Three more judges concluded that “state practice . . . is neutral as to [the] exercise of universal jurisdiction.” They made clear, however, that in their view international law allows the exercise of universal jurisdiction over piracy, war crimes, and crimes against humanity. Id. ¶ 45 (separate joint opinion of Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal). Another judge, who believed that “[i]nternational law clearly permits universal jurisdiction for war crimes and crimes against humanity,” nonetheless noted the confusion in which the very subject of universal jurisdiction is shrouded. In her words, “[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law.” Id. ¶ 59 (dissenting opinion of Judge Christine Van den Wyngaert). The majority opinion did not address the validity of Belgium’s attempted exercise of universal jurisdiction per se (though it did condemn Belgium’s violation of official immunities), but a case now pending before the International Court of Justice, Certain Criminal Proceedings in France (Congo v. France), is likely to address issues concerning the legality of universal jurisdiction.
For the most part these challenges have been advanced by writers whose views on universal jurisdiction are shaped by a deeper antipathy toward international law and multilateral institutions that constrain unilateral action. Invoking many of the same arguments they have deployed against universal jurisdiction, leading critics have also challenged direct enforcement of customary international law by federal courts in the United States and opposed the recently-established International Criminal Court. Their views on universal jurisdiction thus can be seen as one facet of a broader conservative critique of international legal regimes. Perhaps in consequence, their views have not been seriously engaged by other leading voices, including professional human rights advocates, in the public debate over bystander justice.

Yet human rights professionals above all should take these claims seriously. The conservative critique lays bare but does not resolve a paradox at the heart of human rights law itself: on the one hand, postwar law inscribes Nuremberg's lesson that some acts cannot be shielded from global scrutiny behind the mantle of sovereign prerogative. If that lesson is to be more than a barren bromide, it must be backed by the credible threat of enforcement. On the other side of the paradox, international human rights law upholds the right of all societies to govern themselves. And questions of self-government are deeply engaged by the question, what should be done about past atrocities? Thus while the conservative critique of universal jurisdiction has not been framed in terms of international human rights, its core concern finds significant support in that body of law. The central aim of this article is to develop a framework for


44. An exception can be found in Kirby, supra note 28.


47. For this reason I will refer to their critique as the “conservative critique.” As my analysis suggests, the critique could also be described as a democratic critique. Since, however, I use the latter term in a specialized context in Part IV, I use the phrase “conservative critique” to refer to the set of objections, summarized above, advanced by prominent conservative writers.

48. An exception is a project sponsored by Princeton University's Program in Law and Public Affairs, the Princeton Project on Universal Jurisdiction, in which this author participated. Under its auspices, a group of international jurists and scholars drafted the Princeton Principles on Universal Jurisdiction, which seek to constrain the exercise of universal jurisdiction through principled guidelines. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, reprinted in UNIVERSAL JURISDICTION, supra note 5, at 18, 18–25.

49. This point is developed below in Part V.


51. See infra text accompanying notes 69–73.

52. This point is developed below in Part V.A.
resolving the justice/democracy paradox presented by recent trends in the use of universal jurisdiction.

Two recent developments make it necessary to identify principles for assessing and ensuring the democratic legitimacy of transnational lawmaking processes, including but not limited to those at play in the exercise of universal jurisdiction. First, in recent years states have evinced an unprecedented commitment to democratic principles. Second, a large and growing dimension of lawmaking transcends the province of state politics—and this trend is irreversible. The second development has substantial implications for how we resolve the justice/democracy paradox presented by universal jurisdiction: It is no longer possible to revert to lawmaking processes that transpire within the exclusive domain of sovereign states. In a globalized world, a retreat inward would fail the test of plausibility. Instead, the task today is to identify democratic principles appropriate to transnational lawmaking phenomena.

Using the Pinochet case as an analytic lens, I deepen and refine the conservative critique of universal jurisdiction in Parts II and III of this article. Through an analysis of key judicial rulings in Europe, Part II shows how the Pinochet case provides some basis for critics' charge that significant ambiguities surround the law of universal jurisdiction. I nonetheless reject the stark conclusion reached by leading proponents of the conservative critique—that the law underlying universal jurisdiction is inherently vague and incurably undemocratic. There is no reason to suppose that treaties are more susceptible to vagueness than domestic legislation. Excessively vague text is avoidable in both.

A deeper challenge to the democratic legitimacy of universal jurisdiction stems from the prominent role of judicial interpretation in its exercise. Part III of this article develops the claim that bystander justice challenges democratic principles because a court that exercises universal jurisdiction is not nested in the political and legal culture of the country most directly affected by its rulings. But if this challenge is significant, it too is surmountable. Drawing upon processes of democratic legitimation that operate in purely domestic settings, Part III concludes by identifying three benchmarks for assessing the legitimacy of adjudication by foreign courts, particularly those exercising universal jurisdiction.

The first is general acknowledgment of the authority of relevant lawmaking processes, including adjudication, by those who are subject to the law that is generated. This measure of legitimacy follows from the principle of consent underlying democratic theory and thus rests upon a fundamentally normative claim. A second benchmark of democratic legitimacy is more descriptive than normative, although it links up to the principle of consent: The lawmaking role of judges is more likely to be accepted as democratically legitimate when the courts on which they sit have earned institutional respect through their performance. In a national setting, this type of respect is facilitated by a judge’s ability

53. These developments and their implications are explored in Part II.
to craft judgments that resonate with the deepest values of her own political community. The third benchmark of democratic legitimation is the perception by those who may be subject to judge-made law that the lawmakers are accountable to them. In well-functioning democracies, this perception is sustained by a continuous colloquy between courts and society.

In Part IV, I bring these observations to bear in assessing transnational lawmakers, focusing on those underlying the exercise of universal jurisdiction. The first benchmark derived from the inquiry undertaken in Part III—general acknowledgment of the authority of relevant lawmakers by those who are subject to the law they generate—is readily satisfied when an individual is prosecuted before a foreign court whose jurisdiction has been accepted by his own country. Still, in view of the peculiar challenges to democratic values posed by the lawmaker role of extra-territorial courts, it is worth emphasizing that states’ decision to delegate substantial new authority to such courts should be based upon informed public deliberation.

Ensuring the ongoing accountability of courts that operate at a distance from communities directly affected by their rulings presents more elusive challenges. Yet relatively straightforward measures that ensure transparency in foreign courts’ operations can help meet these challenges. Emergent features of the contemporary transnational legislation system already operate as a further and significant constraint on the exercise of universal jurisdiction. For example, a transnational professional community of jurists disciplines decision-making by courts exercising universal jurisdiction in much the same way that domestic judges constrain each other’s interpretive performance.

Part V explores another key plank of the conservative critique of universal jurisdiction: the charge that its exercise undermines nascent democracies that have emerged from the ashes of dictatorship. Questions concerning punishment of those responsible for atrocious crimes belong specially (but not exclusively) to the communities that endured their depredations. By reckoning with past abuses, societies recently ravaged by mass atrocity define their core values and reconstitute their civic body based upon a common commitment to human decency. Even so, the conservative critique misses a crucial point: societies confronting these challenges do not deliberate in isolation. A fundamental feature of contemporary law- and norm-generating activities is the participation of national communities in transnational processes. Nowhere is the point more relevant than in respect of the Pinochet case itself. Chileans were actively engaged in the proceedings against General Pinochet in Europe. Those proceedings, in turn, had a catalytic effect in Chile, revitalizing national processes of reckoning with past abuses. Perhaps most important—and overlooked by proponents of the conservative critique—societies emerging from periods of systemic violence have been the first to accept treaty-based regimes aimed at enforcing human rights.

And so universal jurisdiction presents a paradox: In theory, at least, its exercise may threaten to displace democratic deliberations in societies that have
endured atrocious crimes. In practice, however, it has fortified and energized those processes. Drawing upon the model for legitimate transnational lawmaking developed in previous sections, Part V concludes by identifying principles aimed at ensuring that bystander justice is exercised in a manner likely to enhance rather than usurp national processes of reckoning with crimes of the past.

II. DEMOCRACY ACROSS BORDERS

A. TRANSNATIONAL LAWMAKING PROCESSES

A fundamental feature of the lawmaking processes at play in the Pinochet case is their transnational nature. As the term is used in this article, transnational law is made by more than one state, typically with the participation of non-state actors, and is constituted at least in part by national law. As this working definition implies, a hallmark of transnational law is that it typically comprises elements of both national and international law, dissolving traditional dichotomies between the two.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which proved crucial to the proceedings against General Pinochet in Spain and England, exemplifies this phenomenon. As a multilateral treaty, the Convention Against Torture is an instrument of international law, its text was developed and adopted at the international level, and it is binding under international law. But the law associated with this treaty also comprises domestic law, both legislative and judicial. States Parties are required to "take effective legislative, administrative, judicial or other measures" to prevent torture. Inevitably, then, crucial terms of the convention are left to be clarified by national courts, which embroider onto the treaty text their own interpretive meanings. Thus the law of the convention is "made" at both international and national levels.

Further complicating the legal landscape, the convention also establishes a

54. See infra text accompanying notes 260–62.
55. Cf. Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2349 n.9 (1991) (following Judge Philip Jessup’s definition of “transnational law” as “all law which regulates actions or events that transcend national frontiers” and including “[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories” (alterations in original) (quoting PHILIP JESSUP, TRANSNATIONAL LAW 2 (1956)).
57. See discussion infra Part II.
58. Cf. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), 59 Stat. 1031, 1060, T.S. No. 993, 3 Bevans, 1153, 1179 (including “international conventions” in enumeration of sources of international law that Court may apply).
60. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).
61. Convention Against Torture, supra note 56, art. 2(1).
transnational architecture of enforcement. Articles 5(2) and 7(1) require States Parties either to institute criminal proceedings against persons suspected of having committed torture who are present in their territory or to extradite the alleged torturers for trial in another country.62

The transnational nature of the Convention Against Torture is even wider and deeper than this account suggests. Judicial interpretations of this treaty, summarized in Part III, have drawn upon case law from an eclectic range of international, regional, and national courts. For example, the key British decision judging Pinochet extraditable to Spain to face torture charges cites decisions of the International Criminal Tribunal for the former Yugoslavia,63 the European Commission of Human Rights,64 and courts of countries ranging from the United States65 to Germany66 and Israel.67 Thus, states that adhere to the Convention Against Torture sign on to a diffuse and decentralized system of lawmaking.

B. SHOULD TRANSNATIONAL LAWMAKING PROCESSES BE DEMOCRATIC?

It is not hard to see that this brand of lawmaking challenges traditional notions of self-government, for we have long understood democracy to be inseparable from a bounded political community. Joseph Weiler has summarized this deeply entrenched understanding in terms that are helpful here: "Democracy... is premised on the existence of a polity with members—the demos—by whom and for whom democratic discourse with its many variants takes place. The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos."68

Focusing on the lawmaking processes associated with universal jurisdiction, this Article examines challenges to democratic principles presented by emerging patterns of transnational lawmaking, which by their nature transcend traditional boundaries of self-government. And so a preliminary question merits brief consideration: Should transnational lawmaking processes be democratic? The first point to be made here is that international law itself is now deeply committed to democratic principles. Thus the question whether transnational lawmaking processes are democratically legitimate is in part an inquiry into the internal coherence of international law.

Postwar international human rights instruments affirm a universal right to

62. To the extent that these provisions require prosecution of persons whose only connection to the forum state is presence at the time of their apprehension, their implementation raises special questions of democratic legitimacy, which are the focus of Part IV.


64. See id. at 220 (opinion of Lord Goff).

65. See, e.g., id. at 241 (opinion of Lord Hope).

66. See, e.g., id. at 255–57 (opinion of Lord Hutton).

67. See, e.g., id. at 198 (opinion of Lord Browne-Wilkinson).

self-government and various regional treaties affirm similar rights. Although states' commitment to promote and enforce these guarantees was shallow until recently, efforts in support of democracy gained powerful momentum in the final decade of the twentieth century. By 1992, Thomas Franck proclaimed: “Democracy... is on the way to becoming a global entitlement.” The “emerging law,” he wrote, “requires democracy to validate governance.” What this meant for Franck and others was that international law could now concern itself with broad questions of governance within states, matters long deemed off-limits to global scrutiny notwithstanding formal pledges by states to respect principles of self-government.

Only lately has it become clear that democratic principles may also have significant implications for how supra-national law is made. The change results from an unprecedented shift in the locus and nature of lawmaking activities. Today there is an extensive global dimension to regulation of economic, environmental, telecommunications, labor, health, criminal and other matters that have long been committed to processes of self-governance in democratic states. More than ever before, matters touching on how we conduct our daily affairs are regulated at least in part through law that transcends the province of state governance.

While these phenomena challenge traditional notions of democracy, they are not inherently undemocratic. For the most part, transnational lawmaking has emerged to advance the welfare of discrete political communities—to perform, that is, one of the core functions entrusted to governments by self-governing societies. At a time when states' economies, cultures and ecosystems are extensively integrated, self-governance would be drastically diminished if na-

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72. Id. at 46; see also Gregory H. Fox, The Right to Political Participation in International Law, 17 Yale J. Int'l L. 539 (1992); Diane F. Orentlicher, Democratic Principles and Separatist Claims: A Response and Further Inquiry, in XLV Nomos: Secession and Self-Determination 77 (Stephen J. Macedo & Allen Buchanan eds., 2003).

73. Franck, supra note 71, at 47.

74. Cf. W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, 84 Am. J. Int'l L. 866, 867 (1990) (early international law “insulat[ed] from legal scrutiny and competence a broad category of events that were later enshrined as ‘matters solely within the domestic jurisdiction'” of states (citing League of Nations Covenant, art. 15, para. 8)). In striking contrast, the new “democratic entitlement” has supported highly intrusive forms of intervention in support of democracy, including military intervention. See, e.g., S.C. Res. 940, U.N. SCOR, 3413th mtg., U.N. Doc. S/RES/940, ¶ 4 (1994) (authorizing military intervention in Haiti for the express purpose of restoring “the legitimately elected President,” who had been deposed in a coup).
tional communities were unable to participate effectively in transnational lawmaking processes. And so, as I take up the democratic challenges presented by transnational lawmaking processes, I will assume that democratic societies can and often do benefit from participation in those processes and that informed and engaged polities may and often do choose to participate in international legal regimes. The question, then, is how democratic societies can meaningfully participate in choosing the terms of their participation—and then assure the accountability of lawmaking processes that unfold in significant part beyond their national borders.

III. RECASTING INTERNATIONAL LAW: THE PINOCHET PROCEEDINGS IN EUROPE

A central pillar of the democratic critique of universal jurisdiction is the claim that its exercise imposes foreign law on citizens of the state most directly affected by the judicial proceedings. In support of this charge, critics assert that the substantive law supporting the exercise of universal jurisdiction is ill-defined, leaving the task of interpretation to judges who operate outside the country most affected by their judgments.

The proceedings against General Pinochet in Europe, the leading contemporary case involving the use of universal jurisdiction, provide some support for this claim. Two laws that were central to the prosecution of General Pinochet, including a treaty establishing a regime of mandatory universal jurisdiction, contained significant ambiguities. Yet far from dooming the legitimacy of universal jurisdiction, this problem can be alleviated in a straightforward fashion—through concerted efforts to draft clear text in legal instruments establishing universal jurisdiction.75

A. THE LEGAL PROCEEDINGS AGAINST GENERAL PINOCHET: FROM SPAIN TO CHILE

On July 9, 2001, an appeals court in Santiago ruled that Augusto Pinochet, then 85 years old, was mentally unfit to stand trial.76 One year later, the ruling was reaffirmed by Chile’s highest court.77 These developments appeared—at least for a while—to doom further efforts to bring the former leader to trial.78 It

75. As elaborated in Part IV, no text can eliminate ambiguity altogether. But as the Pinochet proceedings described in this Part remind us, legal texts can suffer from avoidably problematic vagueness.
77. Frederico Quilodran, Chile’s Supreme Court Rules Former Dictator Unfit to Stand Trial, ASSOC. PRESS, July 2, 2002. In separate proceedings, a Chilean appeals court ruled against stripping Pinochet of his immunity in an August 2003 decision. See REUTERS, Chile: Court Bars Pinochet Rights Trial, N.Y. TIMES, Aug. 28, 2003, at A8.
78. Pinochet’s condition has been diagnosed as dementia, which is irreversible. See Quilodran, supra note 77. In late May 2004, however, an appeals court in Santiago ruled in favor of removing the former president’s immunity from prosecution in a case involving disappearances in the 1970s. See Pinochet Loses Legal Immunity, REUTERS, May 29, 2004. Its decision was upheld by Chile’s Supreme Court in August 2004, and Pinochet was questioned by an investigative judge one month later. See Antonio de la Jara, Chile’s Pinochet Questioned by Investigative Judge, REUTERS, Sept. 25, 2004.
nonetheless remains established fact that government-sponsored brutality was a fundamental feature of the Pinochet period in Chile. The most severe repression occurred in the years following the military putsch that brought General Pinochet to power on September 11, 1973. During the mid-1970s, thousands of individuals suspected of political opposition to the Pinochet regime were killed or disappeared while in official custody. Thousands were forced into exile and many more were tortured.

During Pinochet’s tenure as president, Chile’s military government took several measures to ensure that its members would never face legal judgment for their crimes. In April 1978 the junta decreed an amnesty for all those who, “as principals or accessories, committed criminal offenses” from September 11, 1973 to March 10, 1978, the period of the most severe repression. The terms of the 1980 constitution drafted under Pinochet’s direction sought to hobble Chile’s democratic institutions for a protracted period of transition. For example, nine seats in the forty-seven-member national parliament are still appointed by various branches of the government; four of these are reserved for former military commanders. More to the present point, Pinochet himself was guaranteed lifetime tenure in the Chilean Senate—a position that purported to clothe him with state immunity as Senator-for-Life.

Against the backdrop of the former president’s immunity in Chile, victims of

79. See Rabkin, supra note 43, at 33.
80. See Thomas C. Wright & Rody Oñate, Flight from Chile ix (1998) (“Between 1973 and 1988, an estimated 200,000 men, women and children—nearly 2 percent of Chile’s population—were forced out of their country for political reasons.”). See also Simon Collier & William F. Sater, A History of Chile, 1808-1994, at 360 (1st ed. 1996) (“By the middle of 1978 there were nearly 30,000 Chileans in exile in Western Europe alone. By the end of the decade exiles could be counted in the hundreds of thousands.”).
82. See Americas Watch, Chile Since the Coup: Ten Years of Repression 11 (1983); Jorge Mera, Chile: Truth and Justice under the Democratic Government, in Impunity and Human Rights in International Law and Practice 171, 179 (Naomi Roht-Arriaza ed., 1995) (both describing Decree Law 2,191 of Apr. 18, 1978). The sole exception to this sweeping amnesty was the September 1976 car bombing in Washington, D.C. of a senior official of the government ousted by Pinochet’s coup, Orlando Letelier, and his colleague, Ronni Karpen Moffitt. Almost fifteen years after the assassination, two intelligence officials, Manuel Contreras and Pedro Espinoza, were convicted in Chile for their roles in the crime.
83. The President appoints two members; the Supreme Court appoints three; and the National Security Council designates four Senators, each of whom must be a former commander of one of the four branches of the armed forces. See Peter M. Siavelis, The President and Congress in Postauthoritarian Chile 39 (2000). Reforms that would abolish the positions of non-elected senators were approved by Chile’s Senate in October 2003 and are expected to receive support from the lower house of Congress. See Chile’s New Constitution: Untying the Knot, Economist, Oct. 23, 2004, at 36.
84. Immediately after Chile’s Supreme Court declared Pinochet mentally unfit to stand trial, he resigned his Senate seat. Larry Rohter, Chile: Pinochet Quits Senate, N.Y. Times, July 5, 2002, at A10. More than two years before that, a Chilean court ruled for the first time that his immunity as Senator-for-Life was not a bar to the indictment of General Pinochet in connection with crimes investigated by Judge Juan Guzmán. See Clifford Krauss, Ruling on Immunity Puts Chile Closer to Trial of Pinochet, N.Y. Times, May 25, 2000, at A4. The Chilean Supreme Court upheld this ruling in
serious human rights violations sought justice in Spain. On July 1, 1996, an association of Spanish prosecutors filed criminal charges against General Pinochet and other Chilean military junta leaders on behalf of seven victims of Spanish descent who had been killed or disappeared in Chile.\textsuperscript{85} Initially filed before Spanish magistrate Judge Manuel García-Castellón, the case was transferred in October 1998 to Judge Baltasar Garzón, who had been conducting an investigation into similar charges against Argentine military figures.\textsuperscript{86} Judge Garzón triggered General Pinochet's arrest by British police and, soon after, submitted a request for Pinochet's extradition to Spain.\textsuperscript{87}

But while the Spanish case is publicly associated with the magistrate who avidly pursued the inquiry, private parties activated and later played a key role in carrying out the investigation. As Richard Wilson explains:

\begin{quote}
The group responsible for the filing of [the action] was the Association of Progressive Prosecutors of Spain. The prosecutors were not acting as agents of the State, but as private complainants with particular expertise to judge the merits of the cases. The prosecutors' action set the criminal process in motion, after which lawyers for the victims themselves, using a procedural device known in Spanish law as the \textit{acción popular}, or popular action, took over the private prosecution of these claims.

Popular actions may be brought by any Spanish citizen, regardless of injury or other standing, in the public's interest.\textsuperscript{88}
\end{quote}

In the case against Pinochet, the victim-complainants, who at first included seven individuals possessing dual Spanish and Chilean citizenship, apparently relied as well upon a "1958 Spanish-Chilean convention on dual citizenship [that] permits any Chilean," whether or not resident in Spain, the same right that other Spanish citizens possess to file suit in Spanish court.\textsuperscript{89} Although public prosecutors in Spain at first approved the case against General Pinochet, they filed a series of legal actions challenging the magistrates' investigations after General Pinochet's arrest in England, apparently fearing the destabilizing effects on Spanish-Chilean relations.\textsuperscript{90}

\begin{flushleft}


\textsuperscript{87}. Judge Garzón's initial request to British authorities was based upon General Pinochet's alleged responsibility for ordering crimes to be committed in Argentina. See Wilson, \textit{The Spanish Proceedings}, supra note 85, at 25.

\textsuperscript{88}. Wilson, \textit{Prosecuting Pinochet}, supra note 85, at 934–35.

\textsuperscript{89}. Id. at 935.

\textsuperscript{90}. Id. at 935–36.
\end{flushleft}
The Spanish proceedings explicitly relied upon universal jurisdiction, the doctrine of international law that allows any state to prosecute certain crimes regardless of where they occurred even if the prosecuting state has no link to the crime. Traditionally associated with the crime of piracy, universal jurisdiction was given broader application through postwar jurisprudence. At least in principle, states could rely upon universal jurisdiction to prosecute crimes against humanity, wherever they occurred and whatever the nationality of the alleged perpetrators and victims.

But until the 1990s, the principle of universality was invoked almost exclusively in the context of prosecutions stemming from World War II atrocities. Even here, universal jurisdiction was exercised sparingly and was rarely, if ever, invoked as the sole basis for prosecution; the vast majority of prosecutions for World War II atrocities have relied upon more traditional forms of jurisdiction, such as the territorial principle. Thus if universal jurisdiction for certain atrocious crimes was well established at law, it was just as well understood that it had scant relevance to the practice of states outside the special context of Nazi-era crimes.

Against this background, the Spanish magistrates’ reliance on universal jurisdiction seemed nearly as radical as if they had invented the concept out of whole cloth. In fact, however, the foundation for the investigation by Judges García-Castellón and Garzón had already been prepared. Article 23.4 of the Organic Law of the Judicial Branch, enacted in 1985, authorizes Spanish courts

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91. Opinion is divided on the question whether or to what extent a state may exercise universal jurisdiction with respect to defendants who are not present its territory. See Antonio Cassese, International Criminal Law 285–291 (2003).
92. See Randall, supra note 41, at 800.
93. A noted instance of the exercise of universal jurisdiction was Israel’s prosecution of Nazi war criminal Adolf Eichmann in 1961 after Israeli agents abducted the defendant from Argentina. The Israeli courts justified their exercise of jurisdiction on the basis of the principle of passive personality and the protective principle as well as universal jurisdiction. Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 18, 26 (Isr. Dist. Ct. Jm. 1961), aff’d, 36 I.L.R. 277 (Isr. S. Ct. 1962). The principle of passive personality (also known as passive nationality) recognizes that countries may exercise criminal jurisdiction over certain crimes committed outside their territory against their nationals. See Restatement (Third) of the Foreign Relations Law of the United States, § 402 cmt. g (1987) [hereinafter Restatement]. The protective principle recognizes that states may prosecute certain conduct committed outside their territory on the basis that it threatens their national security and a limited class of other state interests. See id. § 402 cmt. f.
94. See Pinochet III, supra note 63, [2000] 1 A.C. 147, 272 (H.L. 1998) (opinion of Lord Millett) (asserting that, following World War II, “[t]he great majority of war criminals were tried in the territories where the crimes were committed”); M. Cherif Bassiouni, The History of Universal Jurisdiction and Its Place in International Law, in Universal Jurisdiction, supra note 5, at 44, 277 n.25 (noting that the author has been unable to locate any post-World War II prosecutions relying solely on universal jurisdiction). Contra Amnesty Report, supra note 11, ch. 2, § III.A, at 26 (asserting that “some of the more than 1,000 trials conducted by Allied national tribunals after the Second World War... were based, at least in part, on universal jurisdiction”).
to exercise “criminal jurisdiction over offenses ‘committed by Spanish or foreign persons outside of national territory and capable of being proven under Spanish law, such as some of the following crimes: a) Genocide [,] b) Terrorism . . . g) and any other [crime] which, under international treaties or conventions, should be pursued in Spain.’”

Charges against General Pinochet pressed by Judge Garzón included genocide, terrorism and torture, although for reasons explained below the torture charges became crucial once the center of legal activity shifted from Madrid to London.

While universal jurisdiction was indispensable to the Spanish proceedings, the case against Pinochet did not rely solely on that principle. As noted, the original complainants comprised seven individuals possessing dual Spanish-Chilean citizenship. Thus the case against Pinochet initially relied principally on passive personality jurisdiction, which allows states to exercise jurisdiction over certain offenses committed against their nationals even if the crimes occurred abroad. When the investigation broadened to include crimes committed against victims possessing only Chilean nationality as well as victims from third countries, jurisdiction had to be justified at least in part on the principle of universality.

A challenge filed by Spanish public prosecutors led to a decision sustaining jurisdiction in respect of the alleged crimes of Pinochet. On November 5, 1998, judges of the National Court Criminal Division in Plenary Session held that Spain could try crimes of terrorism and genocide pursuant to the principle of universal jurisdiction, bolstered by jurisdiction predicated on the nationality of the Spanish victims:

"Spain has jurisdiction to hear the facts, derived from the principle of universal prosecution of certain offenses categorized in international law which has been incorporated into our domestic law. Moreover, Spain has a legitimate interest in the exercise of its jurisdiction, as more than fifty Spaniards were killed or disappeared in Chile, victims of the repression denounced in the record."
In effect, then, the court kept one foot planted firmly on the comparatively secure ground of passive personality jurisdiction while it advanced onto the more contested terrain of universal jurisdiction.  

B. THE BRITISH PROCEEDINGS: PROCEDURAL OVERVIEW

Although Judge Garzón had made substantial progress in his investigation, he had not yet filed charges in the Chilean case when he learned of Pinochet's presence in London.  

On October 16, 1998, Judge Garzón issued an international warrant of arrest against Pinochet.  

At approximately 9:00 p.m. that evening, a London magistrate issued a provisional warrant for Pinochet's arrest, which was executed later that same evening at a London clinic where Pinochet was recovering from surgery.  

A second provisional warrant was issued on October 22, 1998 upon application by the Spanish Government.  

Both warrants were quashed on October 28, 1998 by the Divisional Court of the Queen's Bench Division, the second on the ground that, as former head of

Instead, the law’s effect “is limited to proclaiming Spain’s jurisdiction for trying offenses defined and punished in other laws.” Moreover the “procedural rule in question applies no unfavorable sanction, nor does it restrict individual rights.” Id. at 99.

100. A more recent decision apparently elevated the importance of links to Spain in cases that involve crimes committed outside of Spain. In a February 2003 decision, Spain's Supreme Court suggested that universal jurisdiction should be exercised over genocide only when there is “a direct link to a national Spanish interest.” Sentencia del Tribunal Supremo sobre el caso Guatemala por genocidio [Judgment of the Spanish Supreme Court Concerning the Guatemala Genocide Case], STS, Feb. 25, 2003 (No. 327) (Spain), translated in 42 I.L.M. 686, 701 (2003). The same court apparently further limited the exercise of universal jurisdiction in Spain in a subsequent decision. In a case involving alleged genocide in Peru, the court concluded that, in view of the initiation of criminal processes against several of the accused in Peru, it did not appear necessary for Spanish courts to exercise universal jurisdiction. Sentencia del Tribunal Supremo sobre el caso Perú por genocidio [Judgment of the Spanish Supreme Court Concerning the Peruvian Genocide Case], STS, May 20, 2003 (No. 712) (Spain), translated in 42 I.L.M. 1200, 1206 (2003).

101. By one account, Judge Garzón learned of Pinochet's presence when he read about it in the London Guardian. See GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 345 (1999). By another, Garzón was advised of Pinochet’s presence in London by Juan Garcés, a Spanish attorney representing the private parties who instituted the Spanish criminal investigation. Garcés reportedly was told of Pinochet’s presence in England by a staff member of the London-based human rights organization Amnesty International. Telephone Interview with Reed Brody, Advocacy Director, Human Rights Watch (Mar. 9, 2001). For a somewhat different account that is generally consistent with the second, see María del Carmen Márquez Carrasco & Joaquín Alcaide Fernández, In re Pinochet Ugarte, 93 AM. J. INT'L L. 690, 692 (1999).


105. Pinochet was arrested pursuant to the second provisional warrant on October 23, 1998. While the first warrant apparently covered only the alleged murder of Spanish citizens in Chile, the second covered torture, conspiracy to commit torture, offenses involving the taking of hostages, conspiracy to commit the preceding offenses, and conspiracy to commit murder. Pinochet Ugarte, 38 I.L.M. at 76–77.
state, Pinochet enjoyed immunity from criminal process\textsuperscript{106} in England for the crimes charged.\textsuperscript{107} The Crown Prosecution Service appealed the ruling to the House of Lords with the leave of the Divisional Court.\textsuperscript{108} The legal issue warranting review was certified as “the proper interpretation and scope of the immunity enjoyed by a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was head of state.”\textsuperscript{109} Just as proceedings began before an appellate committee of the House of Lords, Judge Garzón signed a request for the extradition of General Pinochet to Spain.\textsuperscript{110}

By the slimmest margin—a majority of three on a panel of five judges—the appellate committee ruled on November 25, 1998 that Pinochet was not immune in respect of conduct that constitutes an international crime.\textsuperscript{111} It was a stunning reversal, not only of the Divisional Court’s ruling but of deeply rooted expectations.\textsuperscript{112} The ground rules of international law had been upended by a judicial panel that epitomized law’s conservative ethos.

And then, just as unexpectedly as the ruling itself, the decision (to which I will refer as \textit{Pinochet I}) was vacated on January 15, 1999 on the ground that the appellate committee had been improperly constituted.\textsuperscript{113} One of the judges who formed the majority in \textit{Pinochet I}, Lord Hoffman, had failed to disclose that he was a director of Amnesty International Charitable Trust Ltd. Under the circumstances, this was a significant lapse: Amnesty International had been granted leave to intervene in the proceedings before the law lords, in effect becoming a

\textsuperscript{106} For purposes of determining the scope of immunity enjoyed by Pinochet, the arrest and extradition proceedings in England were treated as criminal proceedings. See id. at 85.

\textsuperscript{107} The first provisional warrant of arrest was quashed on the ground that the crime charged therein, which involved the murder of Spanish citizens in Chile, did not constitute an extraditable offense under British law. See id. at 77. This ruling was not appealed. In a judgment joined by his colleagues, the Lord Chief Justice wrote that, “were a further objection [to the first provisional warrant] needed,” his conclusion that Pinochet was entitled to immunity with respect to the second provisional warrant would also apply to the first warrant. Id. at 85.

\textsuperscript{108} The Divisional Court suspended its quashing of the second warrant pending this appeal.

\textsuperscript{109} \textit{Pinochet Ugarte}, 38 I.L.M. at 89–90.

\textsuperscript{109} See \textit{Pinochet III}, supra note 63, [2000] 1 A.C. 147, 191–92 (H.L. 1999) (opinion of Lord Browne-Wilkinson). In the words of Lord Slyn \textsuperscript{110} of Hadley, the request “set out a large number of alleged murders, disappearances and cases of torture which, it is said, were in breach of Spanish law relating to genocide, to torture and to terrorism.” R. v. Bow St. Metro. Stipendiary Magistrate, \textit{ex parte} Pinochet Ugarte (No. 1), [2000] 1 A.C. 61, 68 (H.L. 1998) (opinion of Lord Slyn), \textit{reprinted in} 37 I.L.M. 1302, 1305 (1998) \textit{[hereinafter Pinochet I]}.

\textsuperscript{111} \textit{Pinochet I}, [2000] 1 A.C. at 108–10 (opinion of Lord Nicholls), 114–16 (opinion of Lord Steyn), 116 (opinion of Lord Hoffman).


party to the appeal.\textsuperscript{114}

In the meantime, on December 9, 1998, Jack Straw, then Home Secretary of the United Kingdom, had issued an authorization to proceed with the extradition proceedings against Pinochet. His authorization did not, however, cover two of the charges that had been submitted by Spain, genocide and terrorism.\textsuperscript{115}

An expanded appellate committee, now comprising seven law lords, was assembled to rehear the appeal.\textsuperscript{116} On March 24, 1999, the reconstituted panel rendered its decision, to which I will refer as \textit{Pinochet III}. Where \textit{Pinochet I} had focused principally on the question of Pinochet’s immunity, judges on the reconstituted appellate committee dwelled at some length on a preliminary question—whether the charges submitted by Spain constituted extradition crimes under British law. For reasons explained below, this substantially contracted the scope of their analysis of Pinochet’s immunity from extradition.

\textbf{C. UNIVERSAL JURISDICTION AFFIRMED, NARROWLY}

It fell to the new panel to make legal history in a case that had scant connection to England save the fortuitous visit of a foreign official. Ruling that former Chilean president Augusto Pinochet could be sent to Spain to answer charges of torture, the reconstituted appellate committee swept centuries of precedent before it.\textsuperscript{117} Lord Browne-Wilkinson, the senior judge on the panel, acknowledged as much:

[I]f Senator Pinochet is not entitled to immunity in relation to [certain] acts of torture . . . , it will be the first time . . . when a local domestic court has refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes.\textsuperscript{118}

As Lord Browne-Wilkinson saw, the law lords’ ruling unsettled core tenets of international law—or at the very least, their judgments revealed that a seismic shift had already taken place.

\textsuperscript{115} Spanish law defined genocide more broadly than does international or British law. See \textit{Audencia Nacional} Jurisdictional Order, supra note 99, translated at 100–04. Home Secretary Straw apparently determined that the crime charged against Pinochet under the rubric of genocide did not constitute an extraditable offense because it did not satisfy the definition of genocide under British law. Straw’s ruling made no mention of terrorism, apparently because there is no parallel crime under British law. See Richard J. Wilson, \textit{Prosecuting Pinochet in Spain}, 6 HUM. RTS. BR. 3, 4 (1999).
\textsuperscript{116} By the time the case came before the second appellate committee, the charges submitted by Spain included conspiracy to torture, conspiracy to take hostages, conspiracy to torture in furtherance of which murder was committed in various countries, torture, conspiracy to murder in Spain, attempted murder in Italy, and torture on various occasions. See \textit{Pinochet III}, supra note 63, [2000] 1 A.C. 147, 193 (H.L. 1999) (opinion of Lord Browne-Wilkinson).
\textsuperscript{117} As noted, there were two separate rulings to this effect. The first, \textit{Pinochet I}, was vacated and the case was reheard by the newly constituted and expanded appellate committee.
\textsuperscript{118} \textit{Pinochet III}, [2000] 1 A.C. at 201.
On its face, the first issue addressed in *Pinochet III* seems to be a hyper-technical question of extradition law. Yet it opened a jurisprudential side door onto highly contested terrain. Through its consideration of extradition issues, the law lords indirectly affirmed universal jurisdiction, albeit under narrowly circumscribed conditions.\(^{119}\)

In the terminology of extradition law, the United Kingdom follows the double criminality rule: It allows extradition only for conduct that constitutes a crime under British law as well as under the law of the requesting state. In the view of the *Pinochet III* panel, this meant that Pinochet could be extradited to Spain to face charges for crimes committed beyond Spain's territorial boundaries only if, at the time those crimes were allegedly committed, it would also have been a violation of British law to commit the same crimes outside of the United Kingdom.\(^{120}\) Applying this rule, a majority of judges concluded that most of the torture charges pressed by Spain did not constitute extradition crimes.\(^{121}\)

\(^{119}\) Portions of several law lords’ judgments addressing Pinochet’s immunity in respect of charges that survived application of the double criminality rule provided further affirmation of universal jurisdiction. See, e.g., *Pinochet III*, [2000] 1 A.C. at 198 (opinion of Lord Browne-Wilkinson) (asserting that “[t]he jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed”); id. at 275 (opinion of Lord Millett) (expressing view that “crimes prohibited by international law attract universal jurisdiction under customary international law” if they are “contrary to a peremptory norm of international law” and “are so serious and on such a scale that they can justly be regarded as an attack on the international legal order”).

\(^{120}\) See id. at 188 (opinion of Lord Browne-Wilkinson); id. at 206 (opinion of Lord Goff); id. at 224 (opinion of Lord Hope); id. at 249 (opinion of Lord Hutton); id. at 265 (opinion of Lord Saville, agreeing with reasoning and conclusions of Lord Browne-Wilkinson on this issue); id. at 268 (opinion of Lord Millett, agreeing with reasoning and conclusions of Lord Browne-Wilkinson except with respect to certain aspects of his analysis on immunity issue); id. at 279 (opinion of Lord Phillips, accepting conclusions of Lord Browne-Wilkinson with respect to application of double-criminality rule).

By requiring that the conduct must have been criminal under British law at the time it occurred, the *Pinochet III* majority interpreted relevant law more narrowly than both the *Pinochet I* majority and the Divisional Court. Both assumed that the double criminality rule would be satisfied if extraterritorial torture were criminal under both British and Spanish law at the time Pinochet’s extradition was sought, even if it had not been criminal under both countries’ laws when the alleged torture occurred. See *In re Pinochet Ugarte*, 38 I.L.M. 68, 79 (Eng. Q.B. Div’l Ct. 1998); *Pinochet I*, supra note 110, [2000] 1 A.C. 61, 87–88 (opinion of Lord Lloyd). Issues concerning application of the double criminality rule had assumed larger significance during arguments in *Pinochet III* than in previous stages of the extradition proceedings. In its arguments in *Pinochet III*, the Crown Prosecution Service (CPS), arguing in support of the Spanish extradition request, emphasized acts of torture committed before Pinochet became head of state of Chile. In doing so, the CPS elevated the legal significance of the question whether British legislation criminalizing extraterritorial torture had retroactive effect. See Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415, 435 (2000).

\(^{121}\) The law lords did not take a uniform approach to this question. While a majority believed that the torture-related charges constituted extradition crimes only as of September 29, 1988, the date that extraterritorial torture became a crime under British law, Lord Millett believed that all of the torture-related charges, as well as the charges relating to offenses in Spain, were extradition crimes. See *Pinochet III*, supra note 63, [2000] 1 A.C. at 275–79 (opinion of Lord Millett).

The Spanish charges against Pinochet that were considered in *Pinochet III* included a single charge of conspiracy to take hostages as well as charges of conspiracy to commit murder and attempted murder. The law lords concluded that the former charge did not constitute an extradition crime because the conduct described in the extradition request did not satisfy the statutory definition of hostage-taking
On this issue, the United Kingdom’s ratification of the 1984 Convention Against Torture and its enactment of implementing legislation in 1988 proved decisive. Under the terms of the Torture Convention the United Kingdom is subject to a form of mandatory universal jurisdiction: it must either prosecute or extradite individuals in its territory who are suspected of certain forms of criminal responsibility for torture, regardless of where the crime occurred or of the nationality of the perpetrator or victim. Anticipating the entry into force of this convention for the United Kingdom on December 8, 1988, the British Parliament enacted Section 134 of the Criminal Justice Act 1988, which became effective on September 29, 1988. As a result of this law and, in the words of Lord Browne-Wilkinson, “[a]s required by the Torture Convention ‘all’ torture wherever committed world-wide was made criminal under United Kingdom law and triable in the United Kingdom.” This was crucial. Lord Browne-Wilkinson explained why: “No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law.”

For most of the law lords constituting the Pinochet III majority, the implications of the 1988 law were unambiguous. If universal jurisdiction struck them as extraordinary, even ill-considered, this was none of their concern. Even so, the narrow approach taken by a majority of judges in Pinochet III underscored their reluctance to accord this principle broad scope. Out of more than two dozen draft charges relating to torture submitted by Spain, only three survived the

\[\text{See id. at 197 (opinion of Lord Browne-Wilkinson); id. at 229–32 (opinion of Lord Hope). Presumably for similar reasons the British Home Secretary had already declined to authorize extradition proceedings to proceed against General Pinochet with respect to charges framed in terms of genocide. See id. at 192 (opinion of Lord Browne-Wilkinson); id. at 226 (opinion of Lord Hope). The law lords’ application of the double criminality rule to the murder-related charges against Pinochet produced mixed results; some of these charges survived application of the rule; others did not. See id. at 232–35, 240–41 (opinion of Lord Hope); id. at 196 (opinion of Lord Browne-Wilkinson, following analysis of Lord Hope on this issue); id. at 278–79 (opinion of Lord Phillips, agreeing with Lord Hope’s analysis on this issue generally).}\]

122. Pursuant to Article 5 of the convention, each state party is required to “take such measures as may be necessary to establish its jurisdiction over” acts of torture and certain related offenses when the offenses are committed in its territorial jurisdiction; when the alleged offender is its national; when the victim is its national if the state considers it appropriate; and “in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him... to any of the States mentioned [in the preceding three categories].” Article 7(1) imposes an obligation on each state party in whose territory an alleged torturer is found either to extradite him or to “submit the case to its competent authorities for the purpose of prosecution.” Convention Against Torture, supra note 56, 1465 U.N.T.S. at 45.

123. Section 134(1) of the Criminal Justice Act 1988 provides: “A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties.”


125. Id. (emphasis added).

126. In this context, “majority” refers to a majority of the six judges who ruled in favor of cutting back the scope of Pinochet’s immunity as former head of state. While most of the six-judge majority thought that the extraterritorial torture allegations qualified as extradition crimes only as of September
narrow application of the double criminality rule endorsed by most of the judges on the panel. Only when bound by the legal straitjacket of Section 134 of the Criminal Justice Act 1988 did a majority conclude that extraterritorial torture was an extraditable offense (and, a fortiori, an offense punishable in the United Kingdom).

Having concluded that Spain's request included at least a handful of extradition crimes, the law lords had to determine whether Pinochet could nonetheless avoid extradition on the ground that he was immune from British legal process for conduct committed while he was Chile's head of state. In the jargon of international law, the issue at hand was whether Pinochet enjoyed immunity ratione materiae, an immunity associated with the nature of particular acts, and not whether he enjoyed immunity ratione personae, an immunity associated with an incumbent official's status. Because Pinochet was no longer head of state at the time of the extradition proceedings, he was no longer entitled to the latter.

D. FORMER HEAD OF STATE IMMUNITY

To read the three British decisions that addressed Pinochet's immunity is to understand that there was nothing inevitable about the determination that General Pinochet could be extradited to Spain for any crimes allegedly committed while he was president of Chile. Ultimately, of course, a result was reached: six members of the seven-judge panel concluded that Pinochet was not immune from criminal process for charges relating to torture occurring at the very least after December 8, 1988. But this should not obscure the strikingly diverse

29, 1988, Lord Millett believed that all of the draft charges relating to torture submitted by Spain qualified as extraditable offenses. See supra note 121.

127. See Pinochet III, supra note 63, [2000] 1 A.C. at 196 (opinion of Lord Browne-Wilkinson); id. at 238-41 (opinion of Lord Hope).

128. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 329–332 (4th ed. 1990). Although immunity ratione materiae operates alongside immunity ratione personae, the former generally becomes relevant—or at any rate its relevance becomes apparent—when a foreign defendant's official status comes to an end and he or she is therefore no longer entitled to claim the broader protections associated with immunity ratione personae. See J. Craig Barker, The Future of Former Head of State Immunity After the Pinochet r, 48 INT'L & COMP. L.Q. 937, 940 (1999).

129. In dicta all seven judges expressed the view or implicitly assumed that, were Pinochet still president of Chile, he would be immune from British legal process. See Pinochet III, supra note 63, [2000] 1 A.C. at 201 (opinion of Lord Browne-Wilkinson); id. at 210 (opinion of Lord Goff); id. at 249 (opinion of Lord Hutton); id. at 264 (opinion of Lord Saville); id. at 277 (opinion of Lord Millett); id. at 280 (opinion of Lord Phillips). This view was implicit in the opinion of Lord Hope. See id. at 240.

This view was affirmed in a subsequent judgment of the International Court of Justice. In a decision rendered in February 2002, the Court ruled that Belgium had violated international law by issuing an international arrest warrant in absentia in respect of the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo on charges relating to war crimes and crimes against humanity. Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14), at ¶ 70, available at http://www.ici-cij.org/cjwww/idocket/iCOBE/iCOBEjudgment/iCOBE_judgment_20020214.PDF. In dictum, the Court indicated that the same rule would apply in respect of an incumbent foreign head of state. See id. ¶ 58.

130. See infra note 143 and text accompanying notes 139–49.
approaches taken by the seven judges in *Pinochet III*.\(^{131}\)

Two flukes of impenetrable draftsmanship made this divergence more likely than would have been the case had British law provided a clear rule of decision. The most pertinent British law is a study in ambiguous meaning. The crucial text is found in Article 20(1) of the State Immunity Act 1978:

Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—

(a) a sovereign or other head of state;

... as it applies to a head of a diplomatic mission.

The 1964 Act mentioned in this provision incorporates the immunities enjoyed by diplomatic envoys pursuant to the 1961 Vienna Convention on Diplomatic Relations.\(^{132}\) The law lords thus had to determine what “necessary modifications” to those immunities Parliament had in mind with respect to former foreign heads of state.\(^{133}\)

This required an interpretive leap, for the text from which the judges had to extrapolate was not readily adapted to address former heads of state. The most pertinent provision, Article 39(2) of the Vienna Convention on Diplomatic Relations, provides:

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132. The law lords interpreted these provisions in light of customary international law. See *Pinochet III*, *supra* note 63, [2000] 1 A.C. at 203 (opinion of Lord Browne-Wilkinson) (asserting that Parliament “cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law”); *id.* at 209–10 (opinion of Lord Goff) (asserting that the immunity of a head of state under the State Immunity Act 1978 should “be construed as far as possible to accord with his immunity at customary international law”); *id.* at 240 (opinion of Lord Hope) (asserting that key provision of State Immunity Act 1978 gave “statutory force in the United Kingdom to customary international law as to the immunity which heads of state, and former heads of state in particular, enjoy from proceedings in foreign national courts”); *id.* at 240 (opinion of Lord Hutton) (expressing view that relevant provision of State Immunity Act 1978 “gave statutory form to the relevant principle of international law”); *id.* at 266–67 (opinion of Lord Saville) (concluding that key provision of State Immunity Act of 1978 gave “statutory force” to “international law immunities”); *id.* at 270 (opinion of Lord Millett) (observing that “any narrow statutory immunity is subsumed in the wider immunity... under customary international law”); *id.* at 279 (opinion of Lord Phillips) (affirming that if the State Immunity Act 1978 “governs it must be interpreted, so far as possible, in a manner which accords with public international law”).

133. The ambiguity of Article 20(1) of the State Immunity Act 1978 was manifestly maddening for several judges, who might wish to have been spared altogether the task of having to rule on such a politically charged question as the immunity of General Pinochet. Commenting on the textual ambiguity of this provision, Lord Browne-Wilkinson observed: “It is hard to resist the suspicion that something has gone wrong.” *Pinochet III*, *supra* note 63, [2000] 1 A.C. at 203 (opinion of Lord Browne-Wilkinson).
When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

With some difficulty, a majority of law lords concluded that the “necessary modifications” would amend this text to read, in effect: “a former head of state has immunity in relation to acts done as part of his official functions when head of state.”

Having identified the relevant test, the judges had to determine its meaning. When it comes to the immunity of a former head of state, what conduct constitutes “part of his official functions”? It was this question, above all, that lay at the heart of the British judicial proceedings. By its nature, the question required British jurists to draw a line. On one side would fall official conduct beyond the scrutiny of foreign courts; on the other would fall conduct that could be subject to British criminal process even though the defendant was head of another sovereign state when the acts occurred.

In view of the enormity of the stakes attaching to this issue, one might have expected helpful guidance in relevant law. Yet nothing could be farther from the reality confronting the British jurists. Presented with a question of first impression, they had to resolve profoundly consequential issues with scant guidance from drafting history or judicial precedent. The result was a jurisprudential jumble.

134. Pinochet III, supra note 63, [2000] 1 A.C. at 203 (opinion of Lord Browne-Wilkinson). Although the language quoted in the text comes from the opinion of Lord Browne-Wilkinson in Pinochet III, other Lords adopted substantially similar formulations. See, e.g., Pinochet I, supra note 110, [2000] 1 A.C. 61, 73 (H.L. 1998) (opinion of Lord Slynn) (“The question then arises as to what can constitute acts (i.e. official acts) in the exercise of his functions as Head of State.”); id. at 108 (opinion of Lord Nicholls) (“The effect of these provisions can be expressed thus: ‘A former head of state shall continue to enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to acts performed by him in the exercise of his functions as a head of state.’”); id. at 114 (opinion of Lord Steyn) (“My view is that Section 20 of the 1978 Act . . . should be read as providing that a former Head of State shall enjoy immunity from the criminal jurisdiction of the United Kingdom with respect to his official acts performed in the exercise of his functions as Head of State.”); Pinochet III, supra note 63, [2000] 1 A.C. at 210 (opinion of Lord Goff) (“The effect is that a head of state will, under the statute as at international law, enjoy state immunity ratione personae so long as he is in office, and after he ceases to hold office will enjoy the concomitant immunity ratione materiae ‘in respect of acts performed by him in the exercise of his functions as head of state.’”); id. at 241 (opinion of Lord Hope) (“The test is whether they were private acts on the one hand or governmental acts done in the exercise of his authority as head of state on the other.”); id. at 250 (opinion of Lord Hutton, adopting above-quoted formulation of Lord Nicholls); id. at 265 (opinion of Lord Saville) (“In general . . . a former head of state does enjoy immunity from criminal proceedings in other countries in respect of what he did in his official capacity as head of state. In my judgment the effect of Section 20(1)(a) of the State Immunity Act 1978 is to give statutory force to these international law immunities.”). Lord Phillips interpreted Section 20(1) of the State Immunity Act 1978 more narrowly than other judges. See Pinochet III, supra note 63, [2000] 1 A.C. at 292 (opinion of Lord Phillips) (interpreting Section 20(1) to confer immunity on foreign heads of state only in respect of conduct in the United Kingdom).
At one extreme, the Divisional Court treated the scope of Pinochet's immunity as virtually absolute. Responding to the argument of the Crown Prosecution Service that the functions of a head of state cannot include the acts charged, the Lord Chief Justice asked rhetorically, "If the former sovereign is immune from process in respect of some crimes, where does one draw the line?" In sweeping terms, he concluded that Pinochet "is entitled to immunity as a former sovereign from the criminal and civil process of the English courts."

But the point was hardly as plain to the first committee that rendered judgment on appeal. Two law lords concluded that Pinochet was entitled to claim immunity in relation to all of the acts charged in the second provisional warrant of arrest, however odious. Three others took a profoundly different approach. In their view, Pinochet's immunity *ratione materiae* did not extend to conduct outlawed by international law.

A broader range of views is represented in the crucial ruling of March 24, 1999. Now, only a single member of the seven-judge committee believed that


136. *Id.* at 85. The other judges on the three-judge bench agreed with the conclusions of the Lord Chief Justice. *See id.* at 85 (judgment of Justice Collins); *id.* at 86 (judgment of Justice Richards).

137. Lord Slynn concluded that the acts alleged against Pinochet "were done as part of the carrying out of his functions when he was Head of State," *Pinochet I*, [2000] 1 A.C. at 74 (opinion of Lord Slynn), but this did not end his inquiry. He identified narrow circumstances, which he concluded were not present in the case before him, in which the broad immunity normally enjoyed by former heads of state would be diminished. *See id.* at 74–79 (opinion of Lord Slynn). Lord Lloyd likewise concluded that the acts charged against the former Chilean president were committed "in a sovereign capacity and not in a personal or private capacity," *id.* at 95 (opinion of Lord Lloyd), and that Pinochet was "entitled to immunity as former head of state in respect of the crimes alleged against him on well established principles of customary international law," *id.* at 98 (opinion of Lord Lloyd). Lord Lloyd recognized, however, that a former head of state could be prosecuted abroad if "his own country waives state immunity." *Id.* at 104 (opinion of Lord Lloyd).

138. In the view of Lord Nicholls and Lord Hoffman, a former head of state enjoys immunity only "in respect of acts performed in the exercise of functions which international law recognises as functions of a head of state, irrespective of the terms of his domestic constitution." And "international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law." [2000] 1 A.C. at 109 (opinion of Lord Nicholls). Lord Hoffmann did not write a separate opinion except to state that he would allow the appeal for the reasons given by Lord Nicholls. *Id.* at 118 (opinion of Lord Hoffmann).

Lord Steyn, too, rejected the Divisional Court's approach, which in his view implied "that there is no or virtually no line to be drawn." This, he reasoned, was unacceptable, for the very "concept of an individual acting in his capacity as Head of State... invites classification of the circumstances of a case as falling on a particular side of the line." In Lord Steyn's view, the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'etat [in Chile], and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity... as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.

*Id.* at 115 (opinion of Lord Steyn).
Pinochet was entitled to virtually absolute immunity from the charges pressed by Spain. At the other end of the spectrum, Lord Phillips doubted whether customary law provided former heads of state immunity *ratione materiae* from criminal process in general, much less for international crimes. In his view, the Convention Against Torture confirmed what international law already established—that “no immunity could exist *ratione materiae* in respect of torture, a crime contrary to international law.”

For present purposes, it is useful to highlight two points that loom large in the law lords’ analysis: the decisive impact of the Convention Against Torture and, ironically, that treaty’s textual silence on the all-important question of head of state immunity.

The Convention Against Torture played a key role in the analysis of the law lords who ruled that Pinochet could no longer claim immunity *ratione materiae* in relation to charges of alleged torture occurring after December 8, 1988 at the latest, for some, it was decisive. Although their reasoning varied, the

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139. *Pinochet III*, [2000] 1 A.C. at 206–24 (opinion of Lord Goff). Lord Goff concluded that this immunity could be overcome through waiver in a treaty only when the waiver is express. See *id.* at 215, 217 (opinion of Lord Goff). In his view, the Convention Against Torture did not abrogate the immunity *ratione materiae* accorded heads of state under international law. See *id.* at 217–22 (opinion of Lord Goff).

140. *Id.* at 205 (opinion of Lord Phillips).
141. *Id.* at 289 (opinion of Lord Phillips).
142. *Id.* at 290 (opinion of Lord Phillips). Lord Phillips identified an alternative interpretation of the legal effect of the Torture Convention—that “States Parties . . . expressly agreed that immunity *ratione materiae* should not apply in the case of torture.” *Id.* In his view, either one of these interpretations “must be fatal to the assertion by Chile and Senator Pinochet of immunity in respect of extradition proceedings based on torture.” *Id.*

143. Lords Browne-Wilkinson and Saville explicitly concluded that Pinochet’s immunity *ratione materiae* ended as of December 8, 1988, when the United Kingdom’s ratification of the Torture Convention entered into effect (the convention having already entered into force for Spain and Chile). *Pinochet III*, [2000] 1 A.C. at 200 (opinion of Lord Browne-Wilkinson); *id.* at 265 (opinion of Lord Saville). Lord Hutton seemed to agree. See *id.* at 249 (opinion of Lord Hutton) (observing that since December 8, 1988 Chile, Spain and the United Kingdom agreed with each other that their former heads of state cannot claim immunity *ratione materiae* in respect of alleged official torture). Lord Hope thought that the effective date for loss of immunity should be October 30, 1988, the date that Chile’s ratification became effective, but was willing to accept the view of Lord Saville that the effective date was December 8, 1988. See *id.* at 224 (opinion of Lord Hope).

144. The Convention Against Torture was the pivot on which the opinions of Lord Browne-Wilkinson and Lord Saville turned. See *Pinochet III*, [2000] 1 A.C. at 266 (opinion of Lord Saville); *infra* text accompanying notes 145–149 (discussing opinion of Lord Browne-Wilkinson). For other law lords constituting the *Pinochet III* majority, the interplay between customary international law and the Torture Convention was more complex. Lord Hope treated the Torture Convention as decisive, but apparently only in respect of torture committed on a scale that would amount to crimes against humanity under customary international law. In his view, once the Torture Convention put in place the machinery of extraterritorial jurisdiction over torture, “it was no longer open to any state which was a signatory to the Convention to invoke the immunity *ratione materiae* in the event of allegations of systematic or widespread torture committed after that date being made in the courts of that state against its officials.” [2000] 1 A.C. at 248 (opinion of Lord Hope). Lord Hutton expressed the view that “acts of torture were clearly crimes against international law” and “that the prohibition of torture had acquired the status of *ius cogens*” by September 29, 1988, the date that Section 134 of the Criminal Justice Act 1988 came into force. [2000] 1 A.C. at 260 (opinion of Lord Hutton). After that date and
opinion of Lord Browne-Wilkinson best illustrates the central importance of the treaty to the outcome of Pinochet III.

In Lord Browne-Wilkinson's view, the Torture Convention would be nonsensical if former heads of state could claim immunity from prosecution outside their state of nationality on charges of torture. Crucial to his reasoning, Article 1 of the convention defines torture "as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes '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.'"145 Clearly, in Lord Browne-Wilkinson's view, "the acts alleged against Senator Pinochet, if proved, were acts done by a public official or person acting in an official capacity within the meaning of Article 1."146 This conclusion did not by itself resolve the question of Pinochet's immunity,147 but Lord Browne-Wilkinson thought it inconceivable that the Torture Convention would on the one hand define torture in a manner that required official action and on the other hand exempt from prosecution the official "most responsible" for torture "while his inferiors (the chiefs of police, junior army officers) who carried out his orders will be liable."148 Further—and, for Lord Browne-Wilkinson, "decisively"—"if the implementation of a torture regime is a public function giving rise to immunity ratione materiae, this produces bizarre results.” He explained:

145. Id. at 199 (opinion of Lord Browne-Wilkinson) (quoting Convention Against Torture, supra note 56, art. 1).
146. Id. at 200 (opinion of Lord Browne-Wilkinson).
147. See id. ("To my mind the fact that a head of state can be guilty of the crime [of torture, as defined in the Convention Against Torture] casts little, if any, light on the question whether he is immune from prosecution for that crime in a foreign state.").
148. Id. at 205 (opinion of Lord Browne-Wilkinson).
Immunity ratione materiae applies not only to ex-heads of state and ex-ambassadors but to all state officials who have been involved in carrying out the functions of the state. . . . Under the Convention the international crime of torture can only be committed by an official or someone in an official capacity. They would all be entitled to immunity. It would follow that there can be no case outside Chile in which a successful prosecution for torture can be brought unless the State of Chile is prepared to waive its right to its officials['] immunity. Therefore the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive and one of the main objectives of the Torture Convention—to provide a system under which there is no safe haven for torturers—will have been frustrated. In my judgment all these factors together demonstrate that the notion of continued immunity for ex-heads of state is inconsistent with the provisions of the Torture Convention.149

Although the Torture Convention was crucial to the outcome of \textit{Pinochet III}, the treaty is textually silent about head of state immunity. Further, as Lord Goff observed, “nothing in the negotiating history of the Torture Convention . . . throws any light on the proposed . . . term” implicitly waiving Pinochet’s immunity \textit{ratione materiae}.150 To the contrary, Lord Goff continued, “the travaux preparatoires shown to your Lordships reveal no trace of any consideration being given to waiver of state immunity.”151

E. THE DEVIL IN THE DETAILS . . . THAT WERE OMITTED FROM THE TEXT

In light of the profound repercussions of \textit{Pinochet III}, it is difficult to read its seven opinions without wondering: Is this any way to make law? Significant ambiguities surrounded two laws that were crucial in determining Pinochet’s immunity, the State Immunities Act 1978 and the 1984 United Nations Convention Against Torture. Forced to resolve a question as consequential as whether the United Kingdom could subject the former head of Chile to criminal process, British courts had to render judgment with few signposts to guide them.

That a question of this order should not be left to be resolved in the crucible of a criminal prosecution seems plain. What, then, could account for the failure of the Convention Against Torture even to address this question? Since the preparatory work is as silent as the text itself, we can only speculate. But it seems plausible that the drafters did not focus on this issue because they had difficulty imagining that the treaty would actually be enforced through universal jurisdiction.152 After all, half a century elapsed before states began to implement their obligation to prosecute or hand over for trial in another country persons

149. \textit{Id.}
150. \textit{Id.} at 219 (opinion of Lord Goff).
151. \textit{Id.}
152. Universal jurisdiction is not the only, or even the principal, means of criminal enforcement contemplated by the Convention Against Torture. The treaty assumes that jurisdiction is most likely to be exercised by (1) the state where the offenses were committed; (2) the state whose national is
suspected of ordering or committing "grave breaches" of the 1949 Geneva
Conventions on the laws of war, the most important precedent for the system
of mandatory universal jurisdiction established by the Torture Convention.

In larger perspective, until the 1990s the dominant model for enforcing
post-Nuremberg international criminal law was punishment by national courts
in the territory where the crimes occurred. This approach is exemplified in the
1948 Convention for the Prevention and Punishment of the Crime of Geno-
cide, the first postwar treaty designed to transform Nuremberg’s lesson in
individual responsibility from a precept of victors’ justice into a rule of univer-
sal law. Delegates who participated in drafting the Genocide Convention de-
clined to include a provision for universal jurisdiction even though the treaty
“confirm[s] that genocide . . . is a crime under international law.” Instead,
Contracting Parties are supposed to punish genocide principally in the territory
where the crime occurred.

154. See H.R. Rep. No. 104-698, at 8 (1996) (stating that the Judiciary Committee of the U.S. House of Representatives “has been informed that there has never been a single case of a signatory country to the Geneva conventions exercising its own criminal jurisdiction over an alleged war criminal on the basis of universal jurisdiction”). Although this statement was largely true at the time the committee report was issued, some countries had already exercised universal jurisdiction over war crimes. See, e.g., Prosecutor v. N.N., High Court (Ostre Landsrets) 3d Division (Nov. 25, 1994) (Den.) (conviction of Bosnian Muslim by Danish High Court for torturing detainees in Bosnian prison camp in 1993; jurisdiction had been based on grave breaches provisions of Third and Fourth Geneva Conventions of 1949 in conjunction with Article 8(5) of Danish Penal Code); see also REDRESS REPORT, supra note 7, at 41–42 (summarizing prosecution before Swiss Military Tribunal of Bosnian arrested in Geneva in 1995 on war crimes charges; although defendant was acquitted because of the “confused evidence and testimonies at the trial,” the Swiss Military Tribunal affirmed its authority to exercise universal jurisdiction over war crimes). Since 1996, a number of other prosecutions have been instituted on the basis of the mandatory universal jurisdiction provisions of the Geneva Conventions of 1949. See generally AMNESTY REPORT, supra note 11.
157. Genocide Convention, supra note 155, art. 1.
158. Article VI of the Genocide Convention, supra note 155, provides:

Persons charged with genocide . . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

No international tribunal with jurisdiction over genocide was established until 1993, when the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY). See S.C. Res. 827 (1993). The ICTY is not, however, an “international penal tribunal” established by “Contracting Parties which . . . have accepted its jurisdiction” as contemplated by Article VI of the Genocide Convention. Indeed, immediately following the ICTY’s creation, the government of the Federal Republic of Yugoslavia—whose nationals would be subject to the Tribunal’s jurisdiction—rejected its authority. See FRY OPPOSES SETTING UP OF WAR CRIME TRIBUNAL EXCLUSIVELY FOR YUGOSLAVIA,
In light of this approach, it is hardly surprising that diplomats who drafted the Genocide Convention settled on language that might now seem overly ambiguous. Some measure of ambiguity could actually facilitate the treaty's adaptation to national legal systems of diverse states. And since the drafters envisaged that the Genocide Convention would be enforced primarily through territorial jurisdiction, disparities in national legislation defining genocide would be no more troubling than variations among national laws defining assault and battery.

In contrast to the Genocide Convention, the Convention Against Torture explicitly provides for universal jurisdiction. How, then, could its drafters have overlooked such basic questions as whether defendants could successfully plead official immunity? The most likely answer lies in the drafters' expectations. Geoffrey Robertson, a barrister (later appointed judge on an internationalized court) who participated in the Pinochet litigation in London, suggests that the Torture Convention "was ratified as another exercise in cynical diplomacy, without any belief that it would be enforced." As noted, states had long grown accustomed to non-enforcement of the universal jurisdiction provisions of the 1949 Geneva Conventions. Why should it be any different with the Torture Convention? And yet, as Robertson writes,

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159. The travaux préparatoires of the Genocide Convention include numerous statements reflecting the drafters' assumption that this treaty would be enforced primarily on a territorial basis and that its terms should therefore be readily adaptable to diverse legal systems. For example, the Swedish representative to the Ad Hoc Committee, which prepared the second draft of the Genocide Convention, observed:

The discussion at the beginning of the meeting seems to me to have shown that the significance of the terms corresponding to the French and English expressions here in question—incitement, conspiracy, attempt, complicity, etc.—is subject to certain variations in many systems of criminal law represented here. When these expressions have to be translated in order to introduce the text of the Convention into our different criminal codes in other languages, it will no doubt be necessary to resign ourselves to the fact that certain differences in meaning are inevitable....


161. Universal jurisdiction has a somewhat distinct meaning in the context of treaties like the Convention Against Torture, which authorize and require States Parties—not all states—to prosecute individuals in their territorial jurisdiction suspected of having committed specified crimes.

162. In July 2002, Robertson was appointed to serve on the five-member appeals chamber of the Special Court for Sierra Leone (SCSL), which was jointly established by the United Nations and the government of Sierra Leone. See U.N. News Centre, Annan, Sierra Leone Appoint Experienced Judges for Country's Special War Crimes Court, at http://www.un.org/apps/news/printnewsAr.asp?mid=4291 (July 25, 2002).

163. Robertson, supra note 101, at 370.
[W]hat nobody could have anticipated is that the English judges would approach this treaty as if it were a contract or a parliamentary statute, without a trace of the scepticism that affects anyone who knows with what hypocrisy these conventions are drafted and ratified, by diplomats who never intend them to have any effect beyond inducing a feel-good factor and a good human rights rating to waive in front of aid donors.... With uncanny, uncynical decency, [the judges] took the Torture Convention to mean what it said.  

Now on notice that treaties like the Convention Against Torture may be enforced in accordance with their terms, governments will doubtless take quite seriously any new commitments they may undertake in respect of universal or international jurisdiction. And this is likely to inspire more concerted efforts to clarify states' undertakings when drafting treaty text.

Indeed, a newly serious regard for textual clarity was brought to bear in preparations for the permanent International Criminal Court (ICC). After adopting the Court’s statute at a diplomatic conference in July 1998, representatives of states met periodically for four years to draft ground rules for the Court. One of their central tasks was to draft detailed elements of crimes committed to the Court’s jurisdiction. Where judges serving on precursor tribunals had to work out the meaning of their respective charters case by case, ICC judges will be guided by a detailed enumeration of the elements of crimes charged before the Court.

IV. JUDGE-MADE LAW ACROSS BORDERS

But if heightened regard for textual clarity in future treaty-drafting exercises can alleviate the challenges that bedeviled British law lords, no text can

164. Id.
165. Here (as elsewhere), I use the term universal jurisdiction to refer to the exercise of jurisdiction by national courts over crimes committed in another state, regardless of the nationality of the perpetrator or victim, and use the phrase international jurisdiction to refer to the exercise of jurisdiction by an international tribunal.
169. Under the auspices of the United Nations Commission on Human Rights, work is progressing on a draft convention on enforced disappearance. Such a treaty appears likely to include provisions establishing universal jurisdiction. See Report Submitted by Mr. Manfred Nowak, Independent Expert
eliminate ambiguity altogether. Moreover, treaties already in force that establish a basis for exercising universal jurisdiction are unlikely to be amended with the aim of banishing textual ambiguities. Thus judges who may be called upon to decide cases based on universal jurisdiction will inevitably participate in law-making through adjudication.

It is, of course, commonplace for judges to interpret unclear laws. When a law is ambiguous (as most are when applied to facts that stretch beyond the field of coverage foreseen by legislators), the judge's task inevitably shades into lawmaking. As Judge (later Justice) Benjamin Cardozo observed, "judge-made law" is "one of the existing realities of life."

In this Part, I take up the question, when and why should this trouble us? This inquiry begins by recalling the reasons why judicial lawmaking has been faulted by some writers in the context of purely national proceedings and then considers how the concerns they raise are addressed in democratic societies. In brief, the continuous interaction among judges, other institutions of government, and society at large operates in myriad ways to ensure the democratic accountability of courts.

This inquiry brings into sharper focus the reasons why universal jurisdiction presents special challenges to principles of self-government and judicial accountability. The central issue is not, as some critics have suggested, that international law is inherently vague. While Part III highlighted ambiguities in the Convention Against Torture, there is no reason to suppose that treaties are generally more vague than domestic legislation. Crucially, however, ambiguous domestic laws are normally enforced by judges who are fellow citizens of those whom they judge—and this provides a vital resource for establishing the democratic legitimacy of their lawmaking role. The more important question, then, is whether adequate legitimating resources are available in a transnational setting.


170. See infra text accompanying notes 172, 185–188.

171. Cf. Goldsmith & Krasner, supra note 29, at 49–50 (arguing that even the Convention Against Torture, which addresses one of "the most clearly defined of international crimes," is subject to divergent interpretations).

172. Cf. Louis Michael Seidman, Ambivalence and Accountability, 61 S. CAL. L. REV. 1571, 1580 (1988) (noting that "in most cases that are contested vigorously enough to require judicial resolution, reasonable arguments based upon the text can be made on either side").


174. See supra note 43 and accompanying text.

175. If anything, the more ambiguous law at issue in the Pinochet proceedings in England was the United Kingdom's State Immunity Act 1978. See supra note 133 and accompanying text.

176. Building upon the analysis developed in this Part, I explore this question in Part IV.
A. JUDICIAL LAWMAKING IN NATIONAL PROCEEDINGS

1. The Democratic Critique of Judge-Made Law

Judicial lawmaking has been faulted on two principal grounds. First, there is the risk that the immediate application of a judge-made rule may effectively impose law retroactively. While this is troubling in civil cases as well as in criminal proceedings, it is especially problematic in the latter. It should be noted, however, that the proceedings against General Pinochet in England did not implicate this concern. If Pinochet was astonished to learn that he did not enjoy lifelong immunity outside Chile, he could hardly plead lack of notice that torture is a crime. In fact, Chile ratified the Convention Against Torture—the law that proved pivotal in the British law lords' determination that Pinochet was not wholly immune from legal process—during Pinochet's presidency. Still, this concern could come into play if a national court asserted jurisdiction over a foreign visitor under an idiosyncratic interpretation of international criminal law.

The second set of challenges centers on the claim that judge-made law is fundamentally undemocratic. As framed by some writers, this challenge proceeds from the notion that the legislature is the pre-eminent arena for self-government, at least after a country's constitution has been adopted. From

177. For immediate purposes, “national proceedings” refers to judicial cases involving the interpretation of a national law that has an exclusively domestic application by judges of the same country that enacted the law.


179. Chile's ratification of the Convention Against Torture became effective on October 30, 1988. See supra note 143. Pinochet was president of Chile from 1973 to 1990.

180. This is not a hypothetical concern. The Spanish magistrate who indicted General Pinochet charged him with genocide as well as other offenses. The British Home Secretary declined to authorize extradition for this charge, apparently because Spain's definition of genocide was broader than that followed in the United Kingdom. See supra note 115.

181. See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479, 1498-99 (1987) (summarizing what Eskridge calls a formalist view of Supreme Court's proper role when it comes to statutory interpretation, which rests upon the premise that all lawmaking power resides in Congress); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 588 (1993) (characterizing prevalent view to the effect that “[i]n our system the best reflection of . . . majority will is thought to be legislative judgment”); Jane S. Schacter, Metademocracy: The Changing Structure of Legitimation in Statutory Interpretation, 108 Harv. L. Rev. 593, 594 (1995) (describing the “canonical” commitment of “our legal culture[]” to the notion of legislative supremacy); Steven L. Winter, An Upside/Down View of the Counter-majoritarian Difficulty, 69 Tex. L. Rev. 1881, 1925 (noting the “conventional concern . . . that judges will impose their values in contravention of the policy choices of democratically elected legislatures”). Some versions of the democracy critique of judicial review include Executive action along with legislation among the measures taken by representative branches of government that are due judicial deference. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986) (asserting that “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now”); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 9 (1982) (contrasting the U.S. Supreme Court, “which designedly is not accountable to the electorate,” with elected representatives and non-elected officials whose term of appointment ensures some measure of public accountability); Jesse H. Choper, The Supreme Court and the Political Branches: Democratic
this premise the critique derives its core claim: Judges who effectively modify
or invalidate legislation undermine democratic principles by substituting their
own preferences for statutes enacted by the elected representatives of "the
people."  

Although this claim continues to shape the aspirations and rhetoric of judges, scholars and jurists have long questioned key assumptions behind the democ-

racy critique. Understanding its flaws helps us see when and why the peculiar
brand of judicial lawmaking at play in Pinochet may challenge democratic
values and, just as important, when such concerns are misplaced.

Challenges to the democracy critique begin with the claim that it rests upon
an impoverished understanding of textual meaning. Some conservative ap-

proaches to judicial interpretation assume that legal codes have an objective
meaning, affixed at the moment they were enacted into law and persisting
across time. In this view, the judge’s role is to ascertain and then apply that
meaning to the dispute before her. A rich literature on the philosophy and
jurisprudence of interpretation suggests why this view is flawed: In law as in
literature, text is the beginning of meaning, not its end. Some laws are, to be
sure, capable of only one plausible interpretation. How many ways, after all,
can one interpret a provision setting the minimum age for marriage at eighteen
years? But when it comes to text prohibiting “cruel and unusual punishment”—
or, for that matter, “torture”—it would be nonsensical to insist there is a single,
determinate meaning.

Besides, legislators cannot anticipate every possible application of a law; sometimes they deliberately draft laws ambiguously. Gaps in coverage nor-

182. Alexander Bickel famously framed the central problem this way: "The root difficulty is that
judicial review is a counter-majoritarian force in our system." BICKEL, supra note 181, at 16. Judge
Robert Bork makes a stronger claim in the context of U.S. constitutional principles. "The Constitution," he argues, "preserves our liberties by providing that all of those given the authority to make policy are
directly accountable to the people through regular elections. ... [Judges] are, as they must be to
perform their vital role, unelected, unaccountable, and unrepresentative...." ROBERT H. BORK, THE

Although constitutional scholars and others have debated the role of judicial review throughout
American history, see Erwin Chemerinsky, Foreword: The Vanishing Constitution, 103 HARV. L. REV.
43, 70 (1989), Bickel’s seminal work spawned a new generation of scholarship addressing the
"counter-majoritarian difficulty." As the following discussion makes clear, the constitutional issues
captured in this phrase represent an important subset of the broader democracy critique developed in
this Part.

183. See Schacter, supra note 181, at 598–99.
184. See Eskridge, supra note 181, at 1480.
185. Here I am paraphrasing Paul Kahn’s recapitulation of Robert Cover’s position, as elaborated in
Robert M. Cover, The Supreme Court, 1982 Term—Nemos and Narrative, 97 HARV. L. REV. 4, 11
(1983); Paul W. Kahn, Community in Contemporary Constitutional Theory, 99 YALE L.J. 1, 60 (1989).
186. See supra note 171.
187. Legislation may be ambiguous for a raft of reasons, including legislators’ desire to reach
consensus on language vague enough to satisfy conflicting factions. See William N. Eskridge, Jr.,
mally widen as time passes and circumstances change. When this happens, judges must determine how a law enacted perhaps half a century ago should be applied to facts the lawmakers could not have foreseen.\textsuperscript{188} Even civil law countries, which have a strong commitment to the primacy of legislation, recognize that the judge’s role cannot be confined to a search for legislative intent when a statute is anachronistic or fails clearly to cover the dispute at hand.\textsuperscript{189} The question, then, is not whether judges may bring interpretive skills to bear in their work: they must. In view of the inevitability of judicial lawmaking, the core question is how to ensure its accountability and, thereby, its democratic legitimacy.\textsuperscript{190}

Writing in a domestic setting, a wide range of scholars have tackled this question by challenging another key premise of the democracy critique—the view that laws enacted by elected representatives are more democratic than judgments rendered by courts.\textsuperscript{191} Their arguments, several key strands of which are briefly noted below,\textsuperscript{192} provide a compelling rejoinder to classic critiques of judge-made law. Yet by emphasizing the relationship between judges and the societies in which they are embedded, those same arguments tend to reinforce concerns underlying the conservative critique of universal jurisdiction.

2. The Role of Judgment in Democratic Societies

A major stream of scholarship responding to the democratic critique of judge-made law challenges its core premise: that the political branches of government are more representative of majority will, and thus more democratic, than the judiciary.\textsuperscript{193} As ideologically diverse scholars have argued, this premise

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\textsuperscript{189} See Eskridge, supra note 181, at 1503–05.
\textsuperscript{190} For a helpful explication of distinct aspects of democratic accountability in this context, see Jane S. Schacter, Accounting for Accountability in Dynamic Statutory Interpretation and Beyond, 3 Issues in Legal Scholarship, art. 5 (2002), at http://www.bepress.com/ils/iss3/art5. See also Seidman, supra note 172, at 1574–79 (discussing the meaning of “accountability” as applied to judges and the difficulty of holding them “politically accountable to majority sentiment”).
\textsuperscript{191} See Winter, supra note 181, at 1920.
\textsuperscript{192} This account does not attempt, proverbsially, even to scratch the surface of scholarship addressing the “counter-majoritarian difficulty,” see supra note 181, which is truly vast. Indeed, scholars writing on the subject routinely acknowledge that they join generations of constitutional scholars who have been preoccupied—if not consumed—by the perceived need to reconcile judicial review with democratic principles. See, e.g., Barry Friedman, The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficult, Part Five, 112 Yale L.J. 153, 155 (2002) [hereinafter Friedman, Birth of an Academic Obsession]; Choper, supra note 181, at 810; Seidman, Ambivalence and Accountability, supra note 172, at 1573; Friedman, supra note 181, at 578; Darren Lenard Hutchinson, The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics, 23 L. & Inequality 1, manuscript at 6 (forthcoming 2004).
\textsuperscript{193} See, e.g., Choper, supra note 181, at 815; Hutchinson, supra note 192, manuscript at 17–20; Winter, supra note 181, at 1920.
idealizes the legislative process, underestimates the degree to which courts reflect and respond to public opinion, and overlooks the democracy-enhancing role that courts perform. While the contours of this last set of arguments range across a broad canvas, many of its leading proponents assert a common claim: By performing their own role, courts can offset legislative shortcomings and make a distinctive contribution to democratic processes.

For present purposes it is unnecessary to probe the relative merits of various arguments scholars have deployed in support of this claim. The point that matters here is the insight common to all of them: in democracies, courts, legislatures and other actors participate in an ongoing, interactive process of law-making.

The continuous interaction between courts and the legislature, as well as

194. For example, public choice theorists point to structural factors that produce systematically biased legislation favoring the narrow interests of certain sectors, as well as incentives for legislators to avoid tackling important but controversial issues. See, e.g., Eskridge, supra note 187, at 285–95. Consider, for example, a phenomenon well known in U.S. politics: the legislative agenda can be set by leaders of key committees, who may be especially responsive to narrow interest groups. This is likely to "skew public decisionmaking toward private rent-seeking and away from public interest statutes." Id. at 283. The sort of back-room bargaining at play here is also antithetical to the ideal of public discourse embraced by devotees of deliberative democracy. In their view, the legislature should be an arena for public dialogue aimed at discerning a common good, not a forum for ratifying the results of self-interested bargaining among those who represent powerful factions. See Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29, 48–49 (1985). On problematic aspects of the claim that legislative action reflects majority will, see Chemerinsky, supra note 182, at 77–81; Hutchinson, supra note 192, manuscript at 18–20.

195. See, e.g., Friedman, supra note 181, at 590 (asserting that "courts often rely on majoritarian sources in interpreting constitutional guarantees.... Even the most controversial judicial decisions often enjoy popular support."); Friedman, Birth of an Academic Obsession, supra note 192, at 166 (noting that a "host of scholarly work... strongly suggests that legislative enactments often do not enjoy majority support [while] judicial decisions often do"); Hutchinson, supra note 192, manuscript at 21 (noting that several studies indicate that the Supreme Court’s opinions “tend to coincide with public opinion on matters where an accurate measure of public opinion exists”).

196. For example, some public choice theorists have advocated strategies for judicial interpretation that may compensate for legislative dysfunction without substituting the preferences of judges for policies enacted into law. See, e.g., Eskridge, supra note 187, at 295–305. Other views assign to courts a special role in mitigating legislative tyranny, a perennial threat that looms especially large when legislation enacted long ago continues in effect across time and changed circumstances. See Tushnet, supra note 188, at 788. In another view, courts can enhance the deliberative role of the legislature by reviewing its reason-giving. In this view, the legislature remains the central arena for public deliberation; courts advance democratic deliberation not by usurping the legislature, but by improving its performance. See, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 73–179 (1980) (arguing that certain political-process failures may justify correction through judicial review); Sunstein, supra note 194, at 49–55 (arguing that the U.S. Supreme Court has used constitutional doctrines requiring “rationality” in certain legislative choices to ensure that legislation is not solely a response to political pressures). Others see the judiciary as the paramount institutional site for public deliberation in a large democracy, at least in defined circumstances. See, e.g., Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J. 1013, 1022, 1029–31 (1984) (conceiving the U.S. Supreme Court as the central repository of self-government during periods of "normal politics"). In another prevalent view, "judicial review enhances democracy because it safeguards the substantive values that are part of democratic rule”—more particularly, "fundamental rights." Chemerinsky, supra note 182, at 76.
between courts on the one side and other public institutions and society on the other, anchors the democratic legitimacy of judicial review. Through myriad forms of interaction judges remain publicly accountable in ways that secure and sustain democratic government. Most obviously (though in practice rarely), judicial rulings that stray too far from public consensus can be nullified by legislation. In jurisdictions that elect judges, candidates whose views range far afield of public sentiment are unlikely to be elected or re-elected. Appointed judges whose views are politically unpopular may imperil their prospects for elevation to a higher court. Moreover the role of the political branches in appointing judges helps ensure that their opinions "will not depart radically from public opinion."

But the interaction between judges and society is wider and deeper than the interplay structured by such formal processes as confirmation hearings and elections. As Alexander Bickel wrote, judges engage in "a continuing colloquy with the political institutions and with society at large." Bickel's account of how the U.S. Supreme Court works toward addressing a major issue, from which the metaphor of a continuing colloquy is drawn, is worth quoting at greater length:

Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself. When at last the Court decides that "judgment cannot be escaped—the judgment of this Court," the answer is likely to be a proposition "to which widespread acceptance may fairly be attributed," because in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious. In these continuing colloquies, the profession—the practicing and teaching profession of the law—plays a major role; the law... is made, not by judge alone, but by judge and company. But in American society the colloquy goes well beyond the profession and reaches deeply into the places where public opinion is formed.

197. See Eskridge, supra note 181, at 1525–26 (attributing infrequency of legislative correction to inertia).
198. According to a 2001 report by a committee of the American Bar Association, approximately 80% of state and local judges in the United States are elected. See Schacter, Accounting for Accountability, supra note 190, at 15.
199. Hutchinson, supra note 192, manuscript at 24. Other devices for ensuring democratic control over the judiciary are assessed in Choper, supra note 181, at 849–55.
200. BICKEL, THE LEAST DANGEROUS BRANCH, supra note 181, at 240. Barry Friedman similarly describes constitutional interpretation as "an elaborate discussion between judges and the body politic." Friedman, Dialogue and Judicial Review, supra note 181, at 653; see also id. at 655; cf. Linda Greenhouse, Win the Debate, Not Just the Case, N.Y. TIMES, July 14, 2002, § 4, at 4 (describing public debate over meaning that ensues after the U.S. Supreme Court renders a major decision).
201. BICKEL, THE LEAST DANGEROUS BRANCH, supra note 181, at 240.
The colloquy does not end when judgment is reached. To borrow Martha Minow's imagery, when the Court renders judgment the legal discourse "reaches temporary resting points from which new claims can be made."\(^{202}\) Meanwhile, the ground for further debate has been seeded by dissenting opinions that may some day become the majority view,\(^{203}\) the arguments marshaled in majority opinions,\(^{204}\) editorials, speeches,\(^{205}\) and scholarly critiques. The colloquy continues, and through it the law advances.

The dialogue includes plenty of disagreement, too, both within the judiciary and among the judiciary, the legislature, the executive and society. Thus an essential element of the judge's craft is her ability to persuade those who resist her interpretations as well as to manage outright opposition to her rulings.\(^{206}\)

The persuasive power of judicial rulings turns in large measure on judges' ability to craft opinions that resonate with widely-shared public values. Not surprisingly, then, a rich body of scholarship has found that court rulings, including decisions of the Supreme Court, generally coincide with majority public opinion\(^{207}\) or at least with dominant public conceptions.\(^{208}\) The fact that judges believe they should try to persuade the public that their rulings are correct by drawing upon arguments likely to resonate with widespread sentiment signifies that the judiciary is a democratically accountable institution,\(^{209}\) albeit of a different stripe than the legislature.

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\(^{202}\) Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L.J. 1860, 1876 (1987); cf. Friedman, supra note 181, at 643–48 (challenging a key premise of the "countermajoritarian difficulty"—that courts, including the Supreme Court, have the "final word" on public issues once they issue a decision).


\(^{204}\) Chief among those whom justices may need to persuade are officials serving in the coordinate branches of government. See Owen Fiss, *A Life Lived Twice*, 100 Yale L.J. 1117, 1120 (1991) (praising Justice William J. Brennan for making "every effort" in an opinion to "invite the other branches of government to participate and collaborate in the program of constitutional reform inspired by the Court").

\(^{205}\) Members of the same court have sometimes continued their debates outside the text of opposing opinions. See, e.g., Linda Greenhouse, *Judicial Intent; The Competing Visions of the Role of the Court*, N.Y. Times, July 7, 2002, § 4, at 3 (describing speeches of U.S. Supreme Court Justices Stephen G. Breyer and Antonin Scalia setting forth their respective visions of judicial review). Inevitably, academic commentators join the debate waged between majority and dissenting opinions when a major judgment is issued.


\(^{207}\) See Friedman, supra note 181, at 672; Hutchinson, supra note 192, manuscript at 21 & sources cited in id. n.93.

\(^{208}\) See Winter, supra note 181, at 1920, 1925–26.

\(^{209}\) Cf. Schacter, supra note 190, at 5–7 (unpacking the concept of accountability as developed in literature on the countermajoritarian difficulty, author identifies responsiveness as one of its meanings). As Barry Friedman has argued, for purposes of countering the charge that judicial review thwarts self-government, the important point is not whether arguments marshaled in judicial rulings accurately reflect the motivating reasons behind a judge's conclusions. The key point instead "is that judges find it necessary to, and can, support their conclusions with sources that appear to reflect the sentiment of the people." Friedman, supra note 181, at 672.
When courts are unable to persuade large segments of the public that their
decisions are correct (or even well-reasoned), they must draw upon a reservoir
of institutional authority to secure acceptance of their rulings as binding. That
acceptance derives in large part from two key sources, both of which presup-
pose a court's embeddedness in a political community.

The first is citizens' general commitment to the authority of the government
structure to which courts belong. In a democracy, we accept the authority of
our courts to interpret our laws—and even to render decisions we reckon to be
wrong—because they are our courts. More particularly, in a constitutional
democracy judicial review derives its democratic legitimacy in part from the
public's consent, tacit if not explicit, to judicial review itself.

A second basis for accepting decisions we think flawed derives from the
respect that courts earn over time through their performance. While this is a
distinct ground for public acceptance, like others considered already it is linked
to a court's embeddedness in a constitutional democracy. A precious resource in
establishing this brand of legitimacy is the political relationship of the judge to
the law she interprets—the relationship of a judge who is also a fellow
citizen. When judges interpret legislation in a purely national setting, their
decisions are shaped in myriad and imperceptible ways by community values,
expressed through the daily rituals of self-government as well as at formal
moments of legislative enactment. Thus what may on the surface seem to be
judge-made law derives from a rich, robust, and continuous process of self-

210. Judicial decisions that stray too far from public opinion may, however, elicit outright defiance. See Friedman, supra note 181, at 608; Hutchinson, supra note 192, manuscript at 22.

211. Fiss describes this conception of authoritativeness as one that stresses "an ethical claim to obedience—a claim that an individual has a moral duty to obey a judicial interpretation, not because of its particular intellectual authority (i.e., because it is a correct interpretation), but because the judge is part of an authority structure that is good to preserve." Fiss, supra note 206, at 756.

212. See Choper, supra note 181, at 848 (citing arguments to the effect that "judicial review has been institutionally adopted by a continuing consensus of American society as an integral rule of the system; that, thus, judicial review operates by majority will, with the consent of the governed"); see also Seidman, supra note 172, at 1587 (asserting that "[t]o the extent . . . that the public regularly defers to the expertise of judges and chooses to follow their judgments—even in cases where they do not fully understand or accept the reasoning that lies behind them—there is no conflict between judicial decisionmaking and democratic theory").

213. In somewhat different terms, Paul Kahn has argued that the fact that national judges are embedded in a political community anchors their legitimacy. Within a state "that maintains informal norms that distinguish law from politics," Kahn contends, the link between courts and national political processes "gives assurance that the court will not exercise its independence in a way that is substantially at variance with the political beliefs and interests of the country. It gives assurance that the public order set forth in the judicial narrative is the public order of the larger community." Paul W. Kahn, Independence and Responsibility in the Judicial Role, in Transition to Democracy in Latin America: The Role of the Judiciary 73, at 85 (I. Stotzky ed., 1993).

214. Howard E. Dean captured this notion in his appraisal of the United States Supreme Court:

[The Supreme Court is also a piece of the social and political continent, a part of the main. Thus it must . . . be seen in its natural habitat in American society in the context of . . . other aspects of our complex polity. . . . To insist that the Supreme Court should be viewed in its broadest social setting . . . emphasizes what Montesquieu taught two centuries ago, that only
government. When judges make law, they are not so much writing it for us as with us. In their decisions we recognize public values we have constructed together, much of the time through passionate disagreement,\(^{215}\) across our common history.

As my allusion to disagreement implies, none of this is to suggest that decisions rendered by judges in democratic societies are accepted because they embody values uniformly embraced by all or most citizens. Still, the democratic legitimacy of courts turns, in part, on whether citizens recognize that they share a common political project embodied in legal commitments. Jürgen Habermas's notion of a "common political culture . . . rooted in an interpretation of constitutional principles from the perspective of the nation's historical experience"\(^ {216}\) is helpful here. Despite their diversity, Habermas writes, citizens share a "common horizon of interpretation within which current issues give rise to public debates about the citizens' self-understanding. . . . But the debates are always about the best interpretation of the same constitutional rights and principles."\(^ {217}\)

A final and important justification of judicial review remains to be noted. As Michael Klarman has observed, "It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian overreaching."\(^ {218}\) This view presupposes that citizens possess fundamental rights which are entitled to respect and protection whatever the transient wishes of a political majority.\(^ {219}\)

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\(^{215}\) Even law accepted as authoritative is "always 'essentially contested.'" Cover, supra note 185, at 17 (citation omitted).


\(^{217}\) Id. (Emphasis omitted.)

\(^{218}\) Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 1 (1996). Although this justification of judicial review "exercises a powerful hold over our constitutional discourse," id. at 2, some scholars have challenged its empirical grounding. Klarman and others have argued that the Supreme Court's tendency to mirror mainstream views has limited its ability to protect the rights of vulnerable minorities. See generally id.; Hutchinson, supra note 192; Thomas R. Marshall & Joseph Ignagni, *Supreme Court and Public Support for Rights Claims*, 78 Judicature 146, 151 (1994) (concluding, based on then-recent data, that "public opinion is closely linked to the Supreme Court's own support for rights claims").

\(^{219}\) In some formulations, the rights-protecting function of judicial review effectuates a fundamental dimension of democracy. See, e.g., Chemerinsky, supra note 182, at 76 (asserting that "judicial review is democratic when it reinforces the fundamental rights that are part of American democracy"); Choper, supra note 181, at 812 (noting that "most contemporary defenders of judicial review . . . persuasively contend that the essential values of a democratic society . . . assume the existence of certain inalienable minimums of personal freedom, beyond the political rights of the ballot and free expression, that guard the dignity and integrity of the individual"). Others reconcile the rights-
In the discourse of constitutional law (as well as of international human rights law), fundamental rights are typically conceptualized as inherent in our common humanity and as deriving their normative power from a law which is higher than that embodied in national constitutions and international texts. But this conception naturally raises the question, how do we know which (fundamental) rights are entitled to judicial protection even when their exercise conflicts with democratically-enacted law? Inevitably, authoritative answers are embodied in positive law—and this "gives their enforcement a legitimating basis in political consent." Like other justifications canvassed earlier, then, the view that judicial review derives its legitimacy from the need to safeguard fundamental rights—most especially, the rights of vulnerable minorities—links up with core principles of democratic governance.

If the judicial role of protecting fundamental rights normally finds a basis in political consent, many legal systems regard this function as one that properly enjoys heightened insulation from political control—and properly so. For reasons further developed in Part V, this point is helpful in explaining the theory behind universal jurisdiction: by authorizing courts the world over to exercise jurisdiction over alleged perpetrators of some violations of human rights, states have acknowledged the utility of insulating prosecutions of these offenses from the pernicious effects of domestic politics.

In sum, whether a judge’s interpretive work strikes us as undemocratic may turn upon the particular vision of democratic governance to which we subscribe. Yet across a wide spectrum of views, some measure of judicial lawmaking is understood to be integral to self-government. This is true even for those who believe that there is a discernible fixed legislative intent that courts can and

221. Id. at 1866. As Neuman notes, “[p]ositive fundamental rights normally derive their positive force from some political act that expresses the consent of relevant political actors, or of peoples.” Id.
222. See Andrew Moravcsik, In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union, 40 J. Common Mkt. Stud. 603, 614 (2002) (noting that it is common for states “to delegate to insulated authorities, such as constitutional courts, responsibility for the enforcement of individual or minority prerogatives against the immediate ‘tyranny of the majority’”). In U.S. constitutional law, for example, the “suspect class doctrine carves out a space for countermajoritarianism” by allowing the Supreme Court “to exercise invasive judicial review to protect politically vulnerable and marginalized” groups. Hutchinson, supra note 192, manuscript at 30.
223. Cf. infra text accompanying note 378 (noting that states that have experienced repression are especially likely to ratify human rights treaties that have rigorous enforcement regimes).
should strictly enforce; after all, we can not meaningfully govern ourselves if our courts do not faithfully enforce our law. For those who would allow judges wider scope for interpretation, the embeddedness of courts in a broader framework of self-government and in the social fabric of their communities is crucial to the perceived legitimacy of judicial review.

B. JUDICIAL LAWMAKING IN A TRANSNATIONAL SETTING

We can now better grasp what is at stake when judges interpret law in a case, like the attempted prosecution of General Pinochet, that affects citizens of another country far more than the judge’s own compatriots. In a deeply important sense, British and Spanish judges were not making law for Chile by enforcing the Torture Convention against General Pinochet. By ratifying the convention, Chile had already made the treaty its law. Through adjudication, however, British and Spanish judges became co-authors of this law in a case that would have a more profound effect upon Chileans than on British or Spanish citizens.\(^{224}\) If we believe that citizens should be at least indirect authors of the law that governs them,\(^ {225}\) we instinctively shrink from the thought of Chilean citizens being governed by the law of judges deliberating an ocean away. How, after all, can judges steeped in British or Spanish legal culture reflect the public values and aspirations of Chileans?

Yet despite the dissimilarities I have highlighted, cross-border lawmaking processes share important qualities with domestic lawmaking.\(^{226}\) Most important, lawmaking at both levels entails the continuous interplay of multiple law-generating communities. As Harold Koh has noted, “[e]very court in the United States... applies law that was not made by its own polity whenever the court’s own choice-of-law principles so direct.”\(^ {227}\) This perspective helps us see that the fact that lawmaking across borders involves multiple communities does not hopelessly undermine its democratic legitimacy.

To grasp the significance of this point it is useful to deepen the discussion of judicial interpretation elaborated so far. Much of my analysis in the previous section builds upon a core insight of communitarian streams in legal scholar-
ship: legal meaning is derived from particular socio-cultural matrices. So, too, are the standards we use to assess both the general authority of law-making institutions and their performance in specific instances. Even in a purely national setting, however, the legitimating community is always and inevitably plural.

The plural nature of discrete political communities is easiest to see when we think of spatially-defined sub-state units, such as federal states, communes and municipalities. But these are not the only communities that matter when it comes to lawmaking processes. Centrally important here is the kind of community captured in Robert Cover’s notion of a nomos—a normative universe. Nomoi—religions sects, secular communities committed to common principles, professional communities, and so forth—generate multiple, interdependent meanings for every law. And so while national law, including law established through judicial interpretation, is authoritative and official, its meaning is not unitary. Rather, law that is accepted as authoritative establishes common ground for multiple meanings. What this tells us is modest but important: the fact that multiple states and an eclectic assortment of actors participate in transnational lawmaking—diplomats who draft international treaties, legislators who adopt national implementing legislation, investigating magistrates in Spain, law lords in England, and others—does not irremediably doom the democratic legitimacy of these lawmaking processes.

Nor, however, does the multiplicity of actors who participate in transnational lawmaking demonstrate the legitimacy of these processes. To the contrary, the multi-state nature of judicial enforcement of transnational law presents qualitatively different challenges to democratic values than does judge-made law in a purely national setting. How, then, should we assess the democratic legitimacy of the kind of lawmaking processes at play in the Pinochet case?

C. ASSESSING THE DEMOCRATIC LEGITIMACY OF TRANSNATIONAL ADJUDICATION

As a first cut at this question, the preceding account of adjudication in a purely national setting points to three benchmarks for appraising the legitimacy of lawmaking in a transnational context. The first is general acknowledgment of the authority of relevant lawmaking institutions, including courts, by those who are subject to the law these bodies generate. Deriving from the democratic principle of consent, this criterion is essentially normative.

At least in well-functioning democracies, the institutional authority of courts
is generally accepted by citizens. Their tacit acceptance of the authority of their nation's courts underpins citizens' willingness to accept judicial rulings they consider wrongly decided.\textsuperscript{233} In contrast, the notion of tacit acceptance has scant meaning when it comes to the exercise of jurisdiction by a foreign or international court.\textsuperscript{244} In this setting, international law requires specific acceptance of a court's exercise of authority, whether expressed through treaty,\textsuperscript{235} an ad hoc declaration,\textsuperscript{236} national law,\textsuperscript{237} or the more diffuse process of establishing customary international law.\textsuperscript{238}

A second quality associated with adjudicative lawmaking widely accepted as democratically legitimate is the respect that lawmaking institutions earn over time by virtue of their performance.\textsuperscript{239} In contrast to the first criterion, this benchmark of legitimacy is more descriptive than normative; that is, it reflects conditions in which citizens tend to accept the legitimacy of judge-made law.\textsuperscript{240} Ordinarily, this type of respect derives in large measure from judges' ability to craft decisions that resonate with the deepest commitments of their own political communities—although a judge's "own" political community is always plural.

\textsuperscript{233} See supra text accompanying notes 210--212.

\textsuperscript{234} The need for consent is not readily obviated by the fact that universal jurisdiction in principle is available only with respect to atrocious crimes, which by their nature transcend any state's parochial concerns. As Gerald Neuman has observed, a common feature of international human rights and national constitutional rights is that both rest upon the legitimizing condition of consent alongside a sense that the rights "have normative force independent of their embodiment in law, or even superior to the positive legal system." Neuman, supra note 220, at 1868.

\textsuperscript{235} The United States government has grounded its opposition to the International Criminal Court (ICC) in part on the claim that the Rome Statute impermissibly permits the Court to assert jurisdiction over nationals of non-party states. See Diane F. Orentlicher, \textit{Unilateral Multilateralism: United States Policy Toward the International Criminal Court}, 36 \textit{CORNELL INT'L L.J.} 415, 419 (2004). Proponents of the ICC counter that the Court may exercise jurisdiction over nationals of non-party states only when consent to jurisdiction has been provided by the state in which the crimes occurred. See, e.g., Philippe Kirsch, \textit{The Rome Conference on the International Criminal Court: A Comment}, ASIL Newsletter (Am. Soc'y of Int'l L., Wash., D.C.), Nov.-Dec. 1998, at 1. Despite their differences, both sides acknowledge that the legitimacy of ICC jurisdiction is grounded in state consent.

\textsuperscript{236} See, e.g., Statute of the International Court of Justice, supra note 59 art. 38(1)(a).

\textsuperscript{237} By presidential decree, Argentine President Néstor Kirchner consented to the exercise of universal jurisdiction over former Argentine junta leaders sought by a Spanish magistrate. See Larry Rohter, \textit{Argentina: Arrests of Ex-Officers Ordered}, \textit{N.Y. Times}, July 25, 2003, at A6; see also infra note 255.

\textsuperscript{238} The most authoritative (if somewhat laconic) contemporary definition of customary international law is set forth in the Statute of the International Court of Justice. Article 38, which defines sources of law that the Court may apply in resolving disputes, includes "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, supra note 59, art. 38(1)(b). For a somewhat more helpful definition, see infra text accompanying note 302 (citing Restatement definition of customary international law).

\textsuperscript{239} See supra text accompanying note 213.

\textsuperscript{240} In some theories justifying judicial review on grounds of tacit consent, see, e.g., supra note 212, what I have termed a descriptive benchmark of democratically legitimate process might be seen as empirical evidence that the normative benchmark previously noted—consent—has been satisfied.

\textsuperscript{241} See supra text accompanying notes 207--208, 213--215.
A third benchmark of legitimacy is the belief by those who may be subject to judge-made law that adjudicators are accountable to them. The fact that judges participate in a continuous colloquy with other institutions of self-government, as well as with society at large, helps foster and sustain this sense of accountability within the bounded community of well-functioning democracies.242

The exercise of universal jurisdiction raises the question whether these last two sources for legitimation in particular are available in a transnational context.243 Using the Pinochet case as paradigm, Part V assesses the lawmaking processes associated with universal jurisdiction in light of these three indices of legitimacy.

V. LEGITIMIZING TRANSNATIONAL LAWMAKING

Like all complex legal cases, the European proceedings against Augusto Pinochet involved multiple laws, addressing subjects ranging from extradition to the scope of official immunities. Among these, one source of legal obligation in particular—the Convention Against Torture244—raises the concerns addressed in this Part, and so my discussion will focus on that law.

A. LEGITIMATION THROUGH TREATY PARTICIPATION

As previously noted, Articles 5(2) and 7(1) of the Convention Against Torture explicitly require States Parties to initiate criminal prosecutions against individuals in their territory suspected of having committed torture unless they extradite the suspects.245 Since adjudication plays a significant role in lawmaking processes,246 these treaty provisions effectively authorize national courts of States Parties to “make law” governing conduct that occurs in other states.

By adhering to this convention in 1988,247 Chile accepted the regime established in these articles. In doing so it signed on to the possibility that national courts of other States Parties, including Spain (which had ratified the Convention Against Torture in 1987), could prosecute acts of torture committed in Chile.248 In contrast to the treaty’s textual silence on the question of official immunities,249 the basic duty to extradite or prosecute alleged torturers within

243. While the first criterion—consent—is more readily satisfied in a transnational setting by, for example, a state’s adherence to relevant treaties, the question of meaningful consent to a regime of universal jurisdiction is not wholly unproblematic. See infra Part V.A.
244. Supra note 56.
245. See supra note 122 and text accompanying notes 62 and 122.
246. See supra text accompanying notes 172–73.
247. See supra note 143.
248. Under the terms of the convention, Chilean nationals suspected of committing torture could theoretically be prosecuted by States Parties to the Convention Against Torture even if Chile had not adhered to that treaty. I examine the issues of democratic legitimacy raised by this feature of the convention below, in text accompanying notes 374–76.
249. See supra text accompanying notes 150–51.
the jurisdiction of States Parties is unambiguous.\textsuperscript{250}

Chile's adherence to the Convention Against Torture satisfies a bedrock condition of the democratic legitimacy of the lawmaking processes at play in the \textit{Pinochet} case—consent to the regime of universal jurisdiction established by the treaty.\textsuperscript{251} In this respect, the \textit{Pinochet} proceedings are a model of democratically legitimate reliance on universal jurisdiction.

Even so, in light of the peculiar challenges to democratic governance presented by the exercise of universal jurisdiction,\textsuperscript{252} it may be helpful to deepen our understanding of what meaningful consent to such a treaty regime might entail.

1. Consenting to Multilateral Treaties: General Considerations

Setting aside for now the special questions raised by treaties that authorize or require States Parties to exercise universal jurisdiction, multilateral treaties in general present their own peculiar brand of challenges to democratic processes. By the time states decide whether they will adhere to such a treaty, its text has already been adopted, often after years of multi-state negotiations. Unless citizens of adhering states are able to participate in shaping the treaty's text, their choice is limited: each country's decision about adherence is largely (though by no means entirely\textsuperscript{253}) an "up or down" choice.\textsuperscript{254}

In principle, citizens should be able to participate more meaningfully in national legislative processes aimed at making treaties legally effective in their countries.\textsuperscript{255} But this is not even a theoretical possibility in many countries,
where some or all treaties are automatically incorporated into domestic law. Even in countries where treaty obligations are made legally effective through implementing legislation, it would be a mistake to suppose that the process of adopting such laws provides the same opportunity for citizen participation as the enactment of other legislation (although, as political scientists have repeatedly found, citizen participation in the latter is more an ideal than an accurate account of reality\textsuperscript{256}). When a state ratifies a treaty it commits itself to take whatever steps are necessary to meet its treaty obligations, and this often includes enacting domestic law. For the most part, then, implementing legislation is less a vehicle for meaningful self-government than a process for following through on commitments already undertaken.

2. Enhancing Participation in Treaty-Drafting Processes

One technique that may partially address these challenges is to ensure that relevant government officials participate in shaping the text of multilateral treaties. If a proposed multilateral treaty is likely to have a significant regulatory impact within states, it makes sense for government delegations at international drafting conferences to include, in addition to foreign service professionals, national legislators and government officials who are responsible at home for the relevant subject area.\textsuperscript{257} Also, national parliaments can hold hearings before key treaty-drafting sessions, thereby providing a forum for public deliberation at a time when the government's negotiating position is still being formed and when it may still be possible to shape the treaty's text.\textsuperscript{258}

Another strategy for legitimation advocated by some commentators focuses on the direct participation of non-state actors in supra-national lawmaking processes, including treaty-drafting exercises. In brief, some have claimed that the participation of non-governmental organizations (NGOs) goes a long way
toward ensuring the legitimacy of transnational lawmaking processes, including their democratic legitimacy. In this view the involvement of NGOs serves as a counterweight to the dominant role of government representatives, ensuring that human values and the concerns of under-represented peoples are reflected in these processes.\textsuperscript{259}

An appealing feature of this approach is that it maps neatly onto the distinctive nature of contemporary transnational lawmaking processes. A defining feature of this phenomenon is the broad spectrum of actors who participate in making transnational law, extending well beyond the traditional cast of diplomats and other foreign service professionals. Particularly noteworthy is the role of NGOs and other non-state actors.\textsuperscript{260} Although non-state actors have long participated in developing international law,\textsuperscript{261} their influence has soared in recent years.\textsuperscript{262} Epistemic communities\textsuperscript{263} of lawyers, legal scholars, human rights advocates and others have had a significant impact on the development of human rights law in particular,\textsuperscript{264} as well as on the emergence and growing use of transnational and international mechanisms for enforcing that law. The Convention Against Torture exemplifies this phenomenon: representatives of

\begin{itemize}
\item \textsuperscript{260} Some writers use the term “transnational” to avoid the emphasis on state-to-state interactions implied in the word “international” and to capture the interplay between state and non-state actors. See Lea Brilmayer, \textit{Justifying International Acts} 35 (1989).
\item \textsuperscript{261} See generally Charnovitz, supra note 259.
\item \textsuperscript{263} Although this term has been defined in various ways, its usage here follows Peter Haas’s definition of an epistemic community as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area.” Peter M. Haas, \textit{Epistemic Communities and International Policy Coordination}, 46 Int'l Org. 1, 3 (1992).
\item \textsuperscript{264} On the role and impact of transnational human rights activists, see Kathryn Sikkink, \textit{Human Rights, Principled Issue-Networks, and Sovereignty in Latin America}, 47 Int'l Org. 411 (1993); see also Margaret E. Keck & Kathryn Sikkink, \textit{Activists Beyond Borders} (1998).
\end{itemize}
NGOs that promote human rights played a leading role in its development.\textsuperscript{265} Human rights activists also provided crucial impetus for the creation in 1993 of the first international war crimes tribunal since the immediate aftermath of World War II, the International Criminal Tribunal for the former Yugoslavia.\textsuperscript{266} If anything, NGOs were even more influential in the process that led to the creation of a permanent international criminal court several years later.\textsuperscript{267}

Does the participation of NGOs enhance the democratic legitimacy of transnational lawmaking processes? The short answer is surely yes: NGOs have often provided an uplink from national communities\textsuperscript{268} in transnational lawmaking settings, ensuring that perspectives other than those of government officials feed into lawmaking processes. Moreover, just as expert groups help bridge the gap between domestic legislators and citizens, specialized NGOs can narrow the distance between citizens of national communities and transnational lawmakers.\textsuperscript{269}

This is not to suggest, however, that the simple fact of NGO participation assures the legitimacy of international lawmaking processes. The same concerns about NGOs that arise in a domestic political setting—such as the lack of accountability of many, the pernicious aims of some, and the phenomenon of capture by well-financed interest groups—are also relevant in transnational settings.\textsuperscript{270} The most influential NGOs operating transnationally tend to be

\begin{itemize}
  \item \textsuperscript{265} The important contribution of human rights NGOs is acknowledged in a book co-authored by two government representatives who played key roles in drafting the Convention Against Torture. See Burgers \& Danelius, supra note 59, at 19–22, 24–29.
  \item \textsuperscript{266} See Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice 120–21, 124 (1998).
  \item \textsuperscript{267} Richard Falk and Andrew Strauss write that a global civil society “made itself nearly indispensable to the negotiating process” during the diplomatic conference in Rome that finalized and adopted the text of the Court’s statute. Richard Falk \& Andrew Strauss, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty, 36 Stan. J. Int’l L. 191, 202 (2000). Falk and Strauss describe how highly mobilized non-state actors were able to influence the positions of state representatives:

  Because civil society’s representatives to the Rome Conference included respected academic experts and former government policymakers, its representatives could address the many highly technical issues with great authority. Many governments relied on these expert assessments of specific problems, thereby giving civil society a tremendous influence on framing the overall discussion.

  Id.
  \item \textsuperscript{268} I borrow this phrase from Peter Spiro, who uses it in a somewhat different context. See Spiro, New Global Communities, supra note 262, at 53 (arguing that providing NGO representatives formal participation in intergovernmental fora would “create an additional (and arguably more direct and responsive) uplink from the citizenry in a context where parliamentary-type representation remains impractical”).
  \item \textsuperscript{269} See Charnovitz, supra note 259, at 274.
  \item \textsuperscript{270} Thomas Carothers explodes romantic visions of “international civil society”:

Civil Society Is Warm and Fuzzy. That depends on whether you like snuggling up to the Russian mafia and militia groups from Montana as well as to your local parent-teacher association. They’re part of civil society too. Extrapolating from the courageous role of civic groups that fought communism in Eastern Europe, some civil society enthusiasts have propagated the misleading notion that civil society consists only of noble causes and earnest,
supported by financially privileged sectors and staffed by professional elites.\textsuperscript{271} And, one observer cautions, “very few of even the larger international NGOs are operationally democratic” themselves.\textsuperscript{272}

These cautionary observations hardly negate the important contributions of NGOs and other private actors in ensuring the accountability of transnational lawmaking processes and institutions; their participation has often been invaluable. Raphael Lemkin’s role in making genocide an international crime stands out,\textsuperscript{273} along with the more recent accomplishments of coalitions mobilized to protect civilians against the indiscriminate violence of land mines and to secure affordable treatment for the ravages of AIDS. If NGOs cannot unproblematically claim to represent their societies, they can and often do enhance public deliberation by contributing expert analyses. And so of course we want to see NGOs remain in the picture. Still, we cannot assume that their involvement is all that is needed to ensure the democratic legitimacy of international lawmaking processes.

3. Informed Public Deliberation

While the preceding sections have considered issues that are generally pertinent to states’ adherence to widely-ratified multilateral conventions, further considerations come into play when a state adheres to a treaty that constitutes its consent to a substantial delegation of sovereign authority. In these circumstances, a state’s adherence should be approved under procedures likely to maximize informed and attentive public deliberation.

Although the analogy between treaties authorizing States Parties to exercise universal jurisdiction and conventions establishing trade regimes should not be overdrawn, Laurence Tribe’s assessment of the democratic challenges posed by U.S. participation in the latter helps illuminate the general issue. A heightened level of domestic deliberation is in order, Tribe argues, when the United States enters into a treaty that entails a substantial surrender of sovereignty “and submits United States citizens or political entities to the authority of bodies wholly or partially

well-intentioned actors. Yet civil society everywhere is a bewildering array of the good, the bad, and the outright bizarre.

\textsuperscript{271} See Mathews, supra note 262, at 52. As Peter Spiro suggests, “[a]rguably, it is more often money than membership that determines [the] influence [of NGOs], and money more often represents the support of centralized elites, such as the major foundations, than that of true grass roots.” Spiro, \textit{New Global Communities}, supra note 262, at 51.

\textsuperscript{272} Spiro, \textit{New Global Communities}, supra note 262, at 51. David Rieff charges that human rights activists sometimes speak as though their movement were “an emblem of grass-roots democracy. Yet it is possible to view it as an undemocratic pressure group. . . .” David Rieff, \textit{The Precarious Triumph of Human Rights}, N.Y. TIMES, Aug. 8, 1999, § 6 (Magazine), at 37. On the role of NGOs in instituting cases based on universal jurisdiction, Australian Justice Michael Kirby writes, “While it is true that well-motivated NGOs can constitute a counterweight to political and institutional complacency, judges may sometimes view them as irresponsible, effectively unaccountable, and prone to cause wildfires that imperil orderly legal process and foreign relations.” Kirby, supra note 28, at 253.

If it seems obvious that a state's decision to surrender lawmaking authority to foreign courts merits attentive and well-informed public deliberation, the prospects for this are concededly rather inauspicious. Assessments of Member States' participation in the European Union (E.U.) have highlighted how challenging it is to engage broad public participation in decision-making processes concerning acceptance of treaties, even when the surrender of lawmaking authority entailed in adherence is far more consequential than that entailed in acceptance of treaties establishing a regime of universal jurisdiction. E.U. member states have surrendered a vast measure of decision-making authority to E.U. institutions without appreciating the implications of their delegation.275

4. Clarifying the Scope of Authorized Jurisdiction

Recent cases highlight the potential importance of providing courts clearly defined mandates within which they are authorized to exercise universal jurisdiction.276 Without clear mandates, the ground rules for universal jurisdiction will continue to be defined in large part through piecemeal adjudication.277 While their most obvious effect is to constrain judges, clearly-framed mandates also empower courts to assert universal jurisdiction.278 Faced with uncertainty about how far their authority runs, courts have at times rendered overly narrow interpretations of relevant law,279 dismissing cases properly founded on univer-

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274. Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1268 (1995). This is not to suggest that the occasional exercise of universal jurisdiction involves the same degree of delegation of rulemaking authority entailed in the type of multilateral trade regimes addressed by Tribe.

I have not attempted to identify the particular form that domestic processes for approving new usages of universal jurisdiction should take because the appropriate process turns in substantial part on the peculiarities of each country's political system. In a number of European countries, decisions relating to delegation of substantial authority to EU institutions are put to vote by plebiscite; in the United States heightened deliberation may entail acceptance of treaty commitments by the whole Congress rather than just the Senate. See Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995). But see Tribe, supra (arguing that Senate ratification assures special safeguards for federal states). Further, in countries that utilize more rigorous processes of approval for some categories of legal commitment, the appropriateness of resorting to those procedures may depend upon the degree of judicial delegation authorized by a particular treaty. Thus my principal claim is modest: countries that approve treaties authorizing or requiring the exercise of universal jurisdiction in circumstances not previously authorized should ensure that their consent is predicated on due deliberation.


276. See, e.g., infra text accompanying note 280.


278. An initiative sponsored by the Princeton Project on Universal Jurisdiction provides one model for constraining the exercise of universal jurisdiction within principled limits. As previously noted, see supra note 48, a group of international jurists developed guidelines for the exercise of universal jurisdiction. See The Princeton Principles on Universal Jurisdiction, supra note 48, at 21–25.

sal jurisdiction.

Notably, the most controversial recent developments relating to the exercise of universal jurisdiction have involved efforts by courts and prosecutors to expand the writ of bystander justice beyond clearly established law. Belgium, for example, was ahead of global consensus when it applied its universal competence law to pursue criminal cases against incumbent senior officials of foreign states—and was forced to alter this practice after it was successfully challenged before the International Court of Justice.280

Strict regard for existing law would inevitably limit the ability of domestic legislatures and courts to contribute to the development of universal jurisdiction in the same way they contribute to other areas of customary international law. For it is precisely through the emergence of state practice that at first represents a departure from established norms that new rules of customary law are established. Circumscribing the ability of national courts and legislatures to contribute in this way to the further development of universal jurisdiction may seem ill-considered in light of recent progress in international law advanced in part by progressive state laws: when Bavarian and Swiss courts ruled that serious violations of the laws of war governing non-international armed conflicts gave rise to universal jurisdiction in their respective countries, and when the Belgian legislature established universal jurisdiction over those same offenses,281 they were arguably out ahead of established law. Yet along with other developments, these countries’ laws may have contributed to a development in international law that has been widely supported by other states. In late 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia found that serious violations of the laws of war committed during

280. See Ratner, supra note 21, at 890 (noting that Belgian Cour de Cassation dismissed a case against the incumbent foreign leader of Israel approximately one year after the International Court of Justice ruled that a Belgian magistrate’s issuance of an international arrest warrant against the incumbent foreign minister of the Democratic Republic of the Congo violated international law).

281. The Belgian legislature extended universal jurisdiction to serious violations of the rules governing the conduct of non-international armed conflicts even though it was aware that Belgium was not required to do so under the four Geneva Conventions of 1949 or Additional Protocol II. Considering the number of violations of international humanitarian law that are committed during non-international conflicts, two Belgian writers explain, “the Belgian legislator [sic] found it wise to extend the application of ‘grave breaches’ to violations of the laws of war committed during internal conflicts.” Stefaan Smis & Kim Van der Borght, Introductory Note; Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 38 I.L.M. 918, 920 (1999). The Belgian law was enacted in June 1993, five months before the United Nations Security Council created the International Criminal Tribunal for Rwanda and vested it with jurisdiction over war crimes committed in the context of a non-international armed conflict. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, art. 4, S.C. Res. 955, Annex (1994), amended by S.C. Res. 1165 (1998); S.C. Res. 1329 (2000); S.C. Res. 1411 (2002), and S.C. Res. 1431 (2002), available at http://www.ictr.org/ENGLISH/basiedocs/statute.html.
non-international armed conflicts are international crimes. Its ruling was, in turn, reaffirmed by diplomats who drafted the Rome Statute of the International Criminal Court, which includes serious violations of the laws of war committed in non-international armed conflicts in the subject-matter jurisdiction of the Court.

Still, it may be preferable for states to find other ways to express their support for an expansion of existing law than asserting universal jurisdiction over offenses not yet generally accepted as international crimes (absent the relevant state's consent to the exercise of jurisdiction). There are plenty of ways for states to contribute to the development of customary international law concerning universal jurisdiction, including the development of treaties that make explicit provision for its exercise and adoption of non-binding principles that, through widespread acceptance, attest to state practice and opinio juris.

B. INDIRECT DEMOCRATIC SUPERVISION OF FOREIGN COURTS

The thrust of the inquiry pursued in Part III is that the integration of domestic courts in a bounded political community helps ensure the responsiveness of judges to citizens who are effectively governed by judge-made law. Moreover, the continuous dialogue between judges and fellow citizens enhances the ability of domestic courts to earn the type of institutional respect that underpins general compliance with their rulings and which arguably reflects continuing (if tacit) consent to judicial review itself. Similar resources for legitimation are self-evidently more elusive in a transnational setting. The question, then, is whether adequate and context-appropriate analogues are available.

In approaching this question, it is useful to keep sight of the fact that, by hypothesis, states concerned in the exercise of universal jurisdiction have already consented to its exercise in respect of certain crimes committed in their


283. Rome Statute, supra note 166, art. 8(2)(c) & (e) in conjunction with art. 5(1)(c). An alternative account of the developments summarized above (in text accompanying notes 281-82) is that Belgium’s approach to serious violations of the laws of war applicable in non-international armed conflicts reflected principles of international law that had been developing for some time. Essentially this view was taken by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Tadić decision cited above, supra note 282.

284. As noted above in note 169, work is now under way for the adoption of a treaty on enforced disappearances, which appears likely to include provisions establishing a treaty regime of universal jurisdiction.

285. As noted previously, customary international law derives from (1) the practice of states followed by them out of a sense of legal obligation. See supra note 238; see also infra text accompanying note 302. The phrase opinio juris refers to the second, subjective, element.

286. See supra text accompanying notes 197–214.


288. See supra note 212.
territory and/or by their nationals. These countries have, therefore, judged universal jurisdiction to advance their interests and values, at least when its exercise is confined to the circumstances encompassed in their consent. The present inquiry is concerned, then, with the ongoing accountability of courts whose authority to dispense bystander justice has already been established.

To place this challenge in proper perspective, it is helpful to refine the analysis developed in Part III. When courts exercising universal jurisdiction operate within the defined limits of their delegated competence, the politico-cultural distance between the forum state and the state(s) with substantial links to the crimes in question is not so vast after all. Courts authorized to implement a treaty such as the Convention Against Torture enforce a common code of humanity, embodying values shared across national boundaries. Equally important is a point developed in greater depth in Part VI: While questions of justice belong especially to the political community that endured past depredations, it would be a mistake to assume that national deliberations are or should be insulated from transnational legal and normative processes. In myriad ways, Chileans participated in developing and enforcing the legal norms that were brought to bear in the Pinochet proceedings in Europe. With these considerations in mind, the question at hand is how to further enhance the accountability of courts exercising universal jurisdiction in relation to comparatively remote political communities.

To begin, when courts exercise universal jurisdiction they should be receptive to requests by states especially affected by the proceedings to present submissions setting forth their governments' views. Beyond this, courts exercising

289. See supra text accompanying notes 232, 245–51. In Part VI, I consider some of the reasons why countries have consented to universal jurisdiction. See infra text accompanying note 378.

290. One dimension of the issue addressed here is analogous to a familiar question of legal and political philosophy—whether a community's past consent to a constitutional framework does the work of constituting its consent to contemporary rule-making processes. For citations to views that emphasize the importance of community consensus in support of judicial rulings as an indicator of ongoing consent to judicial review, see supra note 212.

291. Thus, as I have argued, values associated with self-government may be imperiled when legal authorities in one nation attempt to advance international law beyond the sphere of genuine global consensus or specific state consent. Besides the previously-noted example of Belgium's attempt to prosecute the incumbent foreign minister of another state, see supra text accompanying note 280, another instance of this brand of legal overreach is a Spanish magistrate's attempt to prosecute former Chilean president Augusto Pinochet on genocide charges. Relying on an expansive definition of genocide, Judge Garzón—as well as the national court that upheld Spanish jurisdiction on the genocide charges advanced by Garzón—apparently overstepped the bounds of global consensus condemning genocide as an international crime. See supra notes 115 and accompanying text. To the extent, however, that Spanish authorities may seek to enforce their national law's definition of genocide against Spanish citizens for conduct occurring in Spain, the concern raised here is not implicated.

292. See infra text accompanying notes 352–65.

293. The Chilean government actively participated in the extradition proceedings against General Pinochet in London. See Pinochet III, supra note 63, [2000] 1 A.C. 147, 192 (H.L. 1998) (opinion of Lord Browne-Wilkinson) (noting that the Republic of Chile, which initially urged that Pinochet's immunity be recognized, later applied for and was granted leave to intervene in the extradition proceedings against its former president).
universal jurisdiction should be receptive to participation, at the very least as *amici curiae*, of victims’ groups from the countries most concerned in the prosecution as well as other non-governmental organizations representing their interests.

More generally, courts exercising universal jurisdiction should operate with maximum transparency. In most democratic countries and in most circumstances, trials are public. But national legal systems vary in the degree to which their courts explain publicly the reasoning behind their judgments. Courts that exercise universal jurisdiction in particular should provide a public and reasoned explanation for their rulings. At a time when foreign decisions are readily accessible on the Internet, reasoned opinions can bridge the distance between courts exercising universal jurisdiction and societies that are specially affected by their rulings. Aware that their judgments will be closely scrutinized abroad, judges exercising universal jurisdiction, in fact, have special incentive to justify their decisions in terms capable of persuading their distant audiences.

Moreover, the discipline of providing publicly reasoned decisions operates as a significant restraint on the misuse of judicial power. Writing in the context of domestic lawmaking, legal scholars have noted that a judge’s “need to explain and justify her interpretations to the interpretive community of other jurists, legislators, scholars, and lawyers” operates as a key constraint on adjudication. While the accountability provided by professional elites should not be confused with the responsiveness of courts to the general public in democratic societies, the former becomes all the more important in a transnational setting.

Notably, an interpretive community of jurists now plays a disciplining role in transnational adjudication. One need look no farther than the *Pinochet* case for

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295. There are exceptions. Many countries allow or require courts to bar the public from proceedings that involve juvenile defendants, victims of sexual assault, or the introduction of evidence whose disclosure may threaten national security.

296. With these considerations in mind, it was doubtless politically useful, as well as legally relevant, for British judges to remind their Chilean audience that Chile itself had accepted the treaty obligations underpinning the law lords’ judgment that former Chilean President Augusto Pinochet was not wholly immune from legal process. *See supra* note 143.

297. *See* Seidman, *supra* note 172, at 1574.

298. Eskridge, *supra* note 181, at 1537; *see also* Fiss, *supra* note 206, at 744–47 (asserting that the authority of rules disciplining judicial interpretations is derived from an authoritative interpretive community comprising jurists). In Fiss’s conception, “[j]udges do not belong to an interpretive community as a result of shared views about particular issues or interpretations, but belong by virtue of a commitment to uphold and advance the rule of law itself. They belong by virtue of their office.” *Id.* at 746.
evidence. As previously noted, key decisions by British judges cited judgments by other national courts, regional courts, and international tribunals. This phenomenon is emblematic of contemporary transnational lawmaking: courts enforcing international humanitarian law are talking to each other, shaping each other's understanding of the law, critiquing each other and, together, constructing a common code of humanity. Not only are national courts citing decisions from other jurisdictions, but international and regional courts are doing the same.

In fact, the methodology of international law fairly requires intensive interjurisdictional communication. As any student who has taken an introductory class in public international law knows, the principal source of international legal obligation other than treaties is customary international law, which "results from a general and consistent practice of states followed by them from a sense of legal obligation." Faced with the question whether a particular practice constitutes custom, a court applying international law must canvas the actions of states the world over; for this purpose, relevant state practice includes the decisions of national courts. The methodology of treaty interpretation is somewhat different than that associated with customary law, but here, too, courts have reason to canvas the views of other states—to be precise, other States Parties. Although national courts are not bound to follow the views of other States Parties' courts in interpreting the same treaty, classic rules of treaty interpretation make such views relevant in ascertaining a treaty's meaning. If applied with appropriate rigor, the methodology of international law

299. See supra notes 63–67 and accompanying text.

300. For further discussion of cross-fertilization among courts belonging to different legal systems, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004); Amnon Reichman, "When We Sit to Judge We Are Being Judged": The Israeli GSS Case, Ex parte Pinochet and Domestic/Global Deliberation, 9 CARDOZO J. INT'L & COMP. L. 41 (2001); Anne-Marie Slaughter, Judicial Globalization, 40 VA. J. INT'L L. 1103 (2000). Even the famously insular U.S. Supreme Court has recently evinced a receptivity to cross-fertilization. See Charles Lane, Thinking Outside the U.S., WASH. POST, Aug. 4, 2003 (noting that recent rulings of the Supreme Court "reflect the influence of international legal norms, as well as rulings by courts in foreign countries").


300. RESTATEMENT, supra note 93, § 102(2).


302. RESTATEMENT, supra note 93, § 102(2).

303. See id. at 19.


305. See Vienna Convention on the Law of Treaties, supra note 60, art. 31(3)(a)–(b) (providing that subsequent agreement between parties regarding the interpretation of a treaty or subsequent practice establishing such an agreement shall be taken into account in treaty interpretation). The Vienna Convention cites an additional source of interpretive guidance—"any relevant rules of international law
brings significant constraints to the process of transnational enforcement of international law; national judges are not free to impose their own country's idiosyncratic approach upon non-consenting states under the guise of enforcing international law.

In recent years, the type of transjurisdictional communication fostered by international legal adjudication has operated, in practice and not just in theory, to constrain the development and exercise of universal jurisdiction. For example, in several cases tried in the 1990s, German courts imposed a judicially-developed requirement that there be a legitimizing point of contact between the particular case and Germany. German courts' application of this requirement was inconsistent, and in any event the requirement does not appear on the face of Germany's 2002 Code of Crimes Against International Law, at least in respect of genocide, war crimes and crimes against humanity. Even so, citing the earlier German decisions as well as recent amendments to Belgium's law on universal jurisdiction, the Supreme Court of Spain indicated in February 2003 that Spanish courts should exercise jurisdiction over genocide only when there is a "point of connection" with Spain.

There is growing evidence that the discipline imposed by transjudicial communication can serve to legitimize as well as constrain courts. As Joseph Weiler has observed, the dialogue between courts speaking a common language of law helps account for the prestige of the European Court of Justice (E.C.J.). In Weiler's view, a key source of the E.C.J.'s "compliance pull" is "the legal language itself: the language of reasoned interpretation, logical deduction, systemic and temporal coherence—the artifacts that national courts would partly rely on to enlist obedience within their own national orders." Weiler's insight suggests that courts exercising universal jurisdiction may, through well-reasoned opinions, earn the respect of disparate and distant political communities through the mediating influence of a transnational community of jurists.

VI. Universal Jurisdiction and Democratic Deliberations

The final plank in the conservative critique of universal jurisdiction is the applicable in the relations between the parties to a treaty. Id. art. 31(3)(c). Thus, the methodology of customary international law is often relevant in treaty interpretation.

306. These cases are described in Amnesty Report, supra note 11, at 96–101.
310. Reinforcing Weiler's conclusions, a study distilling the insights of judges, lawyers and political scientists who have closely followed the work of supra-national courts concluded that the quality of a supra-national court's judicial reasoning was a key factor accounting for the relative effectiveness of the court. Laurence R. Helfer and Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 Yale L.J. 273, 318–23 (1997).
charge that its exercise undermines democracies newly emerging from repressive governance. This claim has two principal strands. First, some commentators argue that foreign prosecutions could have a destabilizing effect in the country that endured atrocious crimes, potentially reversing tenuous progress in its transition to democracy.\textsuperscript{311} This concern loomed large in critical commentary following the arrest of General Pinochet in London; not a few observers warned that his detention might revive the Chilean military’s penchant for political intervention and deepen divisions within Chilean society.\textsuperscript{312}

Second, some argue that prosecutions by bystander states upend processes of democratic deliberation that properly belong to the political community directly affected by the crimes in question. John Bolton seemed to have something like this in mind when he denounced the European proceedings against General Pinochet on the asserted ground that, “[m]orally and politically, what Pinochet’s regime did or did not do is primarily a question for Chile to resolve.”\textsuperscript{313} To subject Pinochet to prosecution abroad when his own country has accepted his self-amnesty, the argument runs, is to usurp Chilean society’s own decisions about crimes of the Pinochet era.\textsuperscript{314} This critique proceeds from the premise that questions of punishment belong not to humanity writ large, but to particular communities—above all, to the society most deeply affected by the crimes in question.

This view directly challenges a core justification of universal jurisdiction, which emphasizes the universality of interest in and responsibility for repressing atrocious crimes. To understand this point, it is helpful to return to the moment when universal jurisdiction was first made widely applicable to human rights crimes, the aftermath of World War II. Justifying its jurisdiction, a U.S. Military Tribunal operating in Germany emphasized that the defendants were accused “[n]ot [of] crimes against any specified country, but against humanity.”\textsuperscript{315} It followed that “humanity” itself could summon perpetrators to account through universal jurisdiction: “[T]he inalienable and fundamental rights of common man need not lack for a court. . . . Humanity can assert itself by law. It has taken on the role of authority. . . . Those who are indicted . . . are answering to humanity itself, humanity which has no political boundaries and no geographical limitations.”\textsuperscript{316}

\textsuperscript{311} See Goldsmith and Krasner, supra note 29, at 51; Rabkin, supra note 43, at 33. Against this claim, human rights advocates assert that it is difficult, if not impossible, to identify a situation in which a country has been destabilized by prosecutions for human rights crimes. See supra note 30.

\textsuperscript{312} See David Bosco, Dictators in the Dock, AMERICAN PROSPECT, Aug. 4, 2000, at 26, 29.

\textsuperscript{313} American Servicemembers’ Protection Act: Hearing on H.R. 4654 Before the House Committee on International Relations, 107th Cong. (2000) (testimony of John R. Bolton, Senior Vice President, American Enterprise Institute).

\textsuperscript{314} See Kissinger, supra note 46, at 86, 90–91.

\textsuperscript{315} United States v. Otto Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 411, 497 (1950).

\textsuperscript{316} Id. at 498.
With the Nuremberg precedent, the Tribunal continued, "it is inconceivable that . . . the law of humanity should ever lack for a tribunal. Where law exists, a court will rise. Thus, the court of humanity . . . will never adjourn."317 When an Israeli court rendered judgment against Adolf Eichmann in 1961, too, invoked the interests of mankind: "The abhorrent crimes defined in [Israeli] Law are not crimes under Israel [sic] law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself. . . ."318

If a core justification for universal jurisdiction is a claim of universal conscience and responsibility, an important corollary emphasizes practical concerns: by their nature, crimes against universal conscience are unlikely to be punished in the state where they occurred. This justification had strong resonance in the aftermath of Hitler's crimes; German courts were not to be trusted to prosecute major Nazi war criminals. Thus, one U.S. military tribunal operating in Germany observed that surrendering the Nazi defendants before it for prosecution by German authorities would have been the "equivalent [of] a passport to freedom."319

More recently, this rationale for universal jurisdiction has been amplified by a related consideration. In many countries recently scourged by mass atrocity, the judicial system is in a state of wholesale collapse. Decades after the Khmer Rouge were routed from power, for instance, Cambodia was bereft of seasoned judges and lawyers, who had been targeted for extermination in the 1970s.320 In these circumstances, the state where atrocities occurred may not be able to bring perpetrators to account.

In sum, legal justifications for universal jurisdiction over atrocious crimes comprise two core claims: (1) certain crimes offend humanity writ large—a claim that translates into a global entitlement to bring perpetrators to account; and (2) unless every state assumes responsibility to prosecute the perpetrators of such crimes, many will likely elude the net of justice. Beneath the second

317. Id. at 499.
319. United States v. List (The Hostages Trial) (U.S. Mil. Trib. Nuremberg 1948), in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 55 (U.N. War Crimes Comm'n ed., 1949); see also United States v. Klein (The Hadamar Trial) (U.S. Mil. Comm'n Wiesbaden 1945), in 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 46, 53 (U.N. War Crimes Comm'n ed., 1947) (sustaining a U.S. Military Commission's jurisdiction in part on the basis of "'universality of jurisdiction over war crimes,' . . . according to which every independent State has, under International Law, jurisdiction to punish . . . war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished").
rationale is an implied claim: Universal jurisdiction provides an antidote to the impunity that accomplished despots are likely to enjoy in the countries that endured their crimes. Against these claims, critics say that universal jurisdiction has gone too far. If Nuremberg was justified, they argue, contemporary prosecutions push a noble effort "to extremes that risk substituting the tyranny of judges for that of governments." Later I will introduce considerations that call for considerable refinement of this critique. But first I want to make clear why I believe it merits serious consideration.

A. UPENDING DEMOCRATIC DELIBERATIONS?

Whether one subscribes to a deterrence, retributivist, expressive or other theory of punishment, such questions as what behavior should be criminalized and whether or how individuals should be punished matter deeply to the community in whose territory the conduct in question occurs. These issues are thus commonly recognized as ones that ought to be addressed through processes of self-governance. This is not to say that unanimity on matters of criminal punishment is either achievable or desirable for any political community; robust debate about such questions as the appropriateness of severe or mandatory penalties is the daily fare of a vibrant democracy. Nor is it to suggest that questions of punishment are committed to the exclusive province of local jurisdiction. Far from it. But self-government would have thin meaning if it did not include the right of political communities to debate—and determine—the code of lawful behavior within their territorial jurisdiction, as well as the consequences that may attach to breaches.

The claim that questions of punishment belong to particular communities has special significance when the crimes in question arise from a pattern of severe repression. In the aftermath of mass atrocities, the question "what should be done about the guilty?" becomes a defining issue for the society in which the crimes occurred. Whether a country tries to bury past depredations in a grave of silence and denial, examine and condemn them through the work of an officially-sanctioned truth commission, purge from public office those determined to have been culpable for their roles in systemic repression, provide reparations to

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321. Kissinger, supra note 46, at 86.
322. See supra text accompanying notes 315–19.
324. There is no standard definition of truth commissions, of which over thirty have been established in the past quarter-century. A leading expert on the phenomenon defines truth commissions as bodies that share the following characteristics: (1) truth commissions focus on the past; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a truth commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) these commissions are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord).
victims, and/or punish the perpetrators, the path it chooses is constitutive of its political community.

Tellingly, the phrase *transitional justice* has become a term of art for policies of justice devised by societies emerging from repressive governance. The words connote the hope that justice can be transformative, delivering a society from the past it now condemns to a future rooted in its devotion to human dignity and the rule of law. Governments that succeed brutal regimes may see criminal trials and other programs as vehicles for the "construction of a permanent, unmistakable wall between the new beginnings and the old tyranny." Through the work of truth commissions, prosecutions and other measures, societies recently scourged by ghastly crime affirm foundational values and reconstitute their political community based upon a common commitment to those values. At these moments, the social contract conjured by political philosophers as an analytic tool becomes incarnate in politics.

The deliberations surrounding a society’s program of transitional justice are not the sort that should be displaced by the paternalistic judgment of international law (though I want to reserve for now the question whether universal jurisdiction has this effect). It is not simply the case that reckoning with past crimes is a matter of unique interest to the community that endured abominations. Societies that have been governed though wholesale repression bear a special burden of reckoning, deriving from both moral and functional imperatives.

Morally, their burden stems from what Karl Jaspers called political guilt. In Jaspers’ lexicon, political guilt, “involving the deeds of statesmen and of the citizenry of a state, results in my having to bear the consequences of the deeds of the state whose power governs me and under whose order I live.” In his view, German citizens bore collective political (though not criminal) guilt by virtue of their “unconditional political surrender” to Hitler. Jintaro Ishida, a

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**Priscilla B. Hayner, Unsayable Truths 14 (2001).**


326. Otto Kirchheimer, *Political Justice* 308 (1961). While Kirchheimer was writing about criminal trials undertaken by a new government to judge the policies and practices of a predecessor regime, the same point applies to truth commissions. As Priscilla Hayner has noted, reports produced by several truth commissions have become the founding documents of democratic governments that emerged from the ashes of dictatorship. *See* Interview with Priscilla Hayner, Weekend Edition Saturday: Truth Commissions (National Public Radio broadcast, Aug. 25, 2001), available at http://www.npr.org/features/feature.php?wId=1127966.

327. Writing in the aftermath of the Holocaust, Jaspers identified four types of guilt pertaining to Nazi crimes, only one of which was the criminal guilt for which individuals were held to account in postwar prosecutions. Karl Jaspers, *The Question of German Guilt* 25–26 (1947) (E.B. Ashton trans., Fordham Univ. Press 2000).

328. Id. at 25.

329. Id. at 72.
Japanese historian who has chronicled his country's responsibility for World War II atrocities, evokes a related notion—the continuity of political responsibility for past crimes of state. "Even if you were born after the war," he told a reporter, "you still shoulder the history of your country."³³³

The functional aspect of transitional justice relates to its role as a vehicle of social and political transformation. It is easy to see a country's process of reckoning with past crimes as a retrospective exercise. But that misses a crucial point: societies that have instituted programs of transitional justice typically see the undertaking as laying a foundation for their collective future. The notion behind their aspirations is enigmatic and multilayered. I have already touched on one dimension: Through programs of transitional justice, societies emerging from dictatorship seek to draw a line between the values and policies of the ancien régime and their own. By instituting criminal trials or pursuing other policies of transitional justice, the new government condemns brutal policies of its predecessor and signals the dawning of a new era.

In larger perspective, programs of transitional justice may aim at repairing societies that have endured unspeakable crimes. That individual survivors of torture may need special care is a point we can readily grasp. A more elusive point is that whole societies must be repaired after they have endured epic evil.³³¹ Reporting on two countries' efforts to come to terms with past systems of politically-motivated torture, Lawrence Weschler captured the point this way:

I began to realize that there are societies—entire polities—which might themselves be considered torture victims, in every bit as great a need of rehabilitation as the individuals persisting in their midst. Indeed, torture itself, during repressive regimes, has a dual role: the expunging of the capacity for subjective aspiration in specific individuals, and through their example (the whiff of terror their fate spreads), the expunging of that capacity in the wider society as well. When individuals are being tortured and everyone knows about it and no one seems able to do a thing to help, primordial mysteries at the root of human community come under fundamental assault as well. Intersubjectivity is laid to waste.³³²

Thus as Weschler suggests, programs of transitional justice may help restore citizens' capacity to be citizens in a democratic society.³³³ Pablo de Grieff takes

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³³¹ Scholars of transitional justice have frequently invoked therapeutic models and adapted them to a social context. But as Laurel Fletcher and Harvey Weinstein have cautioned, the assumptions behind this approach may not always be warranted. See Laurel E. Fletcher & Harvey M. Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 24 HUM. RTS. Q. 573, 593–95 (2002).
³³³ Cf. Tina Rosenberg, The Haunted Land xviii (1996) (asserting that victims of past atrocities "can truly heal and resume their contributions to society only when their dignity and suffering have been officially acknowledged").
the point farther: a key aim of programs of transitional justice is “to return (or, in some cases to establish for the very first time) the status of citizens to individuals.”

Integrally related to this aim, transitional justice seeks to establish or restore civic trust among citizens and between citizens and their government.

If national processes of reckoning with the past are deeply concerned with victims, they may be “just as important for the collaborators. Preventing dictatorship’s return requires a full understanding of the mechanisms of dictatorship.” This, at any rate, is a deep article of faith among proponents of transitional justice. Of course there is no way to prove its truth. For that, we would need to know the results of paths not taken as well as the reality that unfolded in the wake of an enacted program of transitional justice. But we can know that some programs of transitional justice have had a palpable effect on societies’ understanding of the factors that led to past atrocities and bolstered their resolve to prevent a recurrence.

By common agreement, for example, the work of South Africa’s Truth and Reconciliation Commission (TRC) breached the fortress of denial that many white South Africans had erected around themselves in respect of apartheid-related atrocities. Although those atrocities had been documented in chilling detail across decades, many white South Africans regarded these reports as untrustworthy until they heard perpetrators confess to their crimes before the TRC’s amnesty committee.

In common with many other truth commissions, the TRC adopted recommendations aimed at preventing a recurrence of past abuses as well as repairing the harm suffered by apartheid’s victims. Learning from the past was, in the view of at least some members of the TRC, all about the future. In myriad ways, then, a nation’s reckoning with past atrocities may help restore its civic health.

334. Pablo de Grieff, Reparations Efforts in International Perspective; What Compensation Contributes to the Achievement of Imperfect Justice, in Repairing the Unforgivable: Reparations and Reconstruction in South Africa (Charles Villa-Vicencio & Erik Doxtader eds., forthcoming 2004).

335. Id.; see also Pablo de Grieff, Justice and Reparations in Repairing the Past: Compensation for Victims of Human Rights Abuse (forthcoming 2004).

336. Rosenberg, supra note 333, at xviii.

337. The author of a book that disclosed previously unknown facts about a 1968 massacre in Mexico expressed the importance of confronting past atrocities in terms that emphasize the responsibilities of citizenship: “How can we be citizens,” she asked, “if we do not know what happened before, if we don’t know why political and economic decisions were made — if we don’t understand anything?” Tim Weiner, Mexico Digs at Last for Truth About 1968 Massacre, N.Y. Times, Feb. 7, 2003, at A3 (quoting Claudia Sierra Campuzano).

338. See, e.g., Hayner, supra note 324, at 25.

339. The statute establishing the TRC vested the body with authority to confer amnesty for politically motivated crimes provided the perpetrator fully confessed to his crimes. With the inducement of amnesty, some perpetrators confessed to their crimes in nationally televised hearings.

Although I have focused on considerations that have special relevance during periods of transition from systemic repression to consolidated democracy, these considerations link up to theories of moral autonomy that are central to some strands of democratic theory. Robert Dahl, for instance, suggests that a basic justification for self-government derives from the intrinsic value of moral autonomy. The “reasons for respecting moral autonomy,” in Dahl’s view, “sift down to one’s belief that it is a quality without which human beings cease to be fully human and in the total absence of which they would not be human at all.” Democratic government furthers moral autonomy by maximizing “the feasible scope of self-determination for those who are subject to collective decisions.” If, with Dahl, we believe that democratic government is desirable because it maximizes the scope for moral self-determination, we must take seriously the charge that bystander justice can sideline a society’s process of collective deliberation about abuses committed in its name and against members of its polity.

John Stuart Mill also emphasized the intrinsic importance of moral autonomy, not only for each individual but also because of the social benefits that accrue from ensuring a protected sphere of personal sovereignty in which character can develop. For Mill, participatory politics was important in large part because of its educative effect and its role in fostering public spiritedness. In his conception, a key aim of democratic governance was to inculcate in citizens a commitment to the general interest, and not just each individual’s personal interest. Of course, Mill was thinking mainly of “normal” politics, rather than the extraordinary politics of societies emerging from dictatorship. But the values he cherished have special resonance for societies recovering from a protracted period of brutal governance. As suggested by the preceding account, many believe that a key test of the success of programs of transitional justice is whether they lead citizens to understand and accept their own responsibility for their countries’ moral descent, if only through their silent complicity. Through such acceptance, citizens may be inoculated against the temptation to remain

341. Dahl defines a morally autonomous person as “one who decides on his moral principles, and the decisions that significantly depend on them, following a process of reflection, deliberation, scrutiny, and consideration.” ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 91 (1989).
342. Id.
343. Id.
345. See supra text accompanying notes 336–339. Some aspects of this notion call to mind Karl Jaspers’ conceptions of metaphysical and political guilt. In his typology, metaphysical guilt is based upon the responsibility that humans bear for one another, particularly if crimes are committed in a person’s presence or with her knowledge. “If I fail to do whatever I can to prevent [such crimes],” Jaspers wrote, “I too am guilty. If I was present at the murder of others without risking my life to prevent it, I feel guilty in a way not adequately conceivable either legally, politically or morally.” Political guilt involves the responsibility of citizens for depredations of the state. See supra text accompanying notes 328–330. This type of guilt is based upon the responsibility that citizens share for the actions of their leaders, even if the former opposed the latter. JASPERS, supra note 327, at 26.
silent if, in the future, the rights of others are threatened.

In sum, principles of self-government are deeply implicated in the way a country confronts its own legacy of mass atrocities. Measures of transitional justice are constitutive political acts, ideally restoring to full citizenship those who in the past were denied the protection of law. Further, we may be most confident that a country will not once again descend into the abyss of wholesale repression if it addresses past abuses through home-grown policies of reckoning and repair.

B. ENHANCING DEMOCRATIC DELIBERATIONS?

If the conservative critique of universal jurisdiction finds support in core values of political community, it nonetheless suffers from deeply flawed analysis. To begin, we should not uncritically accept the claim that post-Pinochet Chile was exercising the prerogatives of a full-fledged democracy when its government accepted Pinochet’s self-amnesty. After all, while preparing to relinquish power, Pinochet credibly threatened military force in the event his self-amnesty was challenged. To deliberate under the threat of destabilizing force is hardly an ideal exercise in self-government.

More fundamentally, the critique of universal jurisdiction framed by leading exponents falsely assumes that political communities decide how to confront past atrocities in a hermetically-sealed universe. From this premise the critique proceeds to its principal charge: enforcement of international law through the exercise of universal jurisdiction improperly disturbs policy choices resulting from domestic deliberations. To see why the assumptions underlying this critique are unsound, it is useful to deepen the account of transnational legal process set forth earlier.

As legal and international relations scholars have recognized, domestic and transnational political and social processes are constitutive of the values that shape both international and domestic law. The rules of international law that result from these processes may in turn reinforce and even significantly (re)shape values within discrete political communities, as well as across national boundaries. It is not simply the case that domestic politics define state preferences, which are then advanced by a state’s diplomatic representatives in

346. See AMERICAS WATCH, CHILE IN TRANSITION 1988–1989, at 73 (1989) (quoting Pinochet saying, “No one is going to touch my people. The day they do, the state of law will come to an end.”).
347. See supra Parts II and IV.
their negotiations with representatives of other countries. Rather, interactions across borders often shape participants’ values in ways that define their international negotiating positions. In turn, the international norms constructed through these processes loop back into domestic political and lawmaking processes.

Harold Koh describes the legal dimension of these phenomena in terms of transnational legal process:

Transnational law transforms, mutates and percolates up and down, from the public to the private, from the domestic to the international level and back down again. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again. Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process.

Thus norms embodied in international law, such as the notion that torturers should be punished, may at first percolate up from national law and political processes. Once embodied in international law, at least some norms seep back into domestic settings, reshaping or reinforcing values of domestic political communities.

Nonstate actors play key roles in lawmaking and other normative processes that transcend domestic boundaries. In the Pinochet case, the court room became a focal point for this phenomenon. As previously noted, it was private actors, not a public prosecutor, who activated the criminal proceedings in Spain that led to Pinochet’s indictment. Significantly, the petitioners were Chilean victims of Pinochet-era human rights violations (some possessing dual Spanish-Chilean citizenship), whose efforts to secure justice were backed by a transnational coalition of human rights activists that included Chilean NGOs, Spanish lawyers, European and American human rights advocates, and Chilean exiles in Europe.

The Pinochet proceedings also exemplified the significant role that sub-state actors play in transnational legal processes. States do not always participate in transnational processes as unitary actors; sometimes their participation can be

349. See Martha Finnemore, National Interests in International Society 128 (1996) ("States do not always know what they want. They and the people in them develop perceptions of interest and understandings of desirable behavior from social interactions with others in the world they inhabit."); cf. Anthony Clark Arend, Legal Rules and International Society 128 (1999) ("Constructivists believe that the interests and identities of states are created—at least in part—through interaction and can change through interaction"). By recognizing that political processes shape—and therefore reshape—state preferences, these and other writers depart from the realist approach, which tends to assume that state preferences are "exogenous and fixed." Anne-Marie Slaughter, International Law in a World of Liberal States, 6 Eur. J. Int’l L. 503, 507 (1995).


351. This notion is codified in the Convention Against Torture, which played a key role in the Pinochet proceedings in Europe. See supra note 144 and text accompanying notes 143–149.

352. See supra text accompanying notes 88–90.
meaningfully explained only by disaggregating the state.\textsuperscript{353} Inevitably in light of formal guarantees of judicial independence in both Spain and the United Kingdom, the role of courts in both countries was distinct from that of the executive.\textsuperscript{354} Less obviously but of greater relevance here, the communication among judicial officials in Spain, the United Kingdom, Chile and elsewhere\textsuperscript{355} helped transform values and expectations transnationally, with particularly profound effect in Chile.

The decisions of judges in both Madrid and London had a transformative impact on judges and prosecutors elsewhere, exemplifying what Harold Koh calls the normativity of transnational lawmaking processes.\textsuperscript{356} That Pinochet was arrested in a country whose legal culture epitomizes conservative tradition seemed to inspire the legal imagination of judicial officials across Europe. On

\textsuperscript{353} See Andrew Moravcsik, Taking Preferences Seriously: A Liberal Theory of International Politics, 51 Int'l Org. 513, 519 (1997) (asserting that while states may act in a largely unitary fashion in some areas of foreign policy, with respect to others "the state may be 'disaggregated,' with different elements—executives, courts, central banks, regulatory bureaucracies, and ruling parties, for example—conducting semiautonomous foreign policies in the service of disparate societal interests").

\textsuperscript{354} Although public prosecutors in Spain initially approved the criminal investigation of Pinochet (which, as noted, was activated by private parties), they actively opposed its continuation following Pinochet's arrest in London. See supra text accompanying note 90. The Prime Minister of Spain at the time, José María Aznar, told Chilean officials that he disapproved of the investigation by magistrate Baltasar Garzón but could not stop it. In Aznar's view, Garzón's inquiries complicated Spain's diplomatic and trade relations with Chile. See Marlise Simons, Pinochet's Spanish Pursuer: Magistrate of Explosive Cases, N.Y. Times, Oct. 19, 2000, at A1.

In England, too, the executive and judicial branches acted independently of each other in key respects, although their respective roles were not ostensibly opposing. One of the first crucial decisions about Pinochet's fate following his arrest had to be made by Jack Straw, then British Home Secretary, and it also fell to Straw to decide at various later stages how to respond to Spain's request for Pinochet's extradition. Up until the law lords issued their crucial ruling in Pinochet III, Straw took the position that the issues surrounding Spain's extradition request should be left to judicial resolution. See David Sugarman, From unimaginable to possible: Spain, Pinochet and the judicialization of power, 3 J. Spanish Cultural Stud. 107, 114 (2002). For their part, the law lords who concluded that Pinochet was not wholly immune from criminal process signaled in their opinions that this ruling need not preclude the Home Secretary from declining to extradite Pinochet to Spain. Indeed, virtually every law lord who concluded that Pinochet was liable to extradition included a "back to Jack" invitation in his opinion. See, e.g., Pinochet III, supra note 63, [2000] 1 A.C. 147, 260 (H.L. 1998) (opinion of Lord Browne-Wilkinson) (noting that when the Secretary of State issued an authority to proceed pursuant to British extradition law, he assumed that a "whole range" of torture and murder charges would be the basis of extradition proceedings; since the present decision "exclude[d] from consideration a very large number of those charges," this would "obviously require the Secretary of State to reconsider his decision . . . in the light of the changed circumstances"); see also id. at 248 (opinion of Lord Hope); id. at 264 (opinion of Lord Hutton); id. at 267 (opinion of Lord Saville); id. at 279 (opinion of Lord Millett). Each branch, then, seemed to regard the Pinochet matter as a proverbial hot potato and sought relief from the other branch. Ultimately, Straw brought the British proceedings to an end when he decided, based upon a review of Pinochet's health, that the former Chilean leader could return home. See Clifford Krauss, Freed by Britain, Pinochet Is Facing a Battle at Home, N.Y. Times, Mar. 3, 2000, at A1.

\textsuperscript{355} I do not mean to imply that there was direct communication among these officials, although there has been some of this. Rather, I am referring to indirect communication through the impact on judicial officials in one country of decisions taken or issued by judicial officials in another. See infra text accompanying notes 356-65.

\textsuperscript{356} See supra text accompanying note 350.
the heels of Pinochet’s arrest in London, several other European countries lined up behind Spain seeking Pinochet’s extradition. Pinochet’s arrest in London seemingly legitimized across Western Europe the idea that the former Chilean leader was an appropriate subject of transnational criminal proceedings.

For his part, Spanish magistrate Baltasar Garzón reportedly was emboldened to pursue Pinochet by recent international efforts to prosecute perpetrators of “ethnic cleansing” in the former Yugoslavia and genocide in Rwanda. The unexpected success of Garzón’s seemingly quixotic quest—no one, after all, expected his investigation to lead to Pinochet’s arrest in London—has in turn inspired judges throughout Latin America, as well as Europe and Africa, to pursue dictators previously thought to be legally untouchable. An astute Chilean observer, José Zalaquett, calls this the “Garzón effect.” Zalaquett explains:

The initiative of the now world famous Spanish investigative judge who sought Pinochet’s extradition was soon emulated by judges from other European countries who likewise petitioned the United Kingdom to have him extradited. Garzón seems also to have inspired judges and prosecutors in many other countries. . . . He seems to have ushered into the world arena a new figure—the international judge (or more properly, the international prosecutor). . . . He will probably be remembered for having foreshadowed a period of international judicial activism. . . .

The most profound reverberations of the European proceedings were in Chile. On December 1, 2000, Chilean Judge Juan Guzmán formally charged Pinochet with the kidnapping of political opponents in the aftermath of the 1973 coup that brought Pinochet to power and placed the former president under house arrest. To be sure, even before Pinochet was arrested in England,

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359. See Anthony Faiola, “Pinochet Effect” Spreading: Case Opens Way to Other Prosecutions, WASH. POST, Aug. 5, 2000, at A1 (reporting that arrest of Pinochet inspired efforts to bring to justice former dictators in Brazil, Argentina, and Uruguay who had long been thought beyond the reach of justice).

360. See supra text accompanying notes 4–5.


362. See Clifford Krauss, Pinochet’s Arrest Ordered by Judge, N.Y. TIMES, Dec. 2, 2000, at A1. As noted, legal proceedings against Pinochet in Chile were later halted when the former president was found mentally unfit to stand trial. See supra text accompanying notes 76–78. More recently, however, an appeals court in Santiago ruled in favor of removing the former president’s immunity from prosecution in a case involving disappearances in the 1970s; its ruling was upheld by Chile’s Supreme Court in August 2004. See supra note 78.
Chilean society had made significant progress in its national process of reckoning with his crimes.\textsuperscript{363}\ Even so, proceedings against Pinochet in Spain, England and other countries had a catalytic effect in Chile. In the words of Chilean journalist Patricia Verdugo, the 503 days that Pinochet spent under arrest in London "changed Chilean politics. The 'untouchable' had been touched.\dots. The fog of fear began to dissipate in the deepest recesses of [Chile]."\textsuperscript{364} The \textit{New York Times} reported that the case that led to Pinochet's house arrest in Chile "began to gain currency in Chile only after General Pinochet [had been] arrested two years [earlier] in London on a Spanish warrant."\textsuperscript{365}

Far from displacing Chile's internal project of addressing its past, then, the arrest abroad of General Pinochet re-energized Chile's process of recovering from dictatorship, fortifying its democratic transition. The possibility that Pinochet could be prosecuted outside Chile did not diminish or circumvent that country's democratic deliberations, but rather enlarged the space within which Chilean society could address its past.

Nor is Chile an isolated example. In August 2003, for example, both houses of Argentina's Congress voted to annul two 1980s-era amnesty laws. This action has been attributed in part to Spanish magistrate Baltasar Garzón's issuance of warrants seeking the extradition of 45 Argentine military officers and one civilian.\textsuperscript{366}

Against these developments, the conservative critique of the \textit{Pinochet} case

\textsuperscript{363} See Richard A. Falk, \textit{Assessing the Pinochet Litigation: Whither Universal Jurisdiction?}, in \textit{Universal Jurisdiction}, supra note 5, at 97, 103 (Stephen Macedo, ed. 2003); Zalaquett, supra note 361.


\textsuperscript{365} Krauss, supra note 362, at A1; see also Reed Brody, \textit{Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question}, \textit{The Nation}, Apr. 30, 2001, at 25, 25–26 (noting that after Pinochet's arrest and detention in England, "[p]reviously timid Chilean judges began looking for chinks in the dictator's legal armor.\dots. The number of criminal cases against Pinochet jumped to dozens, then hundreds"); Faiola, supra note 364, at A1 (reporting that although prosecution seemed "impossible" when the first case against Pinochet was filed before Judge Guzmán in 1998, "Chile—along with Guzman's case—has changed in profound ways since the arrest of Pinochet"); Clifford Krauss, \textit{High Court Voids Charges for Pinochet; Sets New Date}, \textit{N.Y. Times}, Dec. 21, 2000, at A11 ("A trial would have been unthinkable [in Chile] until General Pinochet was arrested two years ago in London on a Spanish warrant."); Tina Rosenberg, \textit{Editorial Observer: In Chile, the Balance Tips Toward the Victims}, \textit{N.Y. Times}, Aug. 22, 2000, at A20 (stating that the "catalyst" for Chilean judges' "new assertiveness was the arrest of Mr. Pinochet in Britain on a Spanish warrant in 1998").

seems not so much implausible as impoverished. John Bolton’s account of “a Spanish magistrate operating completely outside the Chilean system” seeking to “impose[] his will on the Chilean people” is, at the very least, descriptively inadequate in light of the central role of Chileans in driving the European proceedings against Pinochet. In larger perspective, it would be a mistake to suppose that Chilean society exists, deliberates, and determines its democratic destiny in isolation from transnational processes. As Martha Finnemore has observed, “[t]he fact that we live in an international society means that what we want and, in some ways, who we are are shaped by the social norms, rules, understandings, and relationships we have with others.” How members of Chilean society define their values is inevitably influenced by the multiple communities to which they belong, some of which transcend national boundaries. Thus to suggest that Chile should determine Pinochet’s fate without hindrance from outsiders misses a crucial point: how Chileans exercise their moral autonomy is partly a function of their participation in transnational normative processes.

Universal jurisdiction thus presents a paradox. As conservative critics have

367. Bolton, supra note 313.
368. FINNEMORE, supra note 349, at 128. Even when they coalesce on a temporary basis to advance a specific goal, such as the prosecution of General Pinochet, transnational coalitions can play a significant role in generating, reinforcing, reconstructing and diffusing values. See Patricia Chilton, Mechanics of Change: Social Movements, Transnational Coalitions, and the Transformation Processes in Eastern Europe, in BRINGING TRANSNATIONAL RELATIONS BACK IN 189, 196 (Thomas Risse-Kappen ed., 1995) (“Specific coalitions may not be durable,... but their capacity to generate ideas which are picked up by other groups is crucial.”).
369. See THOMAS M. FRANCK, THE EMPOWERED SELF 99 (1999) (“What is emerging... is a global system increasingly characterized by overlapping communities and multivariagated personal loyalties yielding more complex personal identities.”); cf. Stephen Macedo, Liberal Virtues, Constitutional Community, Rev. Pol. 215, 221–23 (1988) (writing that within countries, there are multiple, overlapping and cross-cutting communities that play significant roles in shaping the values of their members and that the views and even configuration of these communities may change as a result of debates over political morality).
370. South Africans would readily appreciate the point. Although their country’s Truth and Reconciliation Commission (TRC) was conceived by South Africans, it drew inspiration from other countries that had already experienced political transitions. Twice in 1992, individuals who played a key role in shaping South Africa’s post-apartheid policies traveled to Eastern Europe to observe societies in transition from authoritarian to democratic government. Anticipating South Africa’s first democratic elections in 1994, Alex Boraine, who later became Chairman of the TRC, organized a conference in South Africa examining experiences of other countries that had recently emerged from periods of protracted abuse “in order to assist South Africans towards a better appreciation of the... problem and to narrow the options which might be open to us.” ALEX BORAI NE, A COUNTRY UNM AskED 16 (2000). Years later Boraine reflected on the conference’s impact:

The contribution made by [the foreign participants] cannot be overestimated. Anyone who reads the Promotion of National Unity and Reconciliation Act which was written months later will detect their influence. ... [L]et me emphasize how fortunate South Africa has been in receiving guidance from people who have had particular experience in their own countries or in international human rights, which gave us a road map with which to pursue our own quest.

Id. at 17. The Promotion of National Unity and Reconciliation Act established South Africa’s Truth and Reconciliation Commission.
cautioned, its exercise at least theoretically risks displacing democratic deliberations in societies that have endured atrocious crimes. Yet as the Pinochet case and other recent examples demonstrate, bystander justice may have just the opposite effect: it may energize domestic processes of reckoning in countries most directly affected by atrocious crimes.

Insights provided by international relations theory go some way toward resolving the paradox. The national debate in Chile over “what should be done about the guilty” has not transpired in isolation from the transnational lawmaking phenomena that led to Pinochet’s arrest in London. In fact, Chileans (ironically including Pinochet himself) actively participated in constructing the norms and institutions—the building blocks of a new architecture of transnational justice—that led to Pinochet’s arrest.371 In turn, the universal code that Chileans helped draft has reinforced Chile’s national values, enhancing rather than undermining national processes of self-government. Core features of the emergent system of transnational lawmaking mean that judges in, say, England or Spain are not quite as far removed from Chilean society as we may instinctively suppose.

To recognize that Chile’s national process of reckoning with its past plays out in a broader frame of transnational normative and legal processes is not the same thing as asserting that it hardly matters where Pinochet is prosecuted. As I have argued, democratic values are deeply implicated by questions of punishment for past crimes; these belong specially if not exclusively to particular communities.372 The challenge, then, is to ensure that universal jurisdiction is exercised in a fashion likely to enhance rather than undermine democratic values.

C. A FRAMEWORK FOR RECONCILING DEMOCRATIC PARTICULARISM AND UNIVERSAL JURISDICTION

With this challenge in mind, my aim in this section is to identify principles that may ground the legitimate exercise of universal jurisdiction in light of democratic principles, building upon conclusions derived from previous sections.

First, a state’s exercise of universal jurisdiction satisfies a key test of legitimacy when the defendant’s state of nationality (or, if different, the state where the crimes took place) has provided its consent, whether through general acceptance of established rules of customary international law, ratification of a treaty that establishes a regime of universal jurisdiction, or by providing ad hoc consent. Countries can and frequently do surrender a substantial measure of sovereignty to supranational and transnational legal regimes; when predicated upon meaningful domestic processes of democratic deliberation, such choices

371. As noted earlier, Chile ratified the Convention Against Torture, which proved to be crucial in stripping away Pinochet’s immunity from criminal process in relation to charges of torture, while he was president of Chile. See supra note 179 and accompanying text.

372. See supra Part VI. A.
are a perfectly legitimate exercise of self-government.\textsuperscript{373}

But if democratic consent goes a long way toward legitimizing universal jurisdiction, it is necessary to ask whether its legitimacy invariably \textit{requires} the consent provided by the suspect’s state of nationality or, if different, the state where the crimes occurred. Notably, the Convention Against Torture and several other treaties authorize States Parties to assert universal jurisdiction over anyone in their jurisdiction suspected of having committed certain offenses, even if the suspect’s state of nationality has not ratified the convention.\textsuperscript{374} If we believe that law has legitimate authority only over persons who were able to participate in its adoption as law for them,\textsuperscript{375} applying the Torture Convention to citizens of non-consenting states may seem problematic.

Proponents of bystander justice would likely counter that it is perfectly legitimate for a national court to assert universal jurisdiction over conduct that has been recognized as an international crime\textsuperscript{376} under customary international law; what the Torture Convention adds to the right to exercise universal jurisdiction over torture that states already possess is a \textit{duty} on the part of States Parties to exercise their established authority under circumstances defined in the treaty. For present purposes it is enough to note that the particular issue of consent just raised would be obviated if universal jurisdiction were exercised, in the absence of treaty-based or ad hoc consent by the relevant state, only in respect of offenses that states generally agree are indeed subject to universal jurisdiction.

If a state has generally consented to the exercise of universal jurisdiction in defined circumstances through, for example, its participation in a treaty regime, but nonetheless objects to another state’s exercise of universal jurisdiction over its national in a particular case, is the presumption of democratic legitimacy vitiated by the later objection? The question poses a variant on a conundrum

\textsuperscript{373} See supra Part II.B.


\textsuperscript{375} See supra note 225 and text accompanying note 251.

\textsuperscript{376} The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has observed that universal jurisdiction is “nowadays acknowledged in the case of international crimes.” Prosecutor v. Tadić, No. IT-94-1-AR72, at ¶ 59, 62, 105 I.L.R. 453 (Int’l. Crim. Trib. for former Yugoslavia App. Chamber Oct. 2, 1995) (decision dismissing defense motion for interlocutory appeal on jurisdiction), at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm; see also Prosecutor v. Kallon, No. SCSL-2004-15-AR72(E), and Prosecutor v. Kamara, No. SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 70 (Special Court for Sierra Leone, Mar. 13, 2004) (“One consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes”). But see id. ¶ 68 (“[N]ot every activity that is seen as an international crime is susceptible to universal jurisdiction.”).
that has vexed generations of political and legal philosophers. One writer, seeking to justify judicial review in a domestic context, invokes a metaphor that is helpful here:

Suppose that before the invention of anesthesia a patient needed to have a limb amputated. One can imagine a rational patient telling a doctor prior to the operation to disregard the patient’s own anticipated preference, once the excruciating pain begins, for not going forward. A doctor who then proceeds with the operation despite the patient’s protestations might be treated as following, rather than violating, the patient’s desires.

An analogous form of precommitment arguably supports judicial nonaccountability. Perhaps a previous majority, fearful of its own inability to choose sensibly in the future, wished to bind itself to have at least certain kinds of questions decided by judges who were not accountable. If so, then the argument from majoritarianism can be made to support rather than undermine judicial independence.\textsuperscript{377}

Research undertaken by political scientist Andrew Moravcsik suggests that this metaphor is relevant in explaining why many states have accepted transnational regimes for enforcing human rights. Moravcsik has found that societies that have experienced protracted periods of repressive government are particularly likely to consent to treaties establishing strong judicial enforcement mechanisms.\textsuperscript{378} The reasons are not hard to fathom: having endured the depredations of dictatorship, citizens of new or newly-restored democracies may be determined to lock in their gains through guarantees of external enforcement in the event that dictatorship once again threatens their liberty and security. As Moravcsik’s research suggests, such decisions may be integral to a society’s program of democratic consolidation rather than a circumvention of democratic process.\textsuperscript{379}

\textsuperscript{377} Seidman, \textit{supra} note 172, at 1588 (citations omitted). Professor Seidman credits Thomas Schelling with the medical analogy. \textit{See id.} at 1588 n.54 (citing \textsc{Thomas Schelling}, \textsc{Choice and Consequence} 83 (1984)).

\textsuperscript{378} \textit{See, e.g.,} Andrew Moravcsik, \textit{The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe}, 54 \textsc{Int’l Org.} 217, 220 (2000) (concluding that the “primary proponents of reciprocally binding human rights obligations” in Europe were “the governments of newly established democracies . . . , which have the greatest interest in further stabilizing the domestic political status quo against nondemocratic threats”). Subsequent research undertaken by Moravcsik in relation to international, African and inter-American treaties reinforces this conclusion: “Once a country . . . makes the transition to democracy, then the probability that it will support mandatory or general enforcement is inversely proportional to its age as a democracy (as well as its likely future stability).” Private communication from Andrew Moravcsik to Diane Orentlicher (Oct. 15, 2001) (on file with author) (summarizing results of unpublished research). Lutz and Sikkink suggest that Moravcsik’s thesis is not fully borne out by patterns of treaty adherence in the Americas, but it is not clear that they are applying the same criteria as Moravcsik. \textit{See Lutz & Sikkink, supra} note 366, at 12.

\textsuperscript{379} In recent years some states have acquiesced in the exercise of jurisdiction over their nationals when the prospect was no longer hypothetical. The Bosnian government did not object to Germany’s exercise of universal jurisdiction over Bosnian nationals in several cases prosecuted in the 1990s. \textit{See}
If consent that takes the form of pre-commitment validates the exercise of foreign jurisdiction, courts that can exercise universal jurisdiction should nonetheless respect the right of the "home state" to prosecute offenders if its courts are willing and able to bring them to justice. By averting or dispelling a culture of impunity, in-country justice provides the surest guarantee that human rights will be respected in the future, provided there are sufficient guarantees of fair process. Moreover, justice at home can more surely advance a wounded nation's recovery in the wake of mass atrocity than the remote justice dispensed by foreign courts. Provided that they enjoy legitimacy, trials in the state most affected by human rights abuses are more likely than prosecutions conducted a world away to inspire ownership by societies that have endured mass atrocity. Thus, unless there is reason to doubt the fairness or capacity of their courts, the claims of states that endured such crimes should be honored.

This principle has been reflected—if sometimes problematically—in the law and practice of several countries that have recently exercised universal jurisdiction. In December 2000, a Spanish court dismissed without prejudice a criminal complaint against Guatemalan military officials on the ground that there was no reason to believe the complainants could not find justice in Guatemalan courts;\(^3\) its ruling was later upheld by Spain's Supreme Court.\(^3\) Before Belgium repealed its "universal competence law" in August 2003,\(^3\) its Parliament amended the law to allow criminal complaints based on universal jurisdiction to be forwarded to democratic countries deemed capable of handling the cases in their own legal systems.\(^3\)

Still, deference to the claims of societies ravaged by atrocious crimes must be tempered by a keen awareness of the constraints they face. Victims rarely if ever seek justice abroad if they can find it at home.\(^3\)

**CONCLUSION**

More than six years after the arrest of Augusto Pinochet in England, it is now clear that the criminal proceedings against him were the leading edge of a profound transformation. In recent years a raft of countries have practiced

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31. See supra note 14.

32. See supra note 35 and accompanying text.


34. This consideration may have a bearing on questions such as who bears the burden of proving that the state where atrocities occurred will indeed dispense justice.
bystander justice, securing the legal bridgehead claimed by British judges.

But if *Pinochet* and other recent cases have breathed new life into universal jurisdiction, they have also spawned intensive debate about the scope of its legitimate use. Critics charge that bystander justice threatens democratic values because it allows foreign judges to make law for societies to whom they are largely unaccountable. In their view, a deeper challenge to democratic values is inherent in universal jurisdiction: its exercise assertedly wrests decisions about how to confront past atrocities away from the societies to whom these questions belong and may undermine tenuous transitions to democracy.

These concerns deserve to be taken seriously. Critics of universal jurisdiction properly emphasize the primacy of local efforts to confront past crimes: societies that have endured the depredations of dictatorship bear a special burden of reckoning and repair. Home-grown justice represents at least partial payment of a country's debt to citizens previously denied protection of the law and inspires confidence that, in the future, the nation will not once again succumb to wholesale repression. Skeptics also have some ground to wonder whether bystander justice can surmount the peculiar challenge of judicial accountability inherent in its use. Through continuous interaction with fellow citizens, judges operating in a domestic setting remain publicly accountable in myriad ways that anchor the legitimacy of their interpretive work. Similar resources for legitimation of judicial authority are manifestly more elusive in a transnational setting.

Yet the conclusion to which these concerns have led some critics—whole-sale rejection of universal jurisdiction—rests upon deeply flawed assumptions. To begin, leading proponents of the view that universal jurisdiction is fundamentally undemocratic overlook a crucial point: many states have consented to its exercise, and for perfectly valid reasons. Societies recovering from the ravages of mass atrocity have been the first to sign up for transnational enforcement regimes that can provide a backstop in the event their nations once again descend into the abyss of lawless violence. In doing so, they are exercising the prerogatives of democracy—and seeking to safeguard its future.

In larger perspective, recent critiques of universal jurisdiction reflect an impoverished understanding of how national communities exercise moral and political autonomy in reckoning with past crimes. The way that societies deliberate over issues of public importance is shaped by and reflects their participation in transnational normative processes, including the processes at play in the development and exercise of universal jurisdiction. As *Pinochet* teaches, we ought not commit the mistake of believing that democratic deliberations should—or even could—transpire within a bounded *nomos* of national politics.

More challenging questions of accountability arise by virtue of the fact that courts exercising universal jurisdiction operate at a remote distance from communities deeply affected by their judgments. But these challenges are hardly insurmountable. Straightforward measures can enhance the transparency of courts exercising universal jurisdiction and bridge the distance between them
and the communities most affected by their judgments. Significantly, too, a transnational community of jurists now disciplines the work of courts that exercise universal jurisdiction, operating as a professional bulwark against the misuse of judicial power.

A growing body of empirical data calls for considerable refinement of another concern voiced by critics of bystander justice—that foreign prosecutions could destabilize fragile democracies. Recent attempts to exercise universal jurisdiction have had the opposite effect, as the Pinochet case exemplifies. By all accounts, the arrest and detention of General Pinochet in England had a catalytic effect in Chile, broadening the political space for confronting Pinochet-era crimes at home and fortifying Chile’s democratic transition.

But if the Pinochet case highlights the democracy-enhancing potential of universal jurisdiction, the proceedings in Europe also suggest the value of clarifying the circumstances in which national courts should exercise universal jurisdiction. The legitimacy of bystander justice may be in greatest doubt when national prosecutors and judges seek to extend their writ beyond established boundaries of state assent, whether expressed through participation in a relevant treaty, ad hoc consent, or customary international law. While their most obvious effect is to constrain prosecutors and judges, clearly-framed mandates also empower courts to assert universal jurisdiction in circumstances where its legitimacy should not be doubted.