Human Rights Law Meets
Private Law Harmonization:
The Coming Conflict

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I. INTRODUCTION

As international law underwent a profound transformation in the twentieth century, two movements in particular led the transformation: the international human rights movement and the movement to unify private law. Both developments challenged the international regime that had predominated since the 1648 Treaty of Westphalia. The human rights movement did so by rejecting the premise that nation-states are the sole actors on the international stage and that international law exists to serve their interests. It posited a contrary set of premises: international law exists to foster the freedom and dignity of the individual, and the international legal system must subject states to accountability in their treatment of individuals, including their own citizens. The Westphalian regime also came under attack from a second source, the unification movement, which was directed at a particular byproduct of the nation-state’s rise to dominance: legal fragmentation, exemplified by the creation of national legal codes intended to embody the spirit of particular nation-states rather than their common legal patrimony. These codes moved nearly every country in Europe (with ripple effects on the legal systems of overseas colonies) toward a conception of private law that celebrated particular national characteristics. In the face of this trend, the unification movement of the twentieth century sought to restore not only the unity of European law, but also a conception of law that was less a product of positivism and more an expression of universalism.

Initially, the human rights movement and the unification movement complemented one another. Each provided a potent critique of positivism as applied to lawmaking by the modern nation-state and championed universalism instead. Both rejected the view that law should be the embodiment of the national character or spirit. Human rights law found its source in the universal human spirit, not in national particularism. For the

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1. With the end of the Thirty Years War, the Peace of Westphalia ushered in a sharp decline in the temporal power of the Catholic Church, the slow disintegration of the Holy Roman Empire, and the emergence of distinct nation-states. After Westphalia, it was increasingly these nation-states that claimed the allegiance of the individual, and the prerogatives of these new entities and their dealings with one another became the dominant themes of international law. See generally Wilhelm G. Grewe, The Epochs of International Law (Michael Byers trans., 2000).

2. See, e.g., Hugh Collins, European Private Law and the Cultural Identity of States, 3 EUR. REV. PRIV. L. 353, 353 (1995) (arguing that "the private law systems of the (EU) Member States represent an intrinsic part of their culture and traditions" and that proposals for uniformity represent an "excess of centralisation").
Despite these initial similarities, the human rights movement and the unification movement have grown apart. As they have scored important victories over the old regime, they have grown more ambitious, and the differences between them have become more apparent. One major difference stems from their divergent orientations toward procedural law and process-oriented values. For the unification movement, procedural values such as predictability and regularity lie at the heart of its vision for the future of international law. If the unification of private law is to be achieved, it will occur through multilateralism, transparency, and inclusiveness. Agreement on common principles of private law will require keeping unilateralism in check and including multiple legal traditions in the final product.

In contrast, the importance of process-oriented values to the human rights movement has declined in recent years, as human rights advocates have devoted less effort to those national legal systems that function relatively well (where only fine-tuning is needed), and instead have addressed the wholesale denial of rights taking place in large parts of the world, where legal systems are either under authoritarian control or non-functional. It is not difficult to understand why. In the immediate post–World War II era, human rights supporters drafted seminal texts articulating rights and creating international institutions to oversee compliance. These efforts largely failed to change the situation on the ground. Treaties did not prevent mass killings in Cambodia, South America, or Africa. U.N. monitoring committees did not dislodge profoundly unjust and oppressive regimes. Human rights nongovernmental organizations (NGOs) in particular adopted a greater focus on the most acute and systemic human rights violations. A new subfield—call it “atrocity law”—exerted increasing influence on the human rights movement as a whole, creating a shift in emphasis from procedural due process to holding perpetrators accountable and providing remedies to victims.

As these differences widen, the tension between the two movements can be expected to increase. This dynamic is especially powerful in their competing blueprints for the future of national courts. The human rights movement sees national courts as the institutions best situated to become, in effect, the global system’s courts of first instance for adjudicating alleged violations of the most fundamental individual rights. A major obstacle, however, must be overcome: existing national procedural laws that were never intended for such an undertaking. The human rights movement’s response is to demand procedural innovation. National courts must be armed with

3. I mean to refer to the most serious offenses against human dignity—genocide, torture, ethnic cleansing, crimes against humanity, and offenses of similar gravity—many of which are the subject of multilateral treaties. I focus on these offenses not because the human rights movement has lost interest in freedom of speech, the death penalty, and other human rights issues, but because in the last decade in particular a great deal of the movement’s resources has been devoted to the after-effects of genocide in Rwanda, ethnic cleansing in Bosnia, the creation of the International Criminal Court, and efforts to address atrocities in Cambodia, Sierra Leone, and elsewhere. See, e.g., HUM. RTS. WATCH, WORLD REPORT 1999, Introduction, available at http://www.hrw.org/worldreport99/intro/index.html (noting that more than 200 NGOs attended the Rome Conference in 1998).

4. National courts are best situated in terms of resources, enforcement powers, and prestige.
procedural rules better suited to the task, even if such new rules conflict with long-standing principles of procedural law.\textsuperscript{5}

The unification movement sees the future differently. It regards national courts as oases of constancy. It sees cause for concern in the call for unilateral innovation in hopes of realizing an ambitious new conception of global justice. According to the unification movement, national judges have a humbler calling. They must provide a reliable forum for resolving transnational disputes of all kinds. To do so, they must act with restraint, maximize predictability for litigants, and cooperate with courts elsewhere to form a coherent global system of courts working with each other in order to minimize differences in outcome resulting from differences in forum.

These competing visions are now having an impact on many aspects of procedural law, from rules of evidence to choice-of-law rules, from the limits of national court jurisdiction to limits on the extent to which courts in one country will recognize and enforce the judgments of courts elsewhere. A brief look at a recent transnational human rights suit illustrates the extent of the potential conflict.

During World War II, the Nazi regime compelled approximately ten million people to work as slave laborers. Most worked for private German companies, often under horrific conditions. By the 1990s, approximately one million former slave laborers were still alive. Few had received compensation. Class action lawsuits were filed in New York against the leading German companies that had maintained slave labor forces during the war.\textsuperscript{6} These suits were eventually settled in the context of a treaty between the United States and Germany.\textsuperscript{7}

Had these suits gone forward, difficult issues of procedural law would have loomed ahead. Under New York choice-of-law rules—whether those in effect during the war years or those operative at the time of the suit—there were forceful arguments that the law of Germany (the place of the wrong) applied to most of the substantive issues.\textsuperscript{8} Applying German law might have resulted in no recovery for the plaintiff class if, for example, German law defined enslavement in a way that denied recovery to most claimants, or if it provided airtight defenses to the defendants.\textsuperscript{9} The statute of limitations was

\textsuperscript{5} As one political scientist critical of legalism puts it, "[t]he application of municipal law to war crimes is in many ways the legal equivalent of a bad analogy. The worst crimes in Western law are utterly pallid next to crimes against humanity." Gary Jonathan Bass, Stay the Hand of Vengeance 12 (2000).


\textsuperscript{8} Moreover, New York’s public policy exception in the context of choice of law is narrow. See, e.g., Loucks v. Standard Oil Co. of New York, 224 N.Y. 99 (1918) (refusing to invoke public policy exception unless applying law other than that of the forum would “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal”); accord Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 78 (1993).

also a point of controversy. Under both German and New York laws, the statute seemed to have expired. In some transnational human rights cases, however, U.S. courts had ruled that the statute of limitations ceased to run during periods when the plaintiffs did not know about their claim or faced formidable obstacles in pursuing it. Finally, there were questions concerning the application of Rule 23 of the Federal Rules of Civil Procedure in this context. The circumstances of enslavement varied tremendously among the members of the plaintiff class, most notably between those who were Jewish (viewed as expendable) and those who were not (seen as long-term labor assets). Existing class action law in the United States suggested that if the case were viewed as an ordinary class action suit, the plaintiff class might not qualify for certification because of lack of commonality or, alternatively, that there might be a need for several subclasses.

For human rights advocates, the three procedural issues in this case could not be resolved as if this were a run-of-the-mill case. The norms at issue were anything but ordinary. Rather than focus on the place of the wrong, the nationality of the parties, the governmental interests involved, and other factors typically employed in conflict-of-laws jurisprudence, human rights activists maintained that national judges should focus on vindicating the interest of the international community in enforcing a universal norm as important as the prohibition on slavery. With jus cogens norms at stake, a domestic court in New York or elsewhere should view itself as part of an international system of tribunals providing remedies to victims of grave offenses.

Others saw the matter differently. The defendants, supported by business entities from many countries, decried what they saw as the growing resort by U.S. courts to novel and sometimes result-oriented procedural approaches in human rights litigation. If ordinary choice-of-law rules led to the application of German law on various substantive law questions, why should German law be treated as presumptively suspect? To override the statutorily indicated law by resorting to some heretofore unannounced choice-of-law methodology would create uncertainty and irresistible opportunities for forum shopping.

10. See, e.g., Cicippio v. Islamic Republic of Iran, 18 F. Supp. 2d 62, 68-69 (D.D.C. 1998) (allowing equitable tolling for victims of terrorism during time period in which Iran was protected from suit by virtue of sovereign immunity); Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 360 (C.D. Cal. 1997) (discussing equitable tolling as "available where (1) defendant's wrongful conduct prevented plaintiff from asserting the claim or (2) extraordinary circumstances outside the plaintiff's control made it impossible to timely assert the claim").

11. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814-24 (1985) (choice of law issues may block class certification because constitutional limitations on choice of law must be respected even in large class actions); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 910-12 (7th Cir. 2003) (certifying class only with respect to one common question of causation and refusing to certify it with respect to individual claims of harm); Tylka v. Gerber Prods. Co, 178 F.R.D. 493, 497-98 (N.D. Ill. 1998) (denying certification to national class for failure to meet commonality requirement in the face of the "nuances of 50 consumer fraud statutes"); Cf. also Ortiz v. Fibreboard Co., 527 U.S. 815 (1999) (tightening the standard for certifying a limited fund class action).

12. A jus cogens norm, also called a "peremptory norm," is binding on all states regardless of whether or not they have ratified a treaty incorporating that norm and regardless of whether they have consistently dissented from recognizing its jus cogens character. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 ("[A] peremptory norm of international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.").
The same argument was potentially true for any court’s ruling on certification. A relaxed reading of Rule 23’s commonality requirement would give additional momentum to making the United States a plaintiff haven for human rights suits against foreign corporations. Eventually, there would be a backlash. Courts elsewhere would less readily cooperate with U.S. courts. Efforts to create global rules of procedure would be frustrated.

The problem is pervasive. As Part IV illustrates in detail, similar tensions arise between procedural laws that advance the global interest in multilateralism and ones tending toward unilateralism with respect to personal jurisdiction, subject matter jurisdiction, evidentiary privileges, and recognition of foreign judgments. These rules may soon be caught in a crossfire—with those who desire to bring about uniformity for the sake of an international legal order based on greater cooperation and predictability on one side, and those who resist uniformity in the name of more effective enforcement of basic human rights norms on the other.

This Article examines efforts to deploy domestic courts around the world to implement the human rights policies not only of their own countries but of the international community as a whole. It argues that this development has run into a stumbling block not foreseen by human rights advocates who, during the formative years of the human rights movement, all but ignored the field of private international law. In retrospect, this lack of engagement with private international law appears to have been a mistake. Similarly, few of those lawyers and legal scholars deeply engaged in unification of procedural law saw a conflict with human rights on the horizon. Thus, as one harmonization project after another was launched and as human rights advocates scored victories on several procedural fronts (for example, expanding the jurisdiction of national courts, extending or eliminating statutes of limitations, adapting class action techniques to human rights claims), no one was especially alert to the likelihood that advances in human rights enforcement would become a perceived threat to the priorities of global business and others with vested interests in the existing principles of private international law. The result is that two movements at the heart of liberal internationalism in the twentieth century are poised for conflict in the twenty-first. Unless steps are taken to mediate this conflict, its intensification likely will harm both movements and the international legal system’s ability to manage globalism. The present work argues that the most promising path to mediating the conflict lies in a new unification initiative, an effort to identify a narrow but important category of cases involving the most grave human rights offenses—what one might call atrocity cases—and to harmonize the procedural rules applied in such cases by different national legal systems.

Part II traces the growth of the unification movement in the twentieth century with a particular focus on procedural law. These efforts aimed to create a legal regime that was more intellectually coherent, more hospitable to transnational business, and more supportive of the political integration of Western Europe. From a modest beginning, the movement to unify procedural law produced, by century’s end, a set of important legal instruments. European states, especially members of the European Union (EU), took the
lead in this endeavor, producing a continental European approach to procedural law unification. As the century drew to a close, the influence of this approach was expanding. Cornerstones were laid for global principles of contract law,\textsuperscript{13} transnational rules of civil procedure,\textsuperscript{14} a global regime for transnational bankruptcies,\textsuperscript{15} a regime for the worldwide recognition of civil judgments,\textsuperscript{16} and global rules of jurisdiction.\textsuperscript{17}

Part III turns to the human rights movement, which in the decades after World War II produced a series of landmark texts articulating fundamental rights. These texts were widely ratified but also widely ignored. In response, the emphasis of the human rights movement shifted. Increasingly, its resources were directed at a short list of grave human rights violations typically associated with a complete breakdown in rights protection. The movement also became increasingly focused on developing mechanisms for punishing violators and compensating victims. Frustrated in its efforts to create international tribunals to perform these functions, it turned to domestic courts. This turn to domestic courts as a potential solution to the under-enforcement of human rights law, however, revealed institutions that offered the bitter with the sweet: national courts had the resources and stature to undertake the job, but their procedural rules were poorly suited to the task. The human rights movement responded with calls for changes in those procedural rules—changes that ran counter to the proposals for the unification of procedural law.

Part IV presents a series of hypothetical cases designed to illustrate the conflict between the conception of procedural law promoted by the unification movement and that promoted by human rights advocates. These cases show the conflict at work in such aspects of procedural law as assertions of jurisdiction, class action mechanisms; forum-shifting doctrines, statutes of limitations, retroactivity, evidentiary privileges, and recognition of foreign judgments.

Part V considers and ultimately rejects the manner in which this tension is currently being managed—by directing atrocity cases to separate tribunals, such as the new international criminal tribunals and various hybrid courts. It proposes instead that human rights advocates focus less on creating unique fora and more on developing widely accepted rules of procedure applicable in cases arising from extreme human rights violations, rules that will apply regardless of which court (international, domestic, or hybrid) applies them.

\textsuperscript{13} See \textsc{Int’l Inst. for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts} (1994), available at\textsuperscript{14} See \textsc{Am. Law Inst., ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, Proposed Final Draft, http://www.ali.org} (May 19, 2004) [hereinafter ALI/UNIDROIT Principles (the Principles and their accompanying Comments were approved at ALI’s 2004 annual meeting, subject to editorial revisions); see also notes 153-155 and accompanying text.


\textsuperscript{17} \textsc{Id.}
That is, the task at hand is harmonizing the procedural rules that govern the enforcement of human rights law in national legal systems.

II. PRIVATE LAW HARMONIZATION IN THE TWENTIETH CENTURY

As the twentieth century began, private law differed greatly from country to country and even among regions within the same nation. By the end of the century, these differences had narrowed significantly. The fruits of this convergence are easily seen. In contract law, for example, unification has produced watershed achievements. More than sixty countries have ratified the U.N. Convention on Contracts for the International Sale of Goods (CISG), enabling parties to opt out of the uncertainty caused by differences in national laws. Use of the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts has increased, reflecting the desire among commercial parties to incorporate non-national sources of contract law into their agreements. Elsewhere, a series of multilateral treaties has improved various aspects of financing, thereby lowering the costs of many international transactions. Public law, too, reflects this movement toward convergence. Not long ago, trade in goods was regulated by a motley collection of national laws, many of which were highly protectionist. Inconsistent national tariffs, quantitative restrictions, health and safety rules, and various other legal complexities hampered suppliers of goods. Much, though not all, of this web of conflicting and overlapping rules has yielded to greater uniformity. The World Trade Organization (WTO), the North American Free Trade Association (NAFTA), the EU governing bodies, the World Intellectual Property Organization, and other institutions have done much to build consensus on key elements of world trade. Along with these developments, procedural law has also been the focus of concerted efforts at harmonization.


A. The Origins and Ideologies of Modern Private Law Harmonization

The harmonization of procedural law, from the outset, was a project conceived and guided by elites.\(^2\) Because of the intensity and duration of their influence on this process, three such elites warrant special focus: (1) scholars and intellectuals in search of common legal principles and intellectual coherence; (2) business and commercial interests eager to remove obstacles to transborder trade; and (3) political elites convinced that private law unification could widen economic and political integration among states in a specific geographic region. Each elite was present at the start of the modern unification movement, and each continues to influence the process today.

1. Scholars and Intellectuals

The origins of the international unification movement are closely tied to the birth of modern comparative law, which has always been one of its intellectual engines. The First International Congress of Comparative Law met in Paris in 1900, just after the founding of the Hague Conference on Private International Law.\(^2\) At that time, the Hague Conference consisted solely of European countries; likewise, European legal scholars dominated the new field of comparative law and wrote many of the reports of the Congress, which proved hugely important for the new discipline.\(^2\) Several themes dominate these Congresses and the scholarly literature of this period: universalism, empiricism, and the rise of comparative law as "legal science."

This early view of comparative law had a strong impact on the new enterprise of juridical harmonization. Many of the scholars who took part in the new venture sought to emulate the natural and social sciences.\(^2\) They believed that comparative law, like chemistry, could be both pure science and

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\(^2\) A notable exception is the harmonization produced by international arbitration. *See infra* Part II.B.2. In contrast, much of the convergence in substantive law has been from the bottom up, originating in trade usages and other preexisting commercial practices. In contract law, for instance, perhaps the most important source of harmonized rules is preexisting trade usage. *See, e.g.*, CISG, *supra* note 18, art. 9.2; UNIDROIT, *PRINCIPLES OF COMMERCIAL CONTRACTS*, *supra* note 13, art. 1.8; U.C.C. § 1-205 (1995).


applied science. In the latter form it could produce great social benefits.\(^\text{26}\) As one reporter at the first Congress commented, comparative law was a “vast experimental field, in which the legislator can observe the effects of reform that have been attempted within diverse civilized nations.”\(^\text{27}\)

The early meetings of the Hague Conference were planted in this optimistic soil. They were dominated by comparativists from continental Europe, and these meetings left an indelible imprint on the Hague Conference as an institution and on procedural law unification as a scholarly pursuit. This imprint was to endure even after common law countries joined the process in earnest decades later.\(^\text{28}\) The influence of continental scholars was both scientific and aesthetic. National laws were a vast pool of data in which the scholar had to be immersed.\(^\text{29}\) Empirical rigor was needed to identify the common core of human experience in private law on the way toward the “progressive unification of the rules of private international law.”\(^\text{30}\)

The work of these individuals and organizations was also influenced by a continental aesthetic: a tradition of structured codes rather than case-by-case determination; a strong preference for precise rules rather than loose standards; an orientation toward binding texts rather than model laws;\(^\text{31}\) an admiration for the simple and the orderly and a distaste for judicial

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\(^{26}\) See, e.g., Rudolf B. Schlesinger et al., Comparative Law 47-52 (6th ed. 1998). This view of comparative law as applied science is especially associated with the German scholar Ernst Rabel. By the 1940s, Rabel’s approach had become a kind of orthodoxy in Germany and also in the United States. See David S. Clark, The Influence of Ernst Rabel on American Law, in Der Einfluss Deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland 107 (Marcus Lutter et al. eds., 1993). For an argument that legal science is back, in the context of European integration, see Reinhard Zimmerman, Civil Code and Civil Law: The Europeanisation of Private Law Within the European Community and the Re-emergence of a European Legal Science, 1 Columbia J. Eur. L. 63, 68 (1994–1995).

\(^{27}\) See Session du Congres: Procès-Verbaux Sommaires (Séances du 1er Aout: 1er Section), in 1 Congrès International de Droit Comparé: Procès-Verbaux des Séances et Documents 36 (1905) (trans. by author). Use of the metaphor persists. See Schlesinger et al., supra note 26, at 47 (describing the difference between pure scholars of comparative law and those seeking to use the insights of comparative law for private law unification as “roughly analogous to that which natural scientists draw between basic and applied research”).


\(^{29}\) See Merryman, supra note 25, at 32.

\(^{30}\) See Hague Conference Statute, supra note 23, art. 1 (“La Conférence de La Haye a pour but de travailler à l’unification progressive des règles de droit international privé.”).

Unification was more than a means to useful results. It was a search for intellectual coherence.

2. Commercial Interests

Commercial interests also supported private law unification. Early on, European enterprises saw international unification efforts as an opportunity to replicate the benefits they had achieved through codification at home. They supported unification not for aesthetic reasons and not because they valued legal science in itself. They saw the existing patchwork of national laws as an obstacle to cross-border trade. Unification would lower these indirect trade barriers and expand international commerce. Decades later, multinational firms of all flags would line up behind the view that global commerce had to be freed from inconsistent and idiosyncratic national laws.

Though derived from different perspectives, the views of European business enterprises and intellectuals tended to reinforce each other. The academic celebration of legal science and technical expertise was attractive, at least early on, to people of commerce, who believed that a technocratic view of private law was more likely to produce reliable, stable rules than one more open to political influences. The structure of Hague Conference negotiations has long reflected this view. Much negotiation and drafting is delegated to special commissions composed of experts in the specific field under negotiation, many of them drawn from the academy. These special commissions produce highly detailed drafts before there is any substantial involvement at the diplomatic level. The role of interest groups in producing these multilateral conventions tends to be less active than their role in producing national legislation. Negotiations take place away from the public eye, shrouded in the myth that what is going on is purely technocratic. The audience is limited to multinational businesses, scholars in the field, highly specialized members of the bar, and officials of specific national ministries.

3. Political Integrationists

A third group—I will call them “integrationists”—has also been involved in the unification movement from the beginning, supporting the unification of private law for another set of reasons. Harmonizing technical legal fields is not, for the integrationists, an end in itself. Rather, it is a step

32. The search for order and simplicity was especially characteristic of internal codification in France, which strongly influenced subsequent codification in Belgium, Italy, and much of Western Europe. See John Henry Merryman et al., The Civil Law Tradition: Europe, Latin America, and East Asia 435-58 (1994).

33. For discussion of the codification of private law in France and Germany, see Schoesinger et al., supra note 26, at 245-83; Zimmerman, supra note 26.

34. For discussion of Ernst Rabel’s especially close ties to German business interests, see David J. Gerber, Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language, in Rethinking the Masters of Comparative Law 195-96 (Annelise Riles ed., 2001).

35. Notwithstanding some efforts by the Permanent Bureau to better publicize Hague Conventions. See, e.g., Resolution Adopted by the Seventeenth Session of the Hague Conference, May 19, 1993, http://www.hcch.net/e/resolution.html (recommended that member states “take the appropriate measures to publicize the existence and the operations of the Conventions”).
toward a wider unification of politics, culture, and identity. These aspirations marked the private international law congresses convened in Latin America in the late nineteenth and early twentieth centuries, which attempted, albeit unsuccessfully, to foster political unity and broad cooperation among the peoples of Latin America. Half a century later, Europeans followed suit, but with greater success. At that point, private law unification received support from pivotal figures in the struggle to unify Europe economically and politically. The seeds of this unification began with the early work of UNIDROIT, the Hague Conference, and specialized international bodies in fields such as aviation, telephony, and road transport.


38. See, e.g., ALAIN A. LEVASSEUR & RICHARD F. SCOTT, THE LAW OF THE EUROPEAN UNION: A NEW CONSTITUTIONAL ORDER 29-30 (2001) (“Europe will not be made all at once according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.” (quoting Robert Schuman’s declaration of May 9, 1950)); JEAN MONNET, MEMOIRES 312-15 (1978).


Private law unification took on new urgency after World War II, when economic and political integration were seen as practical steps toward preventing catastrophic European wars. The preeminent private law organizations were reborn at that time. As before the war, their membership was almost entirely drawn from the European continent. With a homogeneous membership, they developed a European conception of juridical unification, one with the jus commune as a frame of reference, one that recalled the time when great universities across Europe taught the same system of law. These organizations sought to bring a European dimension to people's daily lives through such initiatives as the cross-border recognition of marriages, the spread of common name-brand goods and services across Europe, and the creation of a common body of legal rules protecting consumers and employees.

4. The Cumulative Impact

Although these three groups did not hold identical perspectives, their agendas tended to reinforce each other. All tended to ensure that continental European aesthetics and ideas about legal science were built into the structure of procedural law unification. All tended to disparage conferring substantial discretion on judges. All fed the perception that private law harmonization was an esoteric, technocratic endeavor nourished by expertise in comparative law. All saw juridical unification as part of a broader enterprise—intellectual, economic, or political.

B. Harmonization After World War II

The roots of the unification movement's conflict with the human rights movement can be found in the developments described above. But events after World War II transformed a latent conflict into one more apparent. Advocates of unification became intellectually more ambitious. Multinational business became more assertive in this realm. The ideas behind regional integration grew into strong influences on European legal thought. Harmonization became a widening river fed by three main streams: (1) the projects of a international private law organizations; (2) the usages spawned by

41. See Winston S. Churchill, Address to the Congress of Europe (May 7, 1948), in COMPLETE SPEECHES, 1897-1963, at 7636 (“Mutual aid in the economic field and joint military defence must inevitably be accompanied step by step with a parallel policy of closer political unity.”).

42. The term jus commune is associated with the system of law that resulted from the fusion of Roman law with canon law. This process, and the accompanying revival of Roman law, began in centers of higher learning in Italy in the twelfth century and then spread across Europe. See generally David S. Clark, The Medieval Origins of Modern Legal Education: Between Church and State, 35 AM. J. COMP. L. 653, 678-81 (1987). For the reception of the jus commune across Europe and its influence on the development of various European legal systems, see, e.g., ARTHUR T. VON MEHREN, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (1977); MERRYMAN ET AL., supra note 32, at 325-50 (1994); SCHLESINGER ET AL., supra note 26; 1 KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 2d ed. 1987).

43. See MERRYMAN ET AL., supra note 32, at 325 (referring to the “nostalgia of the civil lawyer”).
international arbitration; and (3) the initiatives of regional organizations, such as the EU and the Council of Europe.  

1.  **Harmonization Treaties**

Continuing the trend begun in the first half of the century, much harmonization in the post–World War II years resulted from the work of international and intergovernmental organizations. Six organizations were the principal venues for formal, intergovernmental efforts at private law harmonization: UNIDROIT, the U.N. Commission on International Trade Law (UNCITRAL), the Hague Conference, the Organization of American States (OAS), the Council of Europe, and the EU. The first two have focused on harmonizing substantive fields of law, especially contract law and finance. The Hague Conference has become the preeminent international institution devoted to procedural law harmonization on a global scale, while the EU, the Council of Europe, and the OAS are prime examples of organizations devoted to regional, rather than global, harmonization, a subject to which this Article turns in Part II.B.3.

Since its rebirth in the early 1950s, the Hague Conference and its member states have produced thirty-four multilateral treaties on various aspects of national procedural law. These treaties can be divided into four categories: (1) treaties establishing choice-of-law rules; (2) treaties prescribing jurisdictional rules; (3) treaties creating a duty of mutual recognition; and (4) treaties promoting other forms of judicial cooperation. Before the Conference’s current jurisdiction and judgments project, Hague conventions typically had a narrow focus. So, for instance, the Hague Conference

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44. For simplicity of presentation, the discussion that follows will emphasize the role of intellectuals in the work of international private law organizations, the role of multinational business in arbitration, and the role of political integrationists in the output of the EU. Reality, of course is more complicated; each of these constituencies has played a role in each of these endeavors.


47. In 1992, the United States first proposed that the Hague Conference on Private International Law draft a multilateral convention that would obligate signatory states to recognize and enforce civil and commercial judgments under specified circumstances. The proposal was adopted by the Hague Conference in 1996, which assigned the research, negotiation, and drafting to a special commission in which all member states would be represented. Soon after the project began, the members of the commission concluded that it would not be possible to draft a convention solely regulating recognition and enforcement without also addressing the exercise of jurisdiction. See generally Catherine Kessedjian, Hague Conference on Private Int’l Law, Special Comm’n of June 1997, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Prelim. Doc. No. 7 (1997), http://www.hcch.net/doc/jdgm_pd7.doc [hereinafter Hague Preliminary Draft Convention Doc. No. 7].
concluded five treaties from 1958 to 1996 relating to mutual recognition in specific substantive areas: adoption; marriage; divorce and separation; maintenance obligations; and the protection of minors. Similarly, with respect to rules of jurisdiction, three treaties address jurisdiction in three specific contexts: adoption, the protection of minors, and forum selection clauses.

Despite the breadth of private law covered by the Hague treaties, these agreements are in many ways similar in approach. Their common approach involves: (1) drawing upon academic expertise in comparative law and private international law; (2) producing uniform texts rather than principles, guidelines, or model laws; (3) discouraging states from ratifying subject to reservations; and (4) drafting texts not designed to confer private rights on individuals. This similarity derives historically from the Hague Conference's origins as a small organization of neighboring Western European states and currently from the fact that all twenty-five EU countries are members of the Hague Conference.

2. International Arbitration

In recent decades, legal harmonization has spread beyond the confines of intergovernmental treaties. International arbitration now exerts an important influence on the development of procedural law as well as substantive law. The growth of arbitration accelerated at mid-century. What had been a collection of ad hoc practices and customs derived from the law merchant coalesced into a recognizable field. Practices that had varied greatly among industries and countries assumed a more standard form not tethered to national judicial systems. Toward the century's end arbitration expanded still

48. The co-rapporteurs for the Hague Judgments Project, Fausto Pocar and Peter Nygh, were leading scholars of private international law in Italy and Australia, respectively. See Peter Nygh & Fausto Pocar, Report of the Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Hague Conference on Private Int'l Law, 19th Sess., (Aug. 2000), http://hcch.e-vision.nl/upload/wop/jdgmpd11.pdf [hereinafter Nygh & Pocar]. In 2000, Pocar became a judge on the International Criminal Tribunal for the Former Yugoslavia. Nygh recently passed away. The drafting committee has included Arthur von Mehren of Harvard and Andreas Boucher of the University of Geneva. From 1996 through 1999, a French legal academic, Catherine Kessedjian, was deputy secretary-general in charge of the project. Other legal academics that have served as delegates are: Antonio Boggiano (Argentina), David McClean (British Commonwealth), Kresimir Sajko (Croatia), Helene Gaudemet-Tallon (France), Ioannis Voulgaris (Greece), Masato Dogauchi (Japan), Antoon Struycken (Netherlands), Paul Vlas (Netherlands), Isabel de Magalhaes (Portugal), Octavian Capatina (Romania), Alegría Borras (Spain), Paul Beaumont (United Kingdom), Trevor Hartley (United Kingdom), Ronald Brand (United States), and Paul Dubinsky (United States).

49. UNIDROIT's work is a good basis for comparison. The UNIDROIT Principles of International Commercial Contracts are similar in style to the U.S. Restatements of Contract Law, with text, commentary, and illustrations designed to flesh out the governing factors and principles, but often stopping short of articulating one mandatory, universal rule. UNIDROIT, PRINCIPLES OF COMMERCIAL CONTRACTS, supra note 13.


51. In the past, EU member states occasionally disagreed with one another in the context of negotiations at the Hague Conference. In the aftermath of the Treaty of Amsterdam's conferment of new powers on the EU in private law, see infra notes 74, 77, & 136, EU member states have presented more of a united front in Hague Conference negotiations. See infra note 73.

further, drawing in participants from regions not previously represented, such as Asia, Latin America, and the Arab world. This newfound acceptance had two important byproducts. First, the procedures used in international arbitration became hybridized in form, drawing upon multiple national legal traditions. Second, arbitration gained in influence, losing its taboo as a threat to judicial authority, and becoming instead a source of input into judicial and legislative thinking about procedural norms.

International arbitration today typically involves parties, lawyers, and arbitrators differing in nationality and legal training. This diversity has created new pressures to draw upon more than a narrow range of legal traditions in addressing such procedural details as the form and length of written submissions, the content and style of expert witness affidavits, and the extent to which the proceedings are oral or purely written.

A single arbitration proceeding conceivably can incorporate U.S.-style document discovery, Canadian evidentiary privileges, and a French emphasis on written presentation. This mix would not be found in domestic judicial proceedings.

Another source of international arbitration's harmonizing effects can be found in the stature and influence of the major global and regional arbitral institutions. In drafting arbitral rules of procedure, rules of evidence, and the like, these institutions seek to incorporate principles found in several commercially influential legal systems. Rules that are antiquated or confined

53. Statistics provide a rough sense of how dramatic growth in the field has been. In the fifty-two years from 1924 to 1976, a total of 3000 cases were filed with the International Chamber of Commerce in Paris. In the twenty-two years from 1976 to 1998, more than twice that number, 7000 cases, were filed. See W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 2 (3d ed. 2000). There have been other indicia of growth: the size of the average claim has grown exponentially; prestigious international law firms have entered the field; and arbitration has become the subject of multilateral treaties and serious study at universities. See generally 15 INT. CT. ARB. BULL. 1 tbl. of contents (2004), available at http://www.iccbooks.com/shop/TopBannersites/back-issues.asp#15_1; Facts and Figures on ICC Arbitration, http://www.iccwbo.org/court/english/right_topics/stat_2003.asp (last visited Dec. 12, 2004).

54. It is also common for arbitration panels to hold hearings in locations determined with reference to the convenience of the parties and not with reference to the substantive or procedural law applied to the dispute.

55. See Swiss Private International Law Act of 1987, art. 182, translated in PIERRE A. KARRER ET AL., SWITZERLAND'S PRIVATE INTERNATIONAL LAW 152 (2d ed. 1994) ("The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice."). Though national courts often apply the substantive laws of other countries (especially pursuant to choice-of-law clauses), they rarely, if ever, apply foreign procedural law. See generally William W. Park, The Relative Reliability of Arbitration Agreement and Court Selection Clauses, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 3 (Jack L. Goldsmith ed., 1997). Thus when parties choose a Swiss judicial forum, they are choosing Swiss procedural law to the exclusion of others.

56. E.g., the International Chamber of Commerce, the London Court of International Arbitration, and the American Arbitration Association. These institutions furnish a set of standard arbitration rules (which can be adapted by the parties), provide a mechanism for choosing arbitrators (intervening when necessary on issues such as alleged bias), and ensure that fees are paid. They also promote national legislation on arbitration and scholarship, and education about arbitration.

57. Commercial influence is not a precise term. It reflects many factors: gross domestic product (GDP); the volume of a country's foreign trade; its competitiveness in growth industries; the age, depth, and stability of its legal system; and the global reach of its law firms and legal scholars. On the margin, it may be difficult to spot, but most would agree that the French legal system, for instance, is a commercially influential one. Empirical work and anecdotal accounts suggest that parties and arbitrators in International Chamber of Commerce arbitrations tend to choose procedural rules that are followed in a large number of influential commercial countries. They will choose in this manner because
to a single country or to countries poorly represented in international business are typically left out.\textsuperscript{58}

The position of the arbitrator, unlike that of the judge, is well adapted to experimentation. Arbitrators are less constrained by precedent or fixed schools of statutory interpretation than their judicial counterparts.\textsuperscript{59} In most countries, arbitral awards are accorded a highly deferential standard of review,\textsuperscript{60} a fact that permits arbitrators to apply procedural rules with great responsiveness to the parties' need for compromise, something difficult for national courts to accommodate.

The combined input of arbitrators, arbitral institutions, parties, and their lawyers typically leads to a set of procedural choices that, as a package, do not wholly replicate the provisions of any one national legal system.\textsuperscript{61} Moreover,
each component in this new mix of procedures, by virtue of having been plucked from its national milieu, may be stripped of the interpretive tradition in which it was bred. If modified U.S. discovery rules worked well in one case, repeat players would incorporate such rules in future arbitrations. Their experience using a particular variation on U.S. document discovery will be communicated to other clients, party-appointed arbitrators, and others through arbitration journals, conferences, and word of mouth. As this process of experimentation and selection repeats itself, dominant approaches to arbitration emerge, especially in niche areas. Moreover, the results do not remain confined to the world of arbitration. The same law firms representing clients in international arbitrations also represent these and other clients in national courts. National judges become more familiar with arbitration as they specialize in transnational litigation. See, e.g., GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS (3d ed. 1996) [hereinafter BORN, INTERNATIONAL CIVIL LITIGATION]; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS (1994) [hereinafter BORN, INTERNATIONAL COMMERCIAL ARBITRATION]; LOWENFELD, supra note 61; RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING (2d ed. 1997). For the rise in global influence of the Anglo-American law firm and its impact on cross-fertilization between international litigation and arbitration, see Roger P. Alford, The American Influence on International Arbitration, 19 OHIO ST. J. ON DISP. RES. 69, 80-87 (2003).


64. Arbitration is not a hermetically sealed world. Scholars of international arbitration also specialize in transnational litigation. See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (1993) (noting the uniformity of national judicial decisions interpreting the New York Convention, supra note 60). Two institutions in particular have greatly fostered arbitration’s influence on courts and on national views of procedural law: UNCITRAL and the Iran-U.S. Claims Tribunal. UNCITRAL contributed the New York Convention, supra note 60, and the UNCITRAL Arbitration Rules, supra note 58. The former, the most widely ratified private international law treaty in the world, makes it possible to enforce arbitral awards in over 150 countries. The latter was a project in arbitral harmonization: the creation of a new set of global arbitral rules based on picking and choosing among
The procedural harmonization generated by this process tends to reflect the commercial nature of most arbitrated disputes and the needs of commercial parties. Foremost among those needs are dispute resolution procedures adaptable to changing commercial practices and custom. In that context, international arbitration has long approached procedural concepts in a distinct manner that is now dramatically influencing national courts. For example, party autonomy has always been at the heart of how arbitrators and arbitral institutions approach procedure. In recent decades, national courts have shown increasing respect for party autonomy in the context of forum selection clauses. Often, in fact, the judicial language of deference to forum selection clauses is borrowed from decisions applying arbitration clauses. Arbitration has also fostered the concept of the “natural” or “neutral” forum, one that ex ante is no more advantageous to one party than the other and that is preferable in terms of administrative convenience and cost. Recent common law decisions applying the doctrine of forum non conveniens have borrowed some of the language and the ex ante perspective of arbitration. A number of commentators report the erosion of mandatory rules in the context of

rules dominant regionally. The Iran-U.S. Claims Tribunal, created in 1981 by the Algiers Accords, uses the UNCITRAL rules. Its twenty years of opinions now fill more than thirty volumes. Its influence is attributable to: 1) the stature of its U.S. and neutral-country judges; 2) its being one of the few arbitral bodies to publish all its opinions, which are readily available in law firm and law school libraries around the world and now on the Internet, see Iran-United States Claims Tribunal, http://www.iusct.org (last visited Dec. 12, 2004); and 3) the large volume, and often large dollar amounts, of the claims it has arbitrated. See generally STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1992); Howard M. Holtzmann, Some Lessons of the Iran-U.S. Claims Tribunal, in PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS (J. Moss ed., 1987).

To a much greater extent than litigation, the parties to international arbitration are business entities. Often they are medium-to-large businesses, as reflected by the size of the average claim filed with arbitral institutions. In 1998, almost 35% of the cases submitted to International Chamber of Commerce arbitration involved amounts between $1 million and $10 million, and almost 20% were for amounts over $10 million. CRAIG ET AL., supra note 53, at 743. Typically, one or more claims are for breach of contract, pursuant to an arbitration clause in that contract.

In terms of procedure, party autonomy means that the parties choose the forum and the procedural law to be applied, rather than being forced to appear in some other forum or to submit to another set of procedures and remedies. Unlike courts, for example, arbitral tribunals might not have authority, absent the parties' consent, to order preliminary relief or to hold parties in contempt for noncompliance. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note 64, at 813-23.

See generally, Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 Minn. L. Rev. 703, 727 (1999) (maintaining that the U.S. Supreme Court has come to regard arbitration clauses as a type of specialized forum selection clause). For analyses of the deference that courts currently give to forum selection clauses, see GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING, AND ENFORCING 90-97 (1999). Cf. Park, supra note 55, at 3-35.


Mandatory rules are rules of law that tribunals must apply, even if parties have attempted to exclude them. Whether rules of substantive law or procedure, they are legal rules from which parties cannot opt out. Because arbitration is a creature of contract, arbitrators hesitate to apply statutes or common law rules that the parties have tried to avoid. This fact, and the possibility that parties will intentionally seek to avoid mandatory rules through arbitration, worried the dissent in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), in which the majority held that a contract defense alleging violation of U.S. antitrust laws had to be resolved by arbitration in Japan. Id. at 656
arbitration, together with evidence that the range of legal rules treated as mandatory by courts is also narrowing.

As each of these principles—party autonomy, the natural forum, and narrower mandatory rules—has moved beyond arbitration to judicial procedure, the bar for human rights victims seeking access to court has been raised, a topic to which Part III will return.

3. Regional Harmonization: The Brussels and Lugano Conventions

A third important postwar development is the harmonization of private law on a regional basis, a process by which the countries of the EU and their neighbors have exerted great influence on the global direction of procedural law. The EU today boasts a substantial and growing corpus of treaties and legislation harmonizing aspects of private law. By virtue of its size, economic strength, and ability to influence the initiatives of international organizations, the EU’s approach to private law harmonization warrants special attention.

The first targets of harmonization in what was by the late 1950s the European Community (EC) were differences in trade law that caused unequal conditions of competition. Although the emergence of common policies in

71. What is now the EU began in the early 1950s as three distinct entities created by three treaties. TREATY INSTITUTING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S.140; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter TREATY OF ROME]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 167. Since then, the institutions created by these treaties have been merged, the treaties have been repeatedly revised, and the number of member states has grown from six to twenty-five through five waves of accession agreements. See generally T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW 3-10 (5th ed. 2003). The label “European Union” originated with the treaty concluded in Maastricht, The Netherlands, in 1992. TREATY ON EUROPEAN UNION AND FINAL ACT, Feb. 7, 1992, O.J. (C 224) 1 (1992), reprinted in 31 I.L.M. 247 (1992) [hereinafter MAASTRICHT TREATY]. For simplicity, when discussing the evolution of procedural harmonization in the decades spanning the entry into force of the Maastricht Treaty, this Article will refer to the integrated European entity as the EU. References to the European Community (EC) will be confined to pre-Maastricht events.

72. The EU grew to twenty-five member states upon the accession of the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia in May 2004. The addition of these ten member states increased the EU population by 28% (to nearly 450 million) and expanded its geographic area by 34%, but decreased its per capita GDP by 18%. Opinion of the European Economic and Social Committee on “The Impact of the Enlargement of the European Union on the Single Market,” 2003 O.J. (C 85) 102. Aspects of the legal systems of these new states are noticeably different from those of existing member states. It is unclear whether this unprecedented growth in size and diversity will pose an obstacle to private law harmonization in the EU.


74. Prime examples were tariffs and other trade barriers, unfair competition law, transportation, and coal, steel, and nuclear power regulation. Until the 1980s, practicing EC law usually meant practicing what Americans refer to as antitrust law. In this early period, private law, especially procedural law, was regarded as a sphere reserved to the member states and beyond the legislative
these areas lessened economic distortion, by the 1970s it was evident that focusing on public law alone would not create conditions in which Dutch firms, for example, could enjoy equal market access in The Netherlands and in Belgium. The great majority of economic transactions were governed by private law, and the common market would remain fragmented as long as the laws applicable to such transactions differed substantially from one member state to another. The emergence of a common European identity would be slowed by the absence of such practical structures as common consumer protection policies across the Community. Consider a joint-venture agreement between two European airlines. In the 1960s, such an agreement had to comply with EC antitrust law, EC aviation regulations, and other public regulatory laws. However, at that time there was no European contract law. Rather, the contract law governing the agreement would have been Dutch, Italian, or the law of some other member state. Similarly, in the realm of procedure, the domestic law of the forum determined which court had jurisdiction over any given dispute. Differences in jurisdictional principles across the EC frustrated efforts to create a level playing field. Aggressive jurisdictional rules in one EC member state could work to the advantage of firms based in that state and to the disadvantage of foreign competitors.

A crucial development in harmonizing procedural law came in 1968 in the form of the Brussels Convention, a treaty designed to harmonize procedural law at two key stages of civil litigation: the initial judicial exercise of jurisdiction and the recognition and enforcement of the resulting foreign judgments. The Brussels Convention was a major step in supplanting national procedural norms with multilateral norms, moving European integration beyond public law to a core field of private law—civil procedure. The Convention broke the prohibition against jurisdiction and the recognition and enforcement of the resulting foreign judgments with multilateral norms, moving European integration beyond public law to a core field of private law—civil procedure. The Convention broke the prohibition against EC interference in procedural law.

powers of the EC. This division of power between European institutions and the member states greatly changed in the 1990s, as the EU pursued deeper and broader political integration through treaties modifying the Treaty of Rome. See Treaty of Nice, Feb. 26, 2001 O.J. (C 80) 1; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Oct. 2, 1997, O.J. (C 340) 1 (1997).

75. E.g., Council Regulation 17/62, 1962 O.J. (P 13) 204 (implementing former Article 81 of the Treaty of Rome and prohibiting anticompetitive “agreements, decisions, and concerted practices”).


77. Until 2002, the Brussels Convention had an unusual legal status. Neither an EU treaty nor Community legislation, it technically lay outside the body of EU law. See Treaty of Rome, supra note 71, art. 220 (providing that member states shall seek to secure for their nationals “the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and arbitral awards”). Until the 1999 Treaty of Amsterdam, see supra note 74, EU legislation and treaty provisions left nearly the entire field of judicial procedure to the exclusive legislative power of individual member states. Even before the Treaty of Amsterdam, however, the concerted action of the EU member states under the Brussels Convention was widely viewed as quasi-EU law, in part because the European Court
In shining a floodlight on divergent approaches to procedural justice, the Brussels Convention began establishing forms of judicial cooperation that would be helpful to European litigants and would build crucial bridges in unifying procedural law. With the dissemination and acceptance of case law interpreting the Brussels Convention, soon there were plans to bring other forms of judicial comity and procedural uniformity into the European framework.

At the heart of the Convention’s influence on procedural law in Europe are three main principles: (a) curtailing the exercise of exorbitant jurisdiction; (b) channeling litigation toward its natural forum; and (c) enhancing legal certainty.

a. Curtailing Exorbitant Jurisdiction

Before the Convention entered into force, procedural systems across Europe shared a number of core principles derived from the jus commune. For example, in terms of jurisdiction, most systems incorporated the default rule that the plaintiff had to sue the defendant in the latter’s domicile. From this common starting point, much divergence had arisen as European legal systems had evolved. Each state had developed supplemental jurisdictional
rules. These supplemental rules, often the product of modern legislation rather than tradition, reflected the idiosyncrasies and priorities of individual countries in an age of strong national identities. For the early proponents of harmonization, the multiplication of these rules across Europe was evidence of the extent to which a common legal culture had fragmented.

One area of wide divergence was in the so-called “exorbitant” rules of jurisdiction, which required foreign defendants to litigate in a forum with which they had little or no connection. A plaintiff’s French nationality, for example, could confer jurisdiction on a French court even if the defendant had no connection to France. A similar rule prevailed in Luxembourg. In The Netherlands and Belgium, jurisdiction could be exercised based on the plaintiff’s domicile and residence rather than nationality. In Germany and Italy, nothing of the kind could be found. These countries and others soon to become parties to the Convention had exorbitant rules of their own. Anyone with assets in Germany could be sued in a German court, for example, even in suits unrelated to those assets. In England and Ireland, courts exercised power-based theories of jurisdiction unknown on the continent. A defendant served with process while physically present in England became subject to the jurisdiction of English courts, even if the defendant’s presence was fleeting, isolated, and unrelated to the suit.

The Convention helped to phase out these exercises of exorbitant jurisdiction, thus bringing about important changes in jurisdictional law across Europe. By 1973, courts in the EC had been stripped of the power to apply
exorbitant rules in suits among parties from different member states. Even in cases outside the Convention’s scope, the old exorbitant rules were not applied with the same abandon. A newfound discomfort could be identified in judicial opinions. If member states had agreed that it was unfair to apply exorbitant rules against a U.S. national domiciled in Italy, could it really be fair to apply those rules against an Italian defendant domiciled in Los Angeles? Though the Convention allowed states to continue exercising exorbitant rules against defendants domiciled outside the EU, actually doing so had lost some legitimacy. German courts questioned whether there were limits to asset-based jurisdiction. French courts more willingly found that plaintiffs had waived jurisdiction under Article 14. In England and Ireland, courts broadened the doctrine of forum non conveniens, in part as a way of moderating the unilateralism built into power-based theories.

In place of the old country-specific rules of supplemental jurisdiction were new rules, the product of multilateral negotiation rather than unilateralism. They were based on the principle that jurisdiction always should be premised on a strong connection between the forum and the controversy. Jurisdiction over tort actions now lay in courts in the place where the “harmful event occurred.” Suits for breach of contractual obligations were to be filed “in the courts for the place of performance of the

meetings of the Conference. In legal systems that incorporate remise au parquet, a default judgment can be entered against a defendant without any assurance that the defendant has received actual notice of suit.

86. Article 3 lists the jurisdictional provisions deemed to be exorbitant in each of the member states. The Convention bars a court in any member state from relying on these provisions to assert jurisdiction over a defendant domiciled anywhere within the EU. Brussels Convention, supra note 76, art. 3.

87. The bar on exorbitant provisions does not apply to defendants domiciled outside the EU. Id. art. 4.

88. Jurisdiction under the Convention turns on domicile, not nationality. The Convention applies when a defendant is domiciled in any EU country. It does not apply with respect to nationals of EU countries domiciled elsewhere. Id. art. 2.

89. In 1983, the Bundesverfassungsgericht (BGH) (the Federal Constitutional Court) noted that the compatibility of § 23 ZPO, supra note 83, with international law posed significant legal questions. BverG, 64 BverGE 1, 18 (1984). A subsequent decision by the BGH held that jurisdiction could not be based on assets alone; the dispute had to have some other connection to Germany. See BGHZ 115, 94. In between these two judgments, however, the BGH ruled in a third case that § 23 does not violate either international law or the Grundgesetz, Germany’s Basic Law. See BGHZ 113, 143. See generally Stephen Cromie, International Commercial Litigation 42-43 (2d ed. 1997); Kuner, supra note 83.

90. See generally Cromie, supra note 89, at 36-37. Before the Brussels Convention entered into force, application of Article 14 was considered mandatory.


92. These supplemental rules are defined either by subject matter of litigation or by category of litigant. Plaintiffs thus have the option of bringing suit either in one of these supplemental fora or in the defendant’s domicile, which is the Convention’s default rule.

93. Brussels Convention, supra note 76, art. 5.3. In the 2001 Council Regulation, this formulation was slightly changed to “the place where the harmful event occurred or may occur.” European Council Regulation 44, supra note 77, art. 5.3. In contrast, in the United States the forum need have no connection to the tort or to the harm. What matters are the contacts between the forum and the defendant.
obligation in question.94 The civil claims of crime victims could be heard in the forum where related criminal proceedings were pending.95

Within a generation, lawyers and judges across the EU adapted to the new regime.96 In the space of two decades the legal culture of a new generation of European lawyers and jurists was strongly influenced by multilateralism—not only by the Brussels Convention, but also by the Treaty of Rome,97 the European Convention on Human Rights,98 and an emerging corpus of European instruments. In this context, exercising jurisdiction based solely on national interests and a single legal tradition was out of step with the new Europe.99

b. The Natural Forum

The Brussels Convention went beyond marginalizing exorbitant bases of jurisdiction. It embraced the principle that for each suit there is one forum with the strongest connection to the cause of action. That forum is determined not by examining a long list of contacts.100 In each case, one contact is determinative. For example, Title II of the Convention segregates the universe of potential lawsuits into categories defined by subject matter (e.g., suits over maintenance obligations) or by type of litigant (e.g., consumer suits). For each category, the Convention assigns specific jurisdiction to one and only one forum. In suits for breach of an individual employment contract, the proper forum is where the employee “habitually carries out his work.”101 In suits against multinational entities with branches in different countries, plaintiffs can sue in a forum where a branch is located, but only in disputes arising from the operations of that specific branch.102 The forum for suits involving competing claims to real property is the place where the property is located.103 The Convention was not unique in identifying these logical or natural connections between the cause of action and the forum; for this purpose it

94. Brussels Convention, supra note 76, art. 5.1.
95. Id. art. 5.4.
96. See Vivian Grosswald Curran, Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union, 7 COLUM. J. EUR. L. 63, 64 (2001) (arguing that “[t]he progression towards legal uniformity is spawning a hybrid, homogenized legal culture from the systems of the civil and the common law that encounter each other in the new Europe.”).
97. See TREATY OF ROME, supra note 71.
99. The conversion was not complete. Under Article 4 of the Convention, national courts could still apply exorbitant rules against defendants who were not domiciled in an EU member state. Brussels Convention, supra note 76, art. 4.
100. Under the minimum contacts test in the United States, the suitability of a forum is based on a set of relationships, not on a bright-line rule. See, e.g., Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
102. Brussels Convention, supra note 76, art. 5.5. By comparison, U.S. law permits suit against the foreign parent corporation provided that it has “continuous and systematic” contacts with the forum state, either by virtue of its own activities, those of the U.S. branch, or a combination of the two. See, e.g., Frummer v. Hilton Hotels, Int'l, 19 N.Y.2d 533 (1967).
103. Brussels Convention, supra note 76, art. 16.1.
drew upon rules already in force in one or more member states. A rather, the Convention required that all EC countries recognize the same set of connecting factors or rules. Whether or not these rules were the wisest forum choices, they soon became widely entrenched. Because these jurisdictional rules incorporated principles from a number of legal systems, they became endowed with legitimacy and a certain gravitas. Because the Convention’s provisions had been produced by multilateral negotiations and compromise, they were widely regarded as a fair, if imperfect, start at bringing procedural harmonization to the EC. For those inclined to oppose ratification of the Convention, there was the sobering thought that failure would be a serious setback for judicial cooperation in Europe.

The Convention’s influence quickly spread throughout Europe. Early opposition quickly dissipated. Although scholars quibbled with certain provisions and certain judicial interpretations, few criticized the Convention’s overall approach. The jurisdictional rules of other legal systems now looked parochial by comparison. European countries present at the Hague Conference and other multilateral bodies now saw the Convention as the presumptive starting point for any effort to expand judicial cooperation and procedural harmonization globally.

104. Similar principles still run through European choice-of-law jurisprudence. See generally Mathias Reimann, Conflict of Laws in Western Europe: A Guide Through the Jungle 102-05 (1995). 105. For a comparison of European multilateralism and U.S. unilateralism in private international law, see id. at 105-09. Certainly the Convention’s method was not alien in Europe, where private international law had long incorporated rules derived from a small number of connecting factors and little or no overt policy input. In the United States this methodology fell out of favor with the decline of the Restatement (First) of Conflict of Laws (1934), which underwent several draft revisions and was superseded by a new Restatement in 1971. See Restatement (Second) of Conflict of Laws (1971), Introduction:

what is presented here is a fresh treatment of the subject . . . that takes full account of the enormous change in dominant judicial thought . . . that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored. Such a transformation in the corpus of the law reduces certitude as well as certainty . . . [and requires] candid recognition that black-letter formulations often must consist of open-ended standards . . . The result presents a striking contrast to the first Restatement in which dogma was so thoroughly enshrined.

106. The U.S. legal system became a favorite target of European criticism, especially its assertions of general jurisdiction based on “doing business,” the activities of agents, subsidiaries, and branches of foreign entities. See Baumgartner, supra note 16, at 176-80.

107. See, e.g., Hague Preliminary Draft Convention Doc. No. 7, supra note 47, para. 9 (arguing that the Hague project should follow a double-convention model similar to that of the Brussels and Lugano Conventions). Drafts of the Hague judgments treaty in fact have closely resembled the Brussels Convention. See id.; Hague Conference on Private Int'l Law, Interim Text and Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, http://www.hcch.net/doc/jdgm2001draft_e.doc (June 6-20, 2001). Despite pressure from EU countries, the U.S. delegation stuck to the position that the treaty had to incorporate something resembling a minimum contacts approach to jurisdiction.
c. Minimizing Concurrent Jurisdiction and Maximizing Legal Certainty

The principle of legal certainty had been central in many European legal systems well before the advent of the Brussels Convention.\footnote{108} The Convention did much to further strengthen its status, in the jurisdictional sense of enabling prospective litigants to determine which forum would be able to exercise jurisdiction over anticipated suits.\footnote{109} The Convention advanced legal certainty through restrictions on concurrent jurisdiction,\footnote{110} prohibitions on parallel litigation, and more generally limiting judicial discretion.

**Concurrent jurisdiction:** During the negotiations that produced the Convention, concurrent jurisdiction was quickly identified as an evil to be avoided whenever possible. The reasons were obvious. The proliferation of available fora would create both uncertainty and inequality. Plaintiffs with a choice among fora would seek the one most favorable in terms of choice-of-law rules, damage remedies, and so forth.\footnote{111} Weighty differences in the desirability of one forum compared to another would encourage forum shopping and thus undermine one of the EC's central policies—the creation of a level economic playing field.\footnote{112}

Forum shopping can also interfere with the willingness of one court to recognize the judgments of another. Judgments from courts perceived to be plaintiff havens may elicit less than full cooperation. In its most disruptive form, concurrent jurisdiction may encourage parties to pursue parallel litigation,\footnote{113} with the possibility of conflicting judicial orders and open animosity among the courts involved.\footnote{114}

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\footnote{108} This principle was especially strong in Austria, Germany, and Switzerland (the latter being a member of the Lugano Convention). See Donald P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 10-15 (2d ed. 1997); REIMANN, supra note 104, at 12-17.

\footnote{109} Early in the genesis of the Convention, the need to increase legal certainty in the realm of private law was identified as a vital goal. See Communication from the Commission of the European Economic Community to the Member States, 1979 O.J. (C 59) 1, 3 ("[A] true internal market between the six States will be achieved only if adequate legal protection can be secured . . . [L]egal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by the Member States of a satisfactory solution to the problem of recognition and enforcement of judgments.").

\footnote{110} Concurrent jurisdiction occurs when more than one forum can assert jurisdiction over the same dispute.

\footnote{111} The extent of forum shopping that took place before the Brussels Convention entered into force is subject to debate. Some argue that forum shopping was not a regular occurrence because incentives to initiate cross-border litigation were low and barriers (e.g., differences in language and legal culture) were high. See REIMANN, supra note 104, at 102-05.

\footnote{112} The internal market consists of the sum total of all economic transactions among EU parties. It does not include external trade. From the beginning it has been an EU policy of overriding importance to promote fair competition within the EU for the sake of maximizing the economic welfare of EU citizens and cultivating European enterprises that are competitive in world markets. To the extent that legal rules function as subsidies or barriers, they distort competition in the internal market.

\footnote{113} The term "parallel litigation" refers to when the same dispute is litigated in more than one forum at the same time.

\footnote{114} In the absence of thorough procedural harmonization, forum shopping can lead to competition among courts—competition in terms of favorable law, filing costs, and the like. Although some view such competition as healthy, in a regional organization such as the EU there are clear dangers to it. Some countries become magnets for plaintiffs, diverting cases from courts elsewhere. The judgments of courts in those countries, if entitled to recognition elsewhere, can exert disproportionate influence over legal relations throughout the EU. Lord Denning, the English jurist, captured this idea
Although the Convention did not seek to eliminate concurrent jurisdiction entirely, it did seek to restrict it through several mechanisms: mandatory jurisdictional grants, a double-convention structure, and centralized interpretation by the European Court of Justice (ECJ).

Unlike other multilateral treaties, the Brussels Convention's jurisdictional grants are mandatory, not permissive.\(^{115}\) When providing that a defendant can be sued in a given forum, the Convention requires the courts of that forum to adjudicate the claim.\(^ {116}\) Courts have no discretion to decline to hear the matter based on their national law. The opposite is also true; unless a Convention rule grants it jurisdiction, a court must close its doors. Member states have no discretion, as they would in the absence of a treaty, to be generous with their judicial resources. They cannot create avenues for concurrent jurisdiction that are not built into the Convention.\(^ {117}\)

The Brussels Convention restricts concurrent jurisdiction in a second way. As a double convention,\(^ {118}\) its jurisdictional rules are enforced at two stages.\(^ {119}\) First, the court in which the complaint is filed (\(F1\))\(^ {120}\) verifies jurisdiction directly. It must accept a case that has been filed correctly under a

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\(^{115}\) In contrast, jurisdictional grants in multilateral treaties are typically permissive—the treaty authorizes, but does not require, states party to exercise jurisdiction on specified bases. See, e.g., Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, art. 3, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Aircraft Offenses Convention] (stating when contracting states "are competent to exercise jurisdiction"); see also infra text accompanying notes 203-224.

\(^{116}\) In contrast, the U.S. Supreme Court's minimum contacts test operates solely as a ceiling. State courts may exercise jurisdiction up to the limits of the Due Process Clause, but nothing in the federal Constitution requires that they enact long-arm statutes that are so expansive.

\(^{117}\) The incentives for jurisdictional overreaching are also greatly reduced. There is no need for courts to stretch treaty rules out of concern that a meritorious claim may fail to find a forum. Theoretically at least, every claim will find a forum, so long as procedural requirements (such as service of process and statute of limitations) are met. In contrast, outside the Brussels regime, plaintiffs can be denied access even to a forum with statutory jurisdiction. See, e.g., Islamic Republic of Iran v. Pahlavi, 467 N.E.2d 245, 250 (1984) ("Although the existence of a suitable alternative forum is a most important factor to be considered in applying the forum non conveniens doctrine, its alleged absence does not require the court to retain jurisdiction."). In Pahlavi, the plaintiff was left with essentially nowhere to go.

\(^{118}\) A single convention (known in French as a convention simple) regulates jurisdiction at the enforcement stage, but not when suit is brought. A double convention (convention double) regulates jurisdiction at both stages. See generally Arthur T. von Mehren, Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions, 24 BROOK. J. INT'L L. 17 (1998).

\(^{119}\) In fact, it is somewhat of a misnomer to label double conventions such as the Brussels Convention as "enforcement of judgments" conventions. Rather, they are, as the full title to the Brussels Convention suggests, treaties on both the exercise of jurisdiction and the enforcement of judgments.

\(^{120}\) It has become common to refer to the court to which litigants initially turn and proceed to judgment as the \(F1\) court. The national court to which litigants subsequently turn seeking recognition and enforcement of the \(F1\) judgment is referred to as the \(F2\) court.
Convention provision, and it must dismiss an action not based on a specific provision. After the proceeding has gone to judgment, F1’s jurisdictional ruling may then be reviewed by the courts of other EU member states (F2 courts). At this stage, F2 courts must independently determine whether F1’s initial exercise of jurisdiction was in conformity with the treaty. If not, they are obliged to deny recognition to the judgment. Thus, by means of two jurisdictional filters—one at the filing stage and one at the enforcement stage—the Convention deters the proliferation of new forms of concurrent jurisdiction. The ECJ monitors both filters. Under a protocol to the Convention, national courts funnel difficult issues of treaty interpretation to the ECJ, whose rulings help to ensure uniform interpretation of the Convention.

Parallel Litigation: In international litigation, it is not unusual for essentially the same dispute to come before courts in two or more countries concurrently. This phenomenon can even occur among courts within the same country. In the absence of a treaty, it may be that neither court will be obliged to stay or dismiss its proceedings. Both cases may go to judgment, creating the potential for at least partially conflicting results.

The Convention avoids this result by establishing a first-to-file rule. Once an action has begun in one court with jurisdiction, other courts must dismiss subsequently filed suits, even if there would otherwise be a jurisdictional basis in the Convention for the second suit to proceed elsewhere. Thus, litigation is narrowly circumscribed. Once suit has been brought, it is clear where it will be adjudicated. Litigants cannot invoke provisions of national law that would allow the case to be moved to another forum. Such provisions are trumped by the Convention.

121. Indirect review of this sort does not occur in every case. It is most common where the prevailing party in F1 cannot enforce the judgment in F1 but rather must locate assets elsewhere. In the run-of-the-mill case, the prevailing party can locate assets in F1 to enforce the judgment there without having to go to another member state. That is most often the case, however, when both plaintiff and defendant are domiciled in the same member state, a situation in which the Convention does not apply.


123. Under the 1971 Protocol, the ECJ provides “rulings on the interpretation of the Convention.” ECJ Judgments Protocol, supra note 78, art. 1. Because the ECJ is not, for these purposes, a court of first instance, the mechanism by which interpretive issues come before the ECJ is similar to that under the EC Treaty. Compare id. art. 3, with TREATY OF ROME, supra note 71, art. 234 (formerly art. 177). In cases pending before national courts, when a question arises for which resolution “is necessary to enable [the national court] to give judgment” that court “shall” request a ruling from the ECJ. Id. Although the ECJ does not act in an appellate capacity, these preliminary rulings have a strong tendency to unify the interpretations of the Convention reached by the national court systems.


125. See Brussels Convention, supra note 76, art. 21 (mandatory lis pendens rule applies when the second suit is “the same cause of action and [is] between the same parties”).

126. The exceptions are instances in which one or more parties goes to a second court seeking preliminary relief. See Brussels Convention, supra note 76, art. 24 (using the term “provisional measures”). In that case the second court’s proceedings are unlikely to interfere with the main suit. The former are typically instituted to preserve assets, and they relate to the merits only tangentially.

127. For recent U.K. case law on forum non conveniens, see Lubbe v. Cape plc, [2000] 259 N.R. 18 (H.L.); Spiliada Maritime Corp. v. Cansulex Ltd., 1987 A.C. 460 (H.L.). In practice, this has
Cumulatively, these aspects of the Convention have increased certainty for litigants. Jurisdiction under the treaty is designed to be a clear-cut determination with no leeway for national legislatures or courts to expand or contract access to court. In addition, because exclusive jurisdictional provisions are built into the framework, there are categories of cases in which plaintiffs have only one forum open to them.128

C. The Brussels Convention as Paradigm: More Recent Developments in the Harmonization of Procedural Law

A bold step for one generation looks tame to the next. Though the Brussels Convention was a leap forward in 1968, for the next generation of Europeans it had not gone far enough. Aspects of the Convention were discriminatory and therefore unsuitable as a model for a global treaty.129 Moreover, the document was narrow in scope. It did not address service of process, choice of law, evidence, remedies, and other aspects of procedure subject to wide divergence under national law.130 Finally, the Convention’s chief strength—promoting a deep level of harmonization among a tightly knit community of states—could also be a potential liability. A successful regional system could become insular.131 European states constructing their own private regime might develop chauvinism and inflexibility that would impede harmonization on a broader geographic basis.132

Had none of these limitations and flaws been addressed, the Brussels Convention would not merit extended discussion. From the beginning, however, it has been a work in progress. Before its ink had dried, work began on harmonizing choice-of-law rules.133 For subsequent treaties and legislative measures, the Brussels Convention has served as a model for a pan-European

mean that British and Irish courts have had to abandon the doctrine of forum non conveniens in cases falling within the Brussels or Lugano Conventions.

128. In this sense, the concept of exclusive jurisdiction under the Brussels Convention is different from exclusive jurisdiction in the United States. In the United States, exclusive jurisdiction refers to instances in which Congress has provided that certain suits be adjudicated in federal rather than state court (e.g., federal antitrust suits), or where Congress has created specialized courts (e.g., the Court of International Trade). In neither situation has Congress directed that whole classes of cases that arise under state law be heard exclusively in particular federal courts chosen based on their geography. See supra note 76, art. 4.

129. None of the Convention’s rules on jurisdiction or recognition applies to bankruptcy litigation, for instance, or disputes over wills. Other areas also excluded are taxation, administrative law, criminal law, social security, arbitration, and property settlements resulting from divorce. See id. art. 1.

130. None of the Convention’s rules on jurisdiction or recognition applies to bankruptcy litigation, for instance, or disputes over wills. Other areas also excluded are taxation, administrative law, criminal law, social security, arbitration, and property settlements resulting from divorce. See id. art. 1.


approach to harmonization with uniformity and legal certainty as the central principles. The Convention’s importance has grown with time, allowing it to become a template for the Lugano Convention and the Rome Convention. It is also a proof text for those who supported the major changes in EU procedural law brought about by the Treaty of Amsterdam.

Through its progeny, the Convention has come to represent a certain orthodoxy that remains at the center of the European program to unify procedural law. The influence of the Brussels Convention is amplified through the following treaties that have come after it:

The Lugano Convention: The 1988 Lugano Convention extended the Brussels Convention framework beyond the EC’s borders. The two texts are similar in substantive scope, in provisions designed to limit concurrent jurisdiction, and in restricting judicial discretion. They differ in two main respects: geographic scope (Lugano brought into the fold six countries that were not members of the EC in 1988) and uniformity of interpretation (the Lugano treaty lacks any formal mechanism for assuring uniform interpretation among the many domestic courts called upon to apply it). The success of the Lugano Convention has significantly strengthened the Brussels approach to harmonization and judicial cooperation. In the absence of a network of interstate obligations comparable to those binding upon countries party to the Brussels Convention, it was not clear that uniform interpretation of the Lugano Convention would be achieved. More than a decade of case law, however, confirms that judicial interpretation of the Lugano Convention closely parallels that of the Brussels Convention, and its impact on scholarship and the practicing bar in European Free Trade Area (EFTA) countries has been profound. In five instances, membership in the Lugano Convention has been a way station on the road to full EU membership. By 2004, the Brussels/Lugano regime applied in twenty-eight countries.

The Rome Convention: Whereas the Lugano Convention extended the Brussels framework geographically, the 1980 Rome Convention extended it

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134. Lugano Convention, supra note 79.
136. Regulatory power in the EU is divided horizontally among EU institutions, and also vertically between these institutions collectively and the individual countries that make up the EU. See Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 Am. J. Comp. L. 205 (1990). From the 1950s until the 1990s, the powers of the Community legislative institutions did not extend to regulating the judicial procedures of the courts of individual member states. This changed in 1999, when the Treaty of Amsterdam entered into force and modified the existing EU treaties to confer this power. By way of comparison, it is interesting to note that in the early part of the twentieth century the United States refrained from ratifying the Bustamante Code and fully participating in negotiations with Latin American states in part because at that time many viewed such private law initiatives as outside the treaty power of the federal government. See Tatiana B. De Maekelt, General Rules of Private International Law in the Americas: New Approach, 177 Recueil Des Cours 193, 227 (1982-IV); Kurt Nadelmann, The Need for Revision of the Bustamante Code on Private International Law, 65 Am. J. Int’l L. 782 (1971).
137. For a detailed discussion of the differences, see the authoritative report on the Lugano Convention by P. Jenard and G. Moller. Jenard & Moller, supra note 79, at 69-86.
138. For EC states, the Brussels Convention was one of a long list of interstate commitments. That is not true of the European Free Trade Area (EFTA) states that ratified the Lugano Convention.
139. See Tebbens, supra note 79.
140. Rome Convention, supra note 135.
beyond jurisdiction to choice of law. The goals of the work on jurisdiction could not be fully realized, some argued, without a choice-of-law treaty based on similar priorities: greater legal certainty for transnational litigants, less competitive distortion in the common market, and a narrowing of the divergence among EC member states in the area of private law.

In terms of uniformity and universality, Rome improved upon what Brussels had achieved by steering clear of discriminatory rules. Whereas the Brussels regime allows exorbitant provisions to be used against defendants domiciled outside the EU, the Rome regime is neutral towards foreign litigants and foreign fora. A choice-of-law provision selecting a forum outside the EU is enforceable, and in the absence of such a forum selection clause the choice-of-forum analysis performed by courts does not depend on the nationality of the parties or their domicile.

Private Law Harmonization Based on the Treaties of Maastricht and Amsterdam: The Treaties of Maastricht and Amsterdam were unlike earlier EC instruments. They were preceded by a widespread popular debate about the federal vocation of the EU and about the degree to which the lives of EU citizens should be subject to regulation from Brussels rather than from national or subnational governments. In the private law realm, these treaties were the first expressly to provide a legal basis for EU legislation in private law, thus breaking very sensitive ground. They were able to do so in part because of the early success of the “Europe 1992” program, the fall of the Berlin Wall, and the success of the Brussels, Rome, and Lugano Conventions, which fueled the European Parliament’s call for a greater EU component to European private law. In just the past few years, the result has been a series of major harmonization initiatives: jurisdictional rules in matrimonial matters (Brussels II), EU-wide rules for serving process and taking evidence, and proposed legislation on choice-of-law rules in torts and other areas of non-contractual liability (Rome II). The February 2000 Commission Green Paper

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141. GIULIANO & LAGARDE, supra note 133, para. 3 (Rome Convention described as a “natural sequel” to the Brussels Convention); see also Rome Convention, supra note 135, 2d pmbl.
142. GIULIANO & LAGARDE, supra note 133, para. 3 (referring to the “urgent necessity for greater legal certainty in some sectors of major economic importance”).
143. Id. Distortion can arise in European product and service markets when, for example, the validity of a cause of action or a defense is allowed to depend on the forum’s choice-of-law rule.
144. See id. para. 1 (referring to an “element of urgency” and concern that “the existing divergences would become more marked”).
145. See, e.g., Position of the Italian Government on the Intergovernmental Conference for the Revision of the Treaties, http://europa.eu.int/en/agenda/igc-home/ms-doe/state-it/italien.htm (Mar. 18, 1996). The Maastricht Treaty was the first instance in which a major revision to the EU treaties was subjected to public referendum in several EU member states.
146. So sensitive that Denmark, England, and Ireland negotiated opt-out rights with respect to those provisions of the Amsterdam Treaty constituting the so-called “third pillar,” which extends EU competence to the realms of justice, security, and foreign policy. See generally LEVASSEUR & SCOTT, supra note 38, at 992-1006.
147. See Hufbauer, supra note 132.
148. The European Parliament’s first resolution on private law harmonization was in May 1989. See Resolution on Action to Bring into Line the Private Law of the Member States, 1989 O.J. (C 158) 401 (calling for a “common European Code of Private Law”). Just five years later, the Parliament urged that the EU “promote harmonization and standardization at [a] world or European level within organizations such as UNIDROIT, UNCITRAL, and the Council of Europe.” Resolution on the Harmonization of Certain Sectors of the Private Law of the Member States, 1994 O.J. (C 205) 518.
on barriers to cross-border litigation proposes additional robust efforts to harmonize procedural law in the EU.  

The Hague Conference: Another direct offspring of the Brussels Convention is the Hague Conference’s ongoing effort to create a Convention on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters. The project was proposed by the United States, which initially envisioned a treaty that would make it marginally easier for U.S. judgment creditors to enforce U.S. judgments abroad. The proposal came soon after the U.S. Supreme Court had quite narrowly interpreted the Hague Service Convention and the Hague Evidence Convention as supplements to U.S. procedural rules rather than as presumptive replacements for those rules. Delegates representing countries other than the United States repeatedly referred to the two cases at issue, Aerospatiale and Schlunk, as reasons why a single convention would be inadequate—it would be a superficial stab at harmonization that U.S. courts might interpret as merely optional and supplemental. The scope and structure of the United States proposal was rejected as failing to address the main reasons for poor cooperation between U.S. courts and others—overly aggressive U.S. jurisdictional rules.

Though the scope of the Hague project has been drastically cut back, the history of the project thus far demonstrates the existence of a critical number of countries in favor of harmonizing procedural law in the path of the Brussels Convention and its progeny.

ALI/UNIDROIT: Contemporaneous with the Hague Judgments Project is a joint endeavor of the American Law Institute (ALI) and UNIDROIT that seeks to bridge differences between U.S. and European approaches to pleading and discovery in transnational commercial litigation and arbitration. The proposed “Rules of Transnational Civil Procedure” and the accompanying Principles pick up where successive Hague initiatives have left off. The ALI/UNIDROIT effort moves from jurisdiction to discovery, pleading, and trial. Going beyond judicial cooperation mechanisms (that leave

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150. See Volkswagenwerk AG v. Schlunk, 486 U.S. 694 (1988) (ruling that the Hague Convention is inapplicable where foreign entity has a U.S. subsidiary that can be served with process within the United States).


152. How a project that initially sought a treaty addressing a broad range of issues was pared down to one addressing only judgments reached pursuant to forum selection clauses is summarized in Trevor C. Hartley & Masato Dogashu, Draft Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements, Prelim. Doc. No. 26 (Dec. 2004), http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf.
national approaches in tack), its proposals essentially hybridize U.S. and continental European approaches to the mechanics of dispute resolution. Under the direction of eminent U.S. and European academics, the proposed Principles are nearing final approval by ALI and by UNIDROIT. Approval will set the stage for efforts to secure their adoption by national legal systems and their acceptance by a broad cross-section of transnational litigants. If widely implemented, this project will infuse the harmonization movement with additional momentum.

D. The Brussels and Rome Conventions in Practice

At this point, the impact of these various harmonization initiatives on injured parties may seem abstract. Precisely how do the forum limitations built into the Brussels Convention (and hence any worldwide treaty based on the Convention) restrict efforts to police grave human rights violations through private rights of action? Before this question is taken up in full in Part IV, consider the following hypothetical case.

The Case of the Migrant Workers

A large wine producer in Country A hires temporary workers from Country B to pick grapes on a seasonal basis. The workers are Muslim and legally reside in Country B. When the workers arrive, they find the working and living conditions unsanitary and unsafe. Working hours far exceed the number permitted in either Country A or B. A few of the workers report these health and safety violations to local authorities, who are in the pocket of the wine company. The complaining workers are first subjected to racial and religious insults by local police. Later, company thugs kidnap and severely beat the most outspoken workers, two of whom simply disappear without a trace. Local authorities knowingly look the other way and obstruct efforts to investigate the beatings. Suppose further that a statute in Country B allows workers and their estates to bring civil actions for injuries suffered from acts of retaliation associated with reporting work-related health or safety violations. How would this case be treated under the Brussels Convention?

Under Article 3, the Brussels Convention's default rule, plaintiffs always have the right to sue the company and the police officers where the defendants...
are domiciled, which is Country A. Of course, this right may not be helpful. The courts of Country A may be less than hospitable to suits by foreign seasonal workers against a large local employer, especially if the suit alleges that local officials also conspired based on ethnic and religious bigotry. As a forum, Country A has the further drawback that police and local officials may enjoy immunity there. Plaintiffs will also find it expensive and inconvenient to litigate in Country A, given the geographical distance from their ordinary place of residence in Country B, the language differences, an unfamiliar legal system, and the difficulties in obtaining and monitoring local counsel.\textsuperscript{157} Choice of law may also pose problems. Under the Rome Conventions, it is Country A's substantive law that will apply. Legislation enacted in Country B for the purpose of protecting whistleblowers and seasonal guest workers likely will not be applied if the suit goes forward in Country A despite what a U.S. lawyer would view as Country B's strong interest in protecting its residents.\textsuperscript{158}

Do any other articles of the Convention apply? The plaintiffs might try Article 5.1,\textsuperscript{159} on the theory that their suit is "related to" their contract of employment. This avenue would not take them very far. Under this provision, supplemental jurisdiction rests with the courts in the forum where the work was performed, which, like Article 3, leads to the courts of Country A. They might try Article 5.3, on the theory that the threats and the beatings were torts. This tack would not help either. Article 5.3 grants jurisdiction in tort suits to the courts in the place where "the harmful event occurred." If all the threats and blows were delivered in Country A, Article 5.3 also leads to the courts of A. Subsequent medical treatment, long-term disability, and emotional suffering that take place later in the workers' home country do not, under ECJ case law, make Country B the place where the harmful event occurred.\textsuperscript{160}

What about Article 5.5? Suppose the wine-producing operation in Country A is actually a branch of a larger company that is incorporated and based in Country B. Will this connection to Country B allow the plaintiffs to sue there? Again, probably not. Article 5.5 provides a supplemental jurisdictional rule in the case of disputes "arising out of the operations of a branch, agency, or other establishment." Although the suit here does arise out of the operations of a branch, under Article 5.5, suit must be brought where the branch, agency, or establishment is located. In our case, the branch is located in Country A.\textsuperscript{161} Applying the relevant articles of the Convention, the plaintiffs seem to have no choice but to bring suit in an inconvenient and perhaps hostile forum.

Could Country B remedy this situation by adopting a special jurisdictional provision to go along with the substantive statute it has enacted? Could it, based on legislative findings that the rights of seasonal workers are

\textsuperscript{157} The conditions for obtaining legal aid may be quite different in the two EU member states.

\textsuperscript{158} By way of comparison, that interest in worker protection was decisive in Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532 (1935).

\textsuperscript{159} In matters relating to individual contracts of employment, suit may be brought anywhere the employee habitually carries out his or her work. Brussels Convention, supra note 76, art. 5.1.


\textsuperscript{161} The courts of B may be open if the plaintiffs can show that officials at the main branch directed the illegal acts or actively concealed them. Even if that were so, it would not provide a basis for jurisdiction over Country A's local authorities.
at risk, pass a statute specifying a narrow set of civil claims\textsuperscript{162} that may be adjudicated in the courts of Country B, if the plaintiff is domiciled in Country B or was recruited or hired in Country B? Again, the answer is no. Such a jurisdictional statute would be contrary to the Brussels Convention, whose jurisdictional provisions on employment contracts, torts, and other causes of action are intended to be exhaustive and preemptive. The law would be struck down either by Country B’s own courts or by the ECJ.\textsuperscript{163}

This hypothetical case illustrates the difficulty of bringing transnational civil human rights suits within the Brussels Convention framework. An employee recruited in Country B to work abroad for a local subsidiary of a multinational company headquartered in Country B cannot bring suit against the subsidiary in Country B,\textsuperscript{164} even where the complaint alleges conduct contrary to important legislative policies of Country B. The case also shows that the Convention’s role in harmonizing jurisdictional rules has lessened the ability of states party, acting individually, to vindicate the rights at stake here—freedom from torture, disappearance, and workplace retaliation. Before the Convention, there was greater variation among national jurisdictional rules.\textsuperscript{165} National legislatures had more flexibility to direct their courts to adjudicate certain extraterritorial\textsuperscript{166} violations of their laws. In becoming parties to the Convention, member states have lost much of this flexibility. In becoming a party to the Brussels Convention, Country B, above, has lessened its ability to act unilaterally in the sphere of adjudicative jurisdiction.

Of course Country B could lobby for EU-wide legislation to address the abuses featured in the case. Success, however, would require the votes of other EU states, and any legislation almost certainly would stop short of remedying the basic forum problem: the disadvantages that foreign seasonal

\textsuperscript{162} For example, claims for severe physical injuries inflicted under color of law and suffered in retaliation for reporting health and safety regulations.

\textsuperscript{163} Strictly speaking, the ECJ does not have authority to strike down or invalidate national laws. It has no appellate jurisdiction under either Protocol 1 to the Convention or the Treaty of Rome. Its jurisdiction in our hypothetical case would derive from Article 234 (formerly Article 177) of the Treaty of Rome, which enables the ECJ to give preliminary rulings interpreting the Convention or other sources of Community law. Such requests for preliminary rulings are, in theory, similar to certified questions in U.S. practice. In both instances, one court (a national court, in the EU context) asks another court (the ECJ)—which has authority to interpret a particular body of law (here, the Brussels Convention and EU law)—to answer a specific question of interpretation so that the requesting court can apply this reading to the facts at hand. In practice, a number of ECJ preliminary rulings have come quite close to telling national courts exactly what they should do, even that they should invalidate national legislation after receiving the ECJ’s preliminary ruling. See, e.g., The Queen v. Secretary of State for Transport, ex parte Factortame Ltd., 1990 ECR 1-2433; see generally Paul R. Dubinsky, The Essential Function of Federal Courts: The European Union and the United States Compared, 42 Am. J. Comp. L. 295, 325-40 (1994).

\textsuperscript{164} It may be that a public authority in Country B can take some kind of action, but only if it is authorized to act with respect to extraterritorial conduct by the company.

\textsuperscript{165} The rules were less flexible than in common law countries, but more flexible than today.

\textsuperscript{166} Extraterritorial in the sense that the acts and omissions that are actionable—the threats, the beatings, the retaliation, the police’s failure to intervene—all took place outside Country B. A creative lawyer in the United States might recast the claim in territorial terms by recharacterizing the issue as the company’s failure to warn the workers when recruiting them that they would be exposed to dangerous conditions, hate crimes, and workplace retaliation. The Supreme Court rejected that argument in Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (dismissing attempt to find a jurisdictional exception under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, §§ 1602-11, & §§ 1332, 1391, 1441 (1976) [hereinafter FSIA], in a false imprisonment claim by an American engineer recruited in the United States to work in a Saudi hospital). There is no reason to believe European courts would be any more sympathetic to such an attempt at recharacterizing a claim in order to overcome a jurisdictional obstacle.
workers may face in foreign courts.\textsuperscript{167} It is likely, however, that the EU legislative process would fail to address even a subset of that problem—disadvantages that seasonal workers face in foreign courts when their most fundamental rights are in jeopardy. Nor would the European Court of Human Rights (ECHR) fill the gap.\textsuperscript{168} A presumption in favor of Country $A$'s procedural rules would make it difficult for the ECHR to overturn the result of litigation in Country $A$.

The plaintiffs need the ability to go to another forum in the first instance, as plaintiffs in the United States sometimes may turn to federal rather than state court. The EU, however, has no comparable dual court system, and the Brussels Convention firmly bars attempts to make courts like those in Country $B$ function as an alternative forum. Nor does the ECHR fulfill that function.

The Brussels and Lugano Conventions select proper fora on an ex ante basis through factors that the dominant legal culture deems to be neutral. The treaties greatly limit forum shopping. They do not privilege any class of rights (such as fundamental human rights) as worthy of special jurisdictional provisions to ensure adequate policing of infringements of those rights in particular cases. The same one-dimensional treatment holds true under the proposed Rome II Convention, which in specifying choice-of-law rules fails to assure that suits relating to human rights abuses will not be frustrated by local laws that protect the perpetrators. Finally, the example shows how rules that may make sense in a wrongful termination dispute between an employer and an employee make less sense in suits alleging systemic bias, violence, and denial of fundamental rights. The assumption that every forum operates without bias is questionable in the case of guest workers in general, and especially so when the claim relates to horrendous human rights violations.

Should claims relating to disappearance, ethnic cleansing, and other atrocities be privileged under procedural law? Part III analyzes a key shift in the human rights movement, a shift that has put that question at the crossroads of competing visions of the future of international law.

III. THE HUMAN RIGHTS LAW MOVEMENT IN THE TWENTIETH CENTURY

Like the harmonization of procedural law, the movement to advance international human rights is in flux. Initially, the two developments had much in common. In an era defined by the dominance of the nation-state, both put forward a more cosmopolitan vision. Both contributed to a new consensus that took hold in the latter half of the twentieth century: the nation-state's days as the sole subject and object of international law were numbered. The path to greater worldwide prosperity and respect for human dignity lay in building

\textsuperscript{167} A typical EU Directive might identify certain substantive rights to be protected and require that member states enact their own legislation providing a right to seek relief in local courts. In our case, that would probably not go far in making Country $A$ a reasonable forum for the plaintiffs, given the allegations in their case. Note that the EU at present has no real equivalent to the U.S. system of lower federal courts able to protect rights that might otherwise go unvindicated because of actual or perceived bias in local courts. Suits of this type cannot be filed initially in any EU court.

\textsuperscript{168} In order to get their claim before the ECHR, the plaintiffs would first need to work their way through the court system of Country $A$. See European Human Rights Convention, \textit{supra} note 98, art. 35 ("The Court may only deal with the matter after all domestic remedies have been exhausted").
new international institutions and promoting a wider diffusion of freedom: free markets, free elections, freedom from persecution, and freedom of thought and expression.

Despite these early similarities, the two movements have diverged. Part II focused on one cause of the divergence—the growing efforts to unify procedural law, disproportionately shaped by continental European notions of legal procedure. Although the basic elements of this continental tradition had been in place for quite some time, the European influence was accentuated by two developments in the latter half of the century—economic globalization and European integration. Both developments also were to influence the human rights movement.

This Part examines the growing tension between private law unification and human rights enforcement not from the vantage point of private law but rather from that of international human rights law, international criminal law, and international humanitarian law, three areas traditionally seen as residing at the core of public international law.\(^\text{169}\)

Private international law was not alone in responding to globalization. The new field of human rights law also developed in response to certain phenomena associated with globalization—the globalization of war, the globalization of legalism, and the globalization of rights.\(^\text{170}\) Initially, the movement’s response to these trends was to draft treaties. Activists in the early decades after World War II, when the modern human rights movement really took shape, were consumed with codifying basic human rights and imposing limits on the conduct of warfare. But when the existence of these treaties failed to lessen the extent or the frequency of atrocities, human rights law shifted its focus from codification to enforcement. What was needed was less moral suasion and more coercion. In the last two decades of the twentieth century, human rights NGOs focused on domestic courts as the institutions with the ability to force states to act.\(^\text{171}\)

At first blush, ordinary civil and criminal tribunals, creatures of national constitutions and statutes, might seem an odd choice. If the executive and legislative branches of the U.S. government had shown little inclination to stop the waves of “disappearances” in Latin America,\(^\text{172}\) what could be

\(^{169}\) In the last decade, the three have converged. See, e.g., Antonio Cassese, The International Tribunal for the Former Yugoslavia and the Implementation of International Humanitarian Law, in LES NATIONS UNIES ET LE DROIT INTERNATIONAL HUMANITAIRE 229 (Luigi Condorelli et al. eds., 1996); Theodor Meron, War Crimes Law Comes of Age, 92 AM. J. INT’L L. 462 (1998).

\(^{170}\) The century ushered in the first truly global wars but also saw a great proliferation of atrocities committed in so-called internal conflicts, those lacking a clear nexus to an international dispute. Among the challenges to international criminal law and humanitarian law has been addressing both the globalization of armed conflict and the historical legacy that conflicts confined to one nation lie outside customary international law. See, e.g., Theodor Meron, International Criminalization of Internal Atrocities, 89 AM. J. INT’L L. 554 (1995).

\(^{171}\) See MICHAEL BYERS, THE ROLE OF LAW IN INTERNATIONAL POLITICS (2000).


\(^{174}\) In the aftermath of the Pinochet case, infra note 309, the U.S. government declassified some of its archives with respect to U.S. policy toward Chile in the 1970s and 1980s. These archives
expected of the U.S. judiciary? The answer, quite simply, was fidelity to the rule of law. What the human rights community banked on (correctly so, in retrospect) was that those domestic court systems that were steeped in the rule of law would not ignore flagrant violations of international law, even when the events had taken place abroad. Moreover, they accurately predicted that some domestic courts would conclude that violations of rights of such fundamental stature had to trigger a remedy of some kind.

The timing of this new focus on domestic courts in the late 1980s and 1990s coincided with perhaps the greatest geographic expansion of judicial review ever. Newly invigorated domestic courts had the resources and the authority to succeed where other institutions had failed. When they spoke, the political branches of constitutional democracies listened. Thus, the human rights world, like the world of international private law, began to see domestic courts as institutions central to a new and better international legal regime.

There was, however, a major problem. Domestic courts had not been created with transnational human rights enforcement in mind. Procedural laws had evolved in response to garden-variety domestic litigation. Rules of civil procedure developed to fit two-party, private law disputes in which parties were readily accessible and few intractable issues of evidence were presented. Indeed, most criminal procedure systems incorporated a bias against policing transnational criminal offenses. Limits on the exercise of legislative and adjudicative jurisdiction arose from international law, constitutional and quasi-constitutional doctrines, and prudential principles.

Despite their common focus on the procedural rules of domestic courts, the two movements reacted quite differently to what they found. For proponents of unification, national procedural rules needed to be more alike. The main problem, as they saw it, was that prospective litigants confronted an assortment of national rules that varied too much from country to country. Transacting parties were left adrift in a sea of legal uncertainty. By contrast,

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show much U.S. complicity, as it applied little pressure to stop the “disappearances.” See Peter Kornbluh, George Washington Univ. Nat’l Sec. Archive, Chile Documentation Project, at http://www2.gwu.edu/~nsarchiv/latin_america/chile.htm (last visited Dec. 12, 2004).


176. See, e.g., The Antelope, 23 U.S. 66 (1825); The Queen v. Keynes, 2 Q.B.D. 90 (1876).

177. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES §§ 47-53 (on sovereignty).


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those concerned with human rights enforcement saw a different picture. The problem, as they saw it, was that jurisdictional rules, choice-of-law rules, statutes of limitations, and other procedural devices incorporated assumptions that did not fit the new task that domestic courts faced—or that human rights advocates would have them face. Rules that in most cases embodied a sensible balancing of competing principles (for example, assuring access to justice but also comity toward courts in other countries) were not suitable for disputes presented against a backdrop of widespread atrocities.

A. The Human Rights Movement and the Unification Movement: Early Similarities

Like the unification movement, the human rights movement had its roots in the nineteenth century. Its origin lay in the great moral and humanitarian struggles of that century: abolishing slavery, securing rights for women, safeguarding civilians and prisoners of war during wartime, and protecting persecuted religious minorities. Each of these causes became the focus of an international movement with an international network of supporters. Each sought to end a moral evil not in one place but everywhere. During an era dominated by nationalism, these precursors to the modern human rights movement espoused universalism.

Both the unification and the human rights movements also faced two common obstacles: the nation-state and legal positivism. In the nineteenth century, codification of private law on a national level had done much to displace principles long embedded in the jus commune. In place of principles that had been shared across much of Europe for centuries, the modern nation-state now enacted new laws more reflective of national identities. Legal positivism provided an intellectual justification for this particularism. Positivism’s supporters claimed that the ultimate source of law was neither tradition, nor religion, nor reason. It was power. Law was what the sovereign decreed, and in an age in which each nation-state had its own sovereign but Europe as a whole had none, the call for pan-European legal unity faced a


185. In common law countries, legal positivists tried to replace judicial lawmaking in private law with statutory law. See generally Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799 (1941) (focusing on U.S. doctrine).
formidable roadblock. The calls for unity appeared to be at odds with the emergence of distinct national legal cultures.

Similarly, legal positivism and the nation-state obstructed the early human rights movement. Positivism and its account of law's legitimacy posed a large theoretical obstacle to universalism. If the ultimate source of law was power, how could individual rights be universal? Indeed, the positivist conception saw rights as defined by a list of variables: geography, historical tradition, and the specific characteristics of the claimant (nationality, gender, race, religion, or property ownership). Rights did not rest on a common notion of humanity. An English man could vote, while an English woman could not. A white Belgian was free while a black Congolese was enslaved. The czar's police protected Christian shops, but not Jewish shops.

B. The Early Human Rights Movement: Codification

The two movements also shared an early focus on harmonization and codification. Indeed, it was codification that most clearly demarcated the transition from nineteenth-century moral movements to modern human rights activism. Abolitionists, suffragists, pacifists, and others were essentially single-issue groups. What mattered was securing progressive legislation on their issue. They did little to build a broader, progressive rights movement with foundational texts at its core. That task fell to the immediate post–World War II generation, which authored the Nuremberg Principles, the Universal Declaration of Human Rights, and the two International Covenants. These texts soon became a secular canon of sorts. As in private international law, momentum gathered behind treaty drafting for the sake of producing consensus. The Universal Declaration in particular was instrumental in drawing together previously isolated, single-issue groups and transforming them into networks based in different parts of the world pushing a broad rights agenda.

But this codification of human rights law came at a price. The immediate postwar texts were abstract and vague. They served as important tools in


causing rights advocates of different stripes to coalesce into an effective political and legal movement, but the texts were able to do so only by stating rights at a high level of abstraction. They glossed over fundamental differences in rights traditions and avoided articulating the source of rights or resolving priorities among competing claims of right. Instead, they largely codified a set of least common denominators: prohibitions on slavery, torture, arbitrary arrest, and inequality before the law; rights to freedom of movement, freedom of expression, and free exercise of religion. Even the more controversial social and economic entitlements articulated in the Universal Declaration (e.g., rights to employment, education, and medical care) were stated so abstractly and with so little attention to implementation that they elicited little opposition.

The Declaration was a beginning, however, not an end. It begot more specific, more juridically worded texts over the next few decades, when codification dominated the human rights agenda. The result was a series of widely ratified treaties: the Genocide Convention, the two International Covenants, the Race Discrimination Convention, the Refugee Convention, the Supplementary Convention on Slavery, and the Prostitution Convention. These texts—what one might call “First Generation Human Rights Treaties”—were the first global instruments to

193. See, e.g., Universal Declaration, supra note 190, art. 1 (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”).  
194. Compare id. art. 7 (prohibiting “incitement” to discrimination), with id. art. 19 (“[e]veryone has the right to freedom of opinion and expression”), and id. art. 20 (freedom of association).  
196. ICCPR, supra note 191; ICESCR, supra note 191.  
200. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271. From efforts early in the twentieth century to end the “white slave traffic,” prostitution was viewed in part as the exploitation of a vulnerable class of persons and hence as what would later be termed a human rights issue. See id. pmbl. (stating that prostitution is “incompatible with the dignity and worth of the human person” and a danger to the “welfare of the individual”); see also International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1904, 1 L.N.T.S 83.  
201. Dean Koh divides the postwar human rights movement into four discrete stages. Harold Hongju Koh, A United States Human Rights Policy for the 21st Century, 46 ST. LOUIS U. L.J. 293, 301-04 (2002). In focusing on treaties, however, it is useful to speak in terms of two stages. By First Generation Human Rights Treaties, I mean to refer to instruments that primarily define rights and offenses. They tend to ignore questions of enforcement and procedure. Examples include the Universal Declaration of Human Rights, the ICCPR, the ICESCR, the Genocide Convention, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on Elimination of All Forms of Discrimination Against Women. Although the peak period for drafting these instruments was from 1945 until the early 1970s, the work continues. See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, arts. 6-8, U.N. Doc. 32/A/CONF.183/9, reprinted in 37 I.L.M. 999, 1004-09 [hereinafter Rome Statute of the ICC] (codifying definitions of genocide, crimes against humanity, and war crimes); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (providing an extensive list of positive and negative rights). In contrast, Second Generation Human Rights Treaties focus on mechanisms for ensuring accountability and victim compensation,
articulate universal entitlements and define universal crimes. Although they were more specific than the Universal Declaration, in terms of enforcement they failed to require states party to commit to few specific obligations.\textsuperscript{202}

C. \textit{From Codifying Rights to Enforcing Rights: Second Generation Treaties}

Despite their high ratification rates,\textsuperscript{203} First Generation Treaties fell short in terms of implementation and observance. In the first few decades after the Universal Declaration, systemic repression and flagrant atrocities remained common in many of the states that had ratified the treaties.\textsuperscript{204} Wholesale violations typically were met with silence. Thousands "disappeared" in Latin America. Millions were murdered in Cambodia. Freedom of expression was suppressed across Eastern Europe. Apartheid dominated South Africa. The Geneva Conventions were repeatedly ignored in the Vietnam War.\textsuperscript{205}

At the heart of First Generation Treaties were flaws that explained this failure. The drafters of these texts assumed that future international institutions would be able to expose and sanction noncompliance. In the late 1940s, it was anticipated that a permanent international criminal court with jurisdiction broader than that of the Nuremberg and Tokyo Tribunals would soon be created.\textsuperscript{206} Nearly sixty years passed before such a court was born. Without the anticipated enforcement mechanisms, texts such as the Genocide Convention came to be viewed by some as merely aspirational, though that typically with respect to grave human rights offenses and atrocities. See infra notes 218-223 and accompanying text.

\textsuperscript{202} Consider one representative provision, Article 23.1 of the ICCPR, which states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." ICCPR, supra note 191, art. 23.1. Not only does the provision fail to say how and to what extent society is to protect the family, it also fails to address potentially conflicting principles such as individual liberty and public welfare. With provisions like these, states were able to claim that First Generation Treaties were a valid but indeterminate source of law, and that the task of balancing competing principles was left to national governments.


\textsuperscript{204} In an important piece of empirical research, Professor Hathaway concludes that actual compliance with human rights norms has not greatly improved. Oona A. Hathaway, \textit{Do Human Rights Treaties Make a Difference?}, 111 YALE L.J. 1935, 1939 (2002) (undertaking a "large-scale quantitative analysis of the relationship between human rights treaties and countries' human rights practices" and finding that noncompliance is still common among states that ratify human rights treaties).


\textsuperscript{206} See Genocide Convention, supra note 195, art. VI (referring to trial by either a court in the state in which the offense was committed or by an "international penal tribunal"); see also M. Cherif Bassioumi, \textit{From Versailles to Rwanda in Seventy-Five Years: The Need To Establish a Permanent International Criminal Court}, 10 HARV. HUM. RTS. J. 11 (1997).
outcome was clearly not what the generation drafting the Convention had intended.

In the absence of international criminal tribunals or courts with broad jurisdiction over human rights claims,\(^2\) hope was placed in treaty-monitoring committees.\(^2\) Experience soon demonstrated, however, that these committees were flawed in design. Lacking compulsory, unannounced, on-site inspection powers and prompt access to witnesses and documents, these committees all too often had to rely for information on the government under review. Moreover, the monitoring process soon came to be plagued by habitual lateness. Even today, it is not uncommon for human rights committees to report on regimes that are no longer in power rather than on the current situation.\(^2\)

In addition, First Generation Treaties did not stray far from the core Westphalian principles of state sovereignty. Even the Genocide Convention, a treaty drafted during the Nuremberg and Tokyo trials and concurrent with the retreat of Westphalianism on other fronts, largely conformed to the Westphalian mold. By its terms, the Convention failed to contain any express provision stripping state officials of immunity. It did not limit the ability of states to ratify the treaty subject to extensive reservations, understandings, and declarations.\(^2\) The Convention contained no express statement that the prohibition on genocide was a jus cogens norm being codified, rather than created, by the Convention text. Nor did it impose any affirmative obligations. Ratifying states did not undertake to prosecute violators, to extradite them to

\(^{207}\) The European Court of Human Rights (ECHR) was created in 1959, but initially as a court with a very limited ability to redress human rights abuses. Its jurisdiction extended solely to complaints against states party, and an individual’s ability to bring a complaint depended upon the defendant’s consent. Even then, individual complaints could not be heard by the Court unless deemed admissible by the European Commission on Human Rights. See generally The European Court of Human Rights: Historical Background, Organisation and Procedure, at http://www.echr.coe.int/Eng/EDocs/-HistoricalBackground.htm (Sept. 2003). The Inter-American Court of Human Rights was created in 1979 with similar constraints. See Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L.V/II.82 doc. 6 rev. 1, at 13 (1992), http://wwwl.umn.edu/humanrts/iachr/-general.html.

\(^{208}\) E.g., the U.N. Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women, the Migrant Workers Committee, and the Committee on the Rights of the Child.

\(^{209}\) For evaluation and criticism of human rights committees, see generally INTERNATIONAL HUMAN RIGHTS MONITORING MECHANISMS: ESSAYS IN HONOUR OF JAKOB TH. MOLLER (Gudmundur Alfredsson et al. eds., 2001); THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston ed., 1992).

other states, or to take any specific measures on behalf of communities targeted for genocide.\footnote{11}

1. **Expanding National Jurisdiction: The Hague and Montreal Conventions**

In the decade after the Genocide Convention, national courts seemed unlikely institutions to place at the center of any regime for enforcing international law. To the extent that such courts had applied international law in the past, they had done so only sporadically, hampered by the territorial nature of their jurisdiction. Throughout the nineteenth and the early twentieth centuries, municipal courts were quite limited in their ability to adjudicate disputes involving conduct that had taken place outside their borders. The territorial nature of this limitation had many manifestations: the dominance of the doctrine of *lex loci delicti* (the law of the place of wrong) in choice of law,\footnote{12} the presumptive territorial limits of prescriptive jurisdiction,\footnote{13} the breadth of the act of state doctrine,\footnote{14} and the great stinginess with which res judicata and collateral estoppel were applied across borders.\footnote{15} Even when increasing numbers of judicial opinions began to signal the decline of territoriality as an exclusive principle of jurisdiction and choice of law,\footnote{16}

\footnote{11. For example, the prerogative, in some circumstances, of courts in Country B to entertain a civil or criminal action for a violation that took place in Country A, when Country A has declined to act. 
12. See, e.g., Restatement (First) Conflict of Laws § 378 (1934) (maintaining that the law of the place of wrong determines whether a person has sustained a legal injury).
13. It was not until 1945 that courts committed the United States to an interpretation of the Sherman Act that included the possibility of its extraterritorial application. Compare United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945) (sitting by designation) (finding that the Sherman Act applies to antitrust conspiracy carried out abroad with intent to affect prices in the United States combined with actual effects on the U.S. market), with Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (interpreting the Sherman Act and concluding that "the general and almost universal rule must be that the character of an act as lawful or unlawful is determined wholly by the law of the country where the act is done"). On the presumptive territoriality of criminal legislation, see, e.g., [Montevideo) Treaty on International Penal Law, Jan. 23, 1889, art. 1, reprinted in Harvard Law Sch. Research in Int'l Law, Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 439, 638 (Supp. 1935) ("Crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, of the victim, or of the injured party.").
14. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897): Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to... sovereign powers as between themselves.
15. See Hilton v. Guyot, 159 U.S. 113, 163 (1895) (noting that traditionally "[n]o law ha[d] any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived").
16. As early as 1927, the *S.S. Lotus* case affirmed the principle that legislative jurisdiction could rest on harmful effects within the forum even if the conduct producing those effects took place wholly outside the forum. See Case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) [hereinafter *S.S. Lotus*] (finding that Turkish courts could exercise criminal jurisdiction based on injuries sustained by the crew of a Turkish ship as a result of the negligence of the captain of a nearby French vessel). In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the U.S. Supreme Court overruled Pennoyer v. Neff, 95 U.S. 714 (1877), a bastion of territoriality, and announced that the touchstone for personal jurisdiction in U.S. courts no longer was the defendant's physical presence within the forum. Extraterritorial jurisdiction soon received limited embrace from the EU. See Cases 48/69, 49/69 & 51-57/69, Imperial Chemical Indus. Ltd. v. Commission, 1972 E.C.R. 619 (the Dyestuffs case) (upholding...}
extraterritorial bases of jurisdiction did not immediately find their way into multilateral treaties.

Global terrorism changed this. So did the war on illegal drugs and attempts at creating an effective nonproliferation regime. Repeated hijackings, hostage takings, 217 assassinations, leaks of Western technology to the Eastern bloc, and steadily rising movements of narcotics into Western countries demonstrated the inadequacy of territoriality as an exclusive principle of either legislative or adjudicative jurisdiction. These and other transnational offenses became the driving force for the creation of the Second Generation Treaties, texts focused on violence perpetrated by non-state entities against civilians, usually for political ends. 218 This second generation of treaty-making stepped outside the Westphalian mold largely out of urgent political necessity. 219 Those who drafted the Hague 220 and Montreal Conventions, 221 two early Second Generation Treaties, were responding to a pervasive problem for which conventional juridical responses had been unsuccessful. Efforts to apprehend and try hijackers and other perpetrators of transborder crimes repeatedly had been hampered by the limited jurisdiction of national authorities. 222

Western leaders were under enormous pressure to stop the violence, which in some places had become politically destabilizing. It was in this context that states became more willing to reevaluate a central aspect of state sovereignty: the exclusive jurisdiction of each nation-state over conduct carried out within its borders. 223 The Hague and Montreal Conventions jurisdiction over defendants alleged to have operated a cartel outside the EU that produced effects within the EU.


218. Typically, victims were targeted based on their nationality by perpetrators seeking to extract something from that country's government. For example, the Palestinian Liberation Organization’s taking hostage Israeli athletes at the 1972 Munich Olympics followed this pattern.


222. In the United States, the Antihijacking Act of 1974 was enacted to fill a jurisdictional void and to implement the Unlawful Aircraft Seizure Convention, supra note 220, which requires signatory nations to extradite or punish hijackers present in their territory. Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (1974).

223. One indication of the perceived urgency was the speed with which the new antiterrorism treaties were ratified. Whereas forty years passed before the United States ratified the Genocide Convention, supra note 195, (and even then with two reservations and five understandings), it took only six years for the United States to ratify the Aircraft Offenses Convention, supra note 115, less than a year for the Unlawful Aircraft Seizure Convention, supra note 220, and one year for the Montreal Convention, supra note 221—all without reservations, understandings, or declarations. These Conventions, together with the 1979 International Convention Against the Taking of Hostages, supra note 219, entered into force, on average, within three years of being opened for signature, a brisk pace for multilateral treaties open to worldwide ratification.
reflected a new focus on accountability and a new willingness to use domestic courts to combat offenses that typically produce transnational effects. The jurisdictional scheme of both the Hague and Montreal Conventions was a first response to a set of new problems for which the traditional jurisdictional point of view offered no simple answer: acts of violence committed across multiple geographic boundaries in a matter of hours; violence directed against civilians (often indiscriminately) and harming victims of many nationalities; and violence perpetrated by self-proclaimed liberation movements possessing some but not all the characteristics of states. The Conventions responded by authorizing national courts to exercise jurisdiction over perpetrators, even in the absence of any connection between the offense and the forum.

2. **Expanding National Jurisdiction: National Legislation and Case Law**

The new jurisdictional principles embodied in the antihijacking treaties soon made their way into national law. This process began in the United States in the late 1970s, to be followed two decades later by countries in Europe, the Commonwealth, and to a lesser extent elsewhere. Now, with the recent entry into force of the Rome Statute of the International Criminal Court (ICC), a wave of national implementing legislation incorporating extraterritorial jurisdiction has begun.

Although these new extraterritorial provisions vary in form from one country to another, they all represent a challenge to the future of procedural harmonization. Each variant, each national method of implementing Second Generation Treaties poses a challenge to decades of efforts to marginalize theories of jurisdiction that rest upon tenuous connections between the forum and the dispute. In common law countries, for example, international human rights actions have given new life to power theories of jurisdiction. In the civil law world, universal jurisdiction has been the primary approach. Yet a

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226. Power theories of jurisdiction developed in England and reached their height in the United States in the late nineteenth century. See, e.g., Pennoyer v. Neff, 95 U.S. 714 (1877). Under such theories, the sovereign's physical power over a person—the ability of a sheriff or some other state official to arrest a defendant—was the basis for adjudicating claims against that person.

227. Universal jurisdiction is defined in many different ways. Recent variations can be found in the work of the International Law Association, the case law of the ICJ, and in several widely recognized documents. **RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 423 (1987)** [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS]; **PRINCETON UNIV., THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001)**, available at http://www.princeton.edu/~lapa/unive_jur.pdf [hereinafter THE PRINCETON PRINCIPLES]; Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Violations: An African Perspective, http://www.kituochakatiba.co.ug/cairo-arusha.htm (last visited Dec. 12, 2004). What all of these definitions have in common is that universal jurisdiction arises by virtue of the universality and severity of the offense and not by reason of any contacts between the offender, the offense, and the forum.
third doctrine—passive personality jurisdiction—has also gained ground.\textsuperscript{228} Though different in form, these jurisdictional approaches stem from a common motivation to deny impunity to those who violate the norms articulated in First Generation Treaties. When enforcing human rights today, even national courts in the EU have gone down a road that ultimately may undermine the Brussels Convention.

a. \textit{The Rebirth of Power Theories of Jurisdiction: Jurisdiction Through Physical Presence}

The story repeatedly told about power theories of jurisdiction is that they are shadows of their former selves—that conceptions of jurisdiction based purely on the physical power of the state and its tribunals over the defendant have long been in decline in favor of theories grounded in fairness, convenience, and comity. Once dominant in the common law world, these theories are now widely regarded as "exorbitant"\textsuperscript{229} infringements on the prerogatives of other states and as unfair to litigants.

This story is only partly true. Power theories have indeed been in decline for decades. But recently they have enjoyed a limited resurgence in two fields: international human rights and international criminal law. Consider transient jurisdiction as practiced in England and Ireland.\textsuperscript{230} This concept refers to a court’s ability to adjudicate a claim against a defendant based solely on the defendant’s having been served with process (formerly called a "writ") while physically present within the country.\textsuperscript{231} Until recently, the assertion of transient jurisdiction was the most common basis for the jurisdiction of courts in England and Ireland.\textsuperscript{232} When these countries acceded to the Brussels

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\item \textsuperscript{228} Passive personality jurisdiction is the ability of a state to apply its law to a dispute (typically a criminal matter) based on the fact that nationals of that state were deliberately targeted for injury based on their nationality. \textit{Restatement (Third) of Foreign Relations}, supra note 227, \S 402 cmt. g.
\item \textsuperscript{229} The term "exorbitant" is used here as a term of art employed in private international law. In the Hague Judgments Convention negotiations, the term was defined as follows: [J]urisdiction is exorbitant when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute.
\item \textsuperscript{231} See \textit{Burnham v. Superior Court}, 495 U.S. 604, 629 n.1 (1990) (Brennan, J., concurring) (distinguishing between "jurisdiction premised solely on the fact that a person is served with process while physically present in the forum State" from service where the defendant has other connections to the forum and the act of service merely provides notice).
\item \textsuperscript{232} See \textit{John Russell & Co. v. Cayzer Irvine & Co.}, [1916] 2 A.C. 298, 302 (H.L.): The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the courts have jurisdiction.
\end{itemize}
Convention, however, it was on the condition that the exercise of jurisdiction based on the physical presence of the defendant in the forum had to be curbed.\footnote{233} The practice was expressly prohibited with regard to defendants domiciled in Convention countries,\footnote{234} and it was widely anticipated that the practice would eventually fall into disuse in cases outside the Convention's scope as well, thus bringing about a major procedural rapprochement between common law countries and the European continent.\footnote{235}

Both the specific doctrine of transient jurisdiction and theories based on territoriality in general lost ground in England and Ireland in the 1980s and 1990s, even in cases not governed by the Brussels Convention's jurisdictional rules.\footnote{236} British courts more readily allowed plaintiffs to serve process outside the country, based on a prima facie showing that the case had some connection to the forum and that the forum was an appropriate place to try the action.\footnote{237} In a widely followed case, British courts held that jurisdiction based on extraterritorial service could be upheld where an initial tort injury was sustained abroad, based on allegations that subsequent emotional and mental injuries were sustained within the territory after the plaintiff had moved to England.\footnote{238} They also became more willing to apply the doctrine of forum non conveniens so that cases that had made it through the jurisdictional gate solely by service of process on English soil could be dismissed if such cases lacked a real connection to the United Kingdom.\footnote{239} Forum non conveniens soon spread throughout the common law world.\footnote{240}

\footnote{233} Classically, a defendant could be made to defend a civil suit based solely on his having been served with process while within the court's territory, even if that individual's physical presence was temporary and even if the lawsuit had nothing to do with that presence. For an extreme example, see Grace v. MacArthur, 170 F. Supp. 442 (D. Ark. 1959) (service on defendant while on board an airplane entering Arkansas airspace). Once served with process in the forum, the defendant remained subject to the court's power even after leaving the state. A corollary was also true, at least at common law: individuals physically outside a state's territory and not served within the forum could not be subjected to the power of the state's tribunals.

\footnote{234} See Brussels Convention, supra note 76, art. 3; Lugano Convention, supra note 79, art. 3; European Council Regulation 44, supra note 77, Annex I.

\footnote{235} In civil law countries, the act of service, by itself, cannot confer jurisdiction upon the court. See generally Merryman, supra note 25.

\footnote{236} For example, cases in which the defendant is not domiciled in any Brussels Convention country.


Meanwhile, territoriality also declined in the United States. In terms of personal jurisdiction, *Pennoyer* gave way to *International Shoe*. Jurisdiction increasingly turned less on the place of service and more on the quantity and quality of contacts between the defendant and the forum. Within a generation of *International Shoe*, nearly all U.S. jurisdictions had enacted new long-arm statutes reflecting the shift. These statutes elevated the importance of state interests and the contacts between the defendant and the forum state. They also displaced personal service as the principal basis for acquiring jurisdiction over foreign defendants. Even when the Supreme Court reaffirmed the constitutionality of transient jurisdiction, no general revival of transient jurisdiction followed. State legislatures did not seize upon *Burnham* as an invitation to expand the use of territoriality-based forms of jurisdiction. It remained quite rare for the jurisdiction of a court in the United States to rest solely on service of process within the jurisdiction, and legal scholars of all stripes continued to condemn transient jurisdiction, particularly as applied to foreign nationals. Elsewhere in the common law world, territoriality also yielded to contacts and reasonableness. In Canada, India, and South Africa, personal jurisdiction in garden-variety civil

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241. In the United States, throughout the nineteenth and into the early twentieth centuries, the jurisdiction of state courts was thought to be rigidly defined by state geographical boundaries. See *Pennoyer v. Neff*, 95 U.S. 714 (1877) (state courts cannot acquire jurisdiction by service upon individual defendants located outside the state, even if those defendants have extensive contacts with the state). However, state courts may exercise jurisdiction over individuals served with process within the state’s borders, even if those individuals lack minimum contacts with the forum. See *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (“Nothing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks to establish today: that a defendant’s presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction.”).  
245. See *Burnham*, 495 U.S. 604 (upholding the exercise of jurisdiction by California over someone who was served with process while in California, although that person’s contacts with the state arguably did not meet the *International Shoe* standard). *Burnham* did not address the exercise of transient jurisdiction over natural persons who are neither U.S. citizens nor individuals domiciled in the United States.  
246. It is, of course, still routine for defendants to be served with process while physically present within the state where the court sits, but usually the defendant is domiciled in the state or the physical act of serving process is supported by the defendant’s prior minimum contacts with the state, such as having negotiated contracts within the state or having directed products into the state. See, e.g., Michael J. Edgel, *Proper Application of CRS §15-12-723 For Recovery of Estate Assets*, 32 Colo. L. 59, 61 (2003) (“many attorneys routinely provide personal service”); Miserando v. Resort Props., 345 Md. 43, 58 (“personal delivery of process...is a time-honored method of acquiring personal jurisdiction.”).  
But just as power-based theories of jurisdiction were on the verge of being thoroughly marginalized, territoriality experienced a resurgence in the fields of human rights and international criminal law. This resurgence has even affected countries with no tradition of resting jurisdiction on physical presence. The *Barbie* case is a good illustration. Klaus Barbie’s presence in France was held to be sufficient for French courts to try him for his role in deporting the Jewish community and resistance fighters of Lyons to Nazi concentration camps. When Barbie argued that French courts lacked jurisdiction over him because agents of the French state had secured his physical presence in France by abduction, French courts rejected the argument. Ordinarily, physical presence alone was not a lawful basis for the exercise of jurisdiction by French courts, but in a surprisingly broad opinion, France’s highest court went beyond the fact that Barbie’s crimes had been committed in France. Power theories of jurisdiction could be valid in France, at least in one category of cases—crimes against humanity. As the Cour de Cassation put it:

> [T]he crimes against humanity with which Klaus Barbie, who claims German nationality, is charged in France where those crimes were committed, do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.

The jurisdictional ruling in *Barbie* was important in several respects. First, *Barbie* broke new ground in France (and by extension elsewhere in the civil law world), where power theories of jurisdiction had never enjoyed the influence they had in common law countries. The Cour de Cassation seemed to go out of its way to observe that ordinary principles of French procedural law could be displaced where jus cogens violations were alleged and certain imperatives of the international legal order were at stake. Barbie’s jurisdictional objections were treated like technicalities in a case that the Court was determined not to decide on the basis of technical procedural doctrines.

Courts elsewhere have similarly upheld jurisdiction despite the defendant’s abduction from another country. Israeli agents kidnapped Adolf Eichmann from Argentina to stand trial in Israel for his role in the destruction of European Jewry. More recently, the U.S. Supreme Court upheld the
exercise of jurisdiction in United States v. Alvarez-Machain, in which agents of the U.S. Drug Enforcement Administration orchestrated a Mexican citizen's abduction from Mexico. Moreover, recent studies suggest that the practice of government-sponsored abduction for the purpose of bringing atrocity perpetrators to justice before domestic courts is on the rise. Several common law jurisdictions have effectively endorsed the practice, at least in extreme cases, based on the principle that allegations of severe violation of fundamental human rights norms sometimes call for extraordinary jurisdictional reaching.

Territoriality has also enjoyed a resurgence in civil actions arising out of grave human rights violations. In the United States, the landmark case in this resurgence is Filartiga v. Pena-Irala, a seminal case in what has become a line of atrocity suits in which personal jurisdiction is based solely on service of process within the jurisdiction. In Filartiga, the Second Circuit interpreted the Alien Tort Claims Act (ATCA) as authorizing U.S. courts to exercise jurisdiction over a Paraguayan national in a civil suit alleging the torture of another Paraguayan citizen in Paraguay. The defendant's only link to the

the merits, the Israeli Supreme Court rejected Eichmann's "following orders" defense, maintaining that in the modern era individuals—and not just states—are subjects of international law. But ruling on Israel's jurisdiction, the Court held that where the defendant's presence in court had been procured by abduction in violation of another country's territorial rights, only the injured state and not the abducted individual possesses standing to challenge the forum court's jurisdiction. Id. at 286.


United States was his physical presence in New York at the time he was served with process. Nevertheless, the Filartiga court likened the alleged offense (torture) to eighteenth-century piracy; both plagued all civilized communities, not just the states whose nationals had been struck in any particular instance. Both offenses were potentially destabilizing to the international community. Ordinary principles of jurisdiction could not apply with their usual force to either offense.

Since 1980, more than one hundred ATCA suits have been filed in U.S. courts. Jurisdiction has been based on service of process on defendants temporarily present in the country while in federal custody awaiting extradition, while temporarily present in New York for a visit to the United Nations and other unrelated activities, and while an invited speaker at a university. Despite the tenuousness of these jurisdictional contacts, tag jurisdiction ATCA cases have had a substantial influence on judicial interpretation of human rights norms in the United States. They are a major substantive category of cases requiring U.S. courts (principally federal courts) to interpret and apply international law. ATCA cases, along with claims brought under the Torture Victim Prevention Act of 1991 (TVPA), have addressed such issues as what constitutes state action for purposes of assessing alleged violations of international law; the circumstances under which the statute of limitations can be tolled in a suit for forced disappearance; whether non-state actors can commit violations of international law; whether immunity has been waived; whether plaintiffs have exhausted foreign remedies; what constitutes command

262. Filartiga, 630 F.2d at 880.
267. Other major categories of cases in U.S. courts involving issues of international law concern the FSIA, supra note 166, and treaty interpretation. To some extent, cases in these other two categories also have ATCA issues.
270. See Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995).
271. We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct [including genocide] violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.
273. See TVPA, supra note 268, 28 U.S.C. § 1350.2(b) (2004) (TVPA) (requiring that plaintiffs' 'exhaust[ ]' adequate and available remedies in the place in which the conduct giving rise to the
responsible;\footnote{277} and what human rights abuses are violations of customary international law.\footnote{274}

More important about cases brought under the ATCA and the TVPA is that they run contrary to many postwar trends in U.S. civil procedure, especially trends in favor of the diminished importance of territorial jurisdictional determinations.\footnote{275} Although jurisdiction premised solely on physical presence has disappeared from the landscape in nearly every substantive area of U.S. law,\footnote{276} it has expanded in ATCA and TVPA cases.\footnote{277} Before Filartiga, one searched in vain for any legal academic prepared to defend transient jurisdiction at all, much less as applied to foreign nationals. Since Filartiga, tag jurisdiction has new, if qualified, defense in the academy,\footnote{278} among human rights NGOs,\footnote{279} and in Congress.\footnote{280} Thus, an  


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aspect of civil procedure that as recently as two decades ago was being read its last rites—a victim of harmonization—has rebounded in the United States to become a contentious issue in the proposed Hague Judgments Convention negotiations and, more broadly, a potential obstacle to procedural harmonization.281

b. Jurisdiction Based on Passive Personality

Passive personality jurisdiction—jurisdiction based on injury to a state’s citizens sustained while outside the state’s territory—was practically unknown in international law until a few decades ago.282 That situation changed in the 1960s. In that decade, the first multilateral treaties on hijacking and other forms of terrorism expanded the reach of state jurisdiction over defendants whose only connection to the forum was having targeted nationals or residents of the forum state. The 1963 Tokyo Convention283 adopted this approach with respect to criminal jurisdiction where individuals had committed offenses onboard aircraft.284 The 1970 Hague Convention expanded the passive personality principle, allowing it to be applied in tandem with extradition treaties.285

The passive personality provisions in these new antiterrorism treaties destabilized what, just a few decades earlier, had been a relatively solid consensus on the limits of a state’s criminal jurisdiction. As late as 1935, the landmark Harvard study on jurisdiction with respect to crime did not address passive personality.286 With the advent of large-scale terrorism by liberation movements a few decades later, large numbers of countries began to incorporate the passive personality principle in domestic legislation.287 In the


281. In the preliminary version of the Hague Judgments Convention negotiated from 1998 to 2000, the focal point of contention with regard to transient jurisdiction was Article 18(3), which as proposed would have allowed certain victims of grave human rights offenses to avail themselves of transient jurisdiction and other forms of exorbitant jurisdiction under national law in certain circumstances. For more detailed discussion of this debate, see Nygh & Pocar, supra note 48; van Schaack, supra note 278 at 171-200.


283. Aircraft Offenses Convention, supra note 115.

284. Id. art. 4(b).

285. See Unlawful Aircraft Seizure Convention, supra note 220, art. 8.


287. See IAIN CAMERON, THE PROTECTIVE PRINCIPLE OF INTERNATIONAL CRIMINAL JURISDICTION 76-79 (1994) (comparing the growth in use of the protective principle with passive personality); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 176-225
United States in particular, the growth of such legislation was dramatic. As late as 1965, the Second Restatement of U.S. foreign relations law expressly rejected passive personality as a basis for applying U.S. law.\(^{288}\) It did so at a time when no U.S. statutes incorporated the principle and no prosecutions or civil suits in U.S. courts had been litigated squarely on that basis. Within two decades, the legislative and judicial landscape had greatly changed. Well into the war on drugs and poised for a juridical battle against terrorism, Congress began enacting criminal legislation premised on passive personality jurisdiction.\(^{289}\) By 1987, the ALI did an about-face. The Third Restatement of U.S. foreign relations law contained a section comprehensively addressing prescriptive jurisdiction and including a statement that passive personality had become "increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality," though it was not "generally accepted" for "ordinary torts or crimes."\(^{290}\) In subsequent years, an increasing number of federal statutes relied upon passive personality.\(^{291}\)

This growth in passive personality jurisdiction has already come at the expense of procedural harmonization, nowhere more clearly than in the law relating to sovereign immunity and related jurisdictional immunities. Until quite recently, there was much uniformity (at least among Western democracies) with respect to the conditions under which foreign states and their officials were susceptible to suit. Under the so-called restrictive theory of sovereign immunity, which was codified in a series of multilateral treaties and national statutes, immunity from foreign court jurisdiction could be claimed by states, their agents, and their instrumentalities\(^{292}\) so long as the claim related to a sovereign act, as opposed to a commercial act. Thus, a sovereign state generally is immune from suit if it deliberately shoots down an unarmed civilian aircraft,\(^{293}\) but susceptible to suit for breaching a letter of credit.\(^{294}\)

In litigation under the Foreign Sovereign Immunities Act (FSIA), U.S. courts initially ruled that a foreign state's alleged human rights abuses were sovereign acts, not commercial acts.\(^{295}\) The state and the official involved

\(^{288}\) See Restatement (Second) of Foreign Relations Law § 30.2 (1965) [hereinafter Restatement (Second) of Foreign Relations] ("A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals.").


\(^{290}\) See supra note 289 and accompanying text.

\(^{291}\) See Restatement (Third) of Foreign Relations, supra note 227, § 402 cmt. g.

\(^{292}\) See supra note 289 and accompanying text.

\(^{293}\) FSIA, supra note 166, § 1608(b) (defining "agency or instrumentality of a foreign state").

\(^{294}\) See Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997) (Cuba would have been immune from suit but for retroactive application of a 1996 anti-terrorism amendment to the FSIA).

were thus entitled to immunity, even where the alleged conduct clearly was illegal under international law, under the law of the place where it took place, and under the law of the forum. Cases decided in other countries under similar immunity legislation initially drew a line along the same grounds: the more the alleged conduct was an abuse of governmental power, the more inclined courts were to conclude that the basis for the suit was an official, sovereign act that came within the scope of immunity.\footnote{296}

With the growth of passive personality jurisdiction, the line between sovereign acts and acts not entitled to immunity has shifted. In suits premised on passive personality jurisdiction, plaintiffs seek to go much further in stripping states of sovereign immunity. Plaintiffs and prosecutors argue that in supporting hostage-taking, assassination, torture, and slave labor, states and their officials forfeit any claim to immunity for behavior that could not possibly have been thought to be legal.\footnote{297} American courts have begun to respond to these arguments, and so has Congress. In successive amendments to the FSIA, Congress has curtailed the immunity of foreign states known to be sponsors of terrorism. Under 28 U.S.C. § 1605(a)(7), Cuba,\footnote{298} Iran,\footnote{299} Iraq,\footnote{300} and Libya\footnote{301} have been stripped of jurisdictional immunity in suits over their support for hostage-taking, attacks on civilian aircraft, and assassinations.\footnote{302}

Sovereign immunity has been in retreat in other countries as well. Canada has enacted two far-reaching statutes amending the Criminal Code\footnote{303} and requiring Canadian courts to act pursuant to an expanded conception of the nationality and passive personality principles with respect to war crimes and crimes against humanity.\footnote{304} As amended, Section 6 of the Code supports jurisdiction if the perpetrator was either a Canadian citizen, or a person employed by the government of Canada, or a citizen or employee of a state engaged in an armed conflict against Canada.\footnote{305} Canadian courts can also exercise jurisdiction when the victim is a Canadian citizen and when the

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\footnote{297}{See Abrams v. Société Nationale des Chemins de Fer Français, 332 F.3d 173, 187-88 (2d Cir. 2003); Altmann v. Republic of Austria, 317 F.3d 954, 965 (9th Cir. 2002).}
\footnote{298}{See, e.g., Alejandre v. Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997).}
\footnote{300}{See, e.g., Daliberti v. Republic of Iraq, 146 F. Supp. 2d 19 (D.D.C. 2001).}
\footnote{301}{See, e.g., Rein v. Socialist People’s Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y.), aff’d in part, 162 F.3d 748 (2d Cir. 1998).}
\footnote{302}{See generally Joseph W. Dellapenna, Civil Remedies for International Terrorism, 12 DEPAUL BUS. L.J. 169 (1999-2000).}
\footnote{304}{CRIM. CODE, R.S.C., ch. C-46 § 6(1.91) overrides the presumption in § 5(2) against prosecution of extraterritorial offenses, stating that its provisions apply “[n]otwithstanding anything in this Act or any other Act.”}
\footnote{305}{Id. § 6(1.91)(a)(i) & (ii).}
offense is committed against "a citizen of a state that is allied with Canada in
an armed conflict." If either the nationality or the passive personality
principle applies, the statute directs Canadian courts to treat the offense as
though it had been committed in Canada.

On the other side of the Atlantic, the protracted Pinochet extradition
proceedings demonstrated that passive personality had gained ground in
Western Europe as well. During Augusto Pinochet's detention in England, the
U.K. government received extradition requests from four countries: Belgium,
France, Spain, and Switzerland. Each request referred to the requesting state's
right to prosecute based on torture and other injuries inflicted against their
nationals in Chile. Each request also asserted that these violations were the
basis for stripping Pinochet of head-of-state immunity.

c. Universal Jurisdiction

In the realm of jurisdiction, the growing tension between well-
established procedural principles and new means of imposing accountability
does not stop at physical presence or passive personality. In fact, the last
decade witnessed a reborn and expanded conception of universal jurisdiction.
From national statutes to national court decisions and reports by
influential bar associations, from the opinions of international tribunals to
scholarly works and NGO advocacy (including a ten-volume study by
Amnesty International), the validity of universal jurisdiction stands at the

306. Id. This provision, by encompassing victims who are not Canadian citizens or
domiciliaries, actually goes beyond the passive personality principle.

307. See infra note 384 and accompanying text.

308. See, e.g., Loi du 10 février 1999 relative à la reprise des violations graves du droit
international humanitaire, MONITEUR BELGE, Mar. 23, 1999, at 9286 (Belg.), translated in 38 I.L.M. 918
(1999).

309. See Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte,
2 W.L.R. 827 (H.L. 1999) [hereinafter Pinochet].

310. See ABA Section of Individual Rights and Responsibilities, Standing Comm. on Law and
Nat'l Security, Section of Int'l Law and Practice, Ctr. for Human Rights, Criminal Justice Section,
universal_jurisdiction_documents.doc (Feb. 2004); see also INT'L LAW ASS'N, COMM'N
ON INT'L HUMAN RIGHTS LAW & PRACTICE, FINAL REPORT: ON THE EXERCISE OF UNIVERSAL JURISDICTION IN
RESPECT OF GROSS HUMAN RIGHTS OFFENCES (2000) [hereinafter INT'L LAW ASS'N, FINAL REPORT ON
UNIVERSAL JURISDICTION].

311. See Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J.
121 (Feb. 14) [hereinafter Congo v. Belgium].

312. Among recent works on universal jurisdiction, see INT'L LAW ASS'N, FINAL REPORT ON
UNIVERSAL JURISDICTION, supra note 310; THE PRINCETON PRINCIPLES, supra note 227; A.R. Carnegie,
Jurisdiction over Violations of the Laws and Customs of War, 39 BRIT. Y.B. INT'L L. 402 (1963);
Kenneth C. Randall, Universal Jurisdiction Under International Law, 66 TEX. L. REV. 785 (1988);
Kenneth Roth, The Case for Universal Jurisdiction, 80 FOREIGN AFF., Sept./Oct. 2001, at 150; Thomas
H. Sponsler, The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen,
15 LOY. L. REV. 43 (1968-1969); Henry J. Steiner, Three Cheers for Universal Jurisdiction—Or Is It

313. See AMNESTY INT'L, DOC. NO. EUR 45/001/1999, UNIVERSAL JURISDICTION AND
ABSENCE OF IMMUNITY FOR CRIMES AGAINST HUMANITY (1999); LAWYERS COMM. FOR HUMAN RIGHTS,
1 INT'L CRIM. CT. BRIEFING SERIES No. 8, EXERCISE OF ICC JURISDICTION: THE CASE FOR UNIVERSAL
LCHRUniJurisdiction.pdf; FIONA MCKAY, UNIVERSAL JURISDICTION IN EUROPE (2000), available
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forefront of discourse in international affairs. Past and present U.S. Secretaries of State have warned of its dangers. The volume and breadth of the commentary almost make it seem as if the future of the human rights movement, on the one hand, and orderly diplomatic relations, on the other, hang in the balance. The debate is also being waged in queries that laymen understand: "On what basis does Belgium presume to judge General Tommy Franks?" or "Why should Osama bin Laden escape justice merely by staying out of countries with extradition treaties with the United States?"

The issues are clarified by recognizing that the recent growth of universal jurisdiction is one of a number of practical and theoretical areas in which the human rights movement and the unification movement are currently far apart. This divergence can be analyzed by turning to some basic questions: What are the origins of universal jurisdiction? What is its likely trajectory? In what ways does it conflict with procedural law harmonization? How serious and inherent are these points of conflict?

i. Defining Terms

The term "universal jurisdiction" is currently used in several related yet distinct ways. Understanding these distinctions is important to analyzing its interaction with traditional jurisdictional doctrines.

Universal jurisdiction is often understood as a type of prescriptive jurisdiction or choice-of-law principle. Used in this way, it refers to the circumstances in which a state can apply its law to conduct that takes place outside its borders and that lacks any connection to the forum state. With respect to a circumscribed list of offenses, universal jurisdiction is invoked when lawmakers in a state displace familiar choice-of-law rules and direct


317. There may be no extradition treaty, or another country's courts and Justice Ministry may have serious doubts that such a defendant could receive a fair trial in a U.S. court, especially in light of the current administration's embrace of military commissions. For recent commentary critical of such commissions and their fairness, see Harold Hongju Koh, The Case Against Military Commissions, 96 AM. J. INT'L L. 337 (2002); Evan J. Wallach, Afghanistan, Quirin and Uchiyama: Does the Sauce Suit the Gander?, 2003 ARMY LAW. 18 (2003).

318. For example, connections such as the nationality of the people or entities involved in the case, or a threat to various interests of the forum state, such as national security or the health and economic well-being of its people. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, supra note 227, § 402.

319. In criminal actions, this would usually be the place where the criminal act took place. In tort actions, most European courts would apply lex loci delicti, the law of the place where the injury was sustained. Today, most U.S. jurisdictions would apply the law of the jurisdiction with the most significant relationship to the cause of action, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971), or the law of the jurisdiction with the strongest interest in having its law applied. See, e.g.,
their domestic courts to apply the forum’s law to claims arising from atrocities committed elsewhere. 320

The term is also used in another way. In this second usage, universal jurisdiction refers not to the applicable law but to whether a court will adjudicate a dispute with which it has no connection. Universal jurisdiction is thus a species of what U.S. lawyers call adjudicatory jurisdiction. 321 For example, in a recent case before the International Court of Justice (ICJ), Belgium sought to assert its courts’ jurisdiction to hear criminal allegations against a Congolese national, even though the alleged offense had taken place completely outside of Belgium. 322 At issue was the availability of a Belgian forum, not which substantive law should apply. Had Belgium prevailed before the ICJ, conceivably Belgian courts might have applied something other than Belgium’s substantive law to some issues in the case. 323

Whether employed as a principle of prescriptive or adjudicative jurisdiction, universal jurisdiction is typically associated with criminal law, 324 in part because in much of the world, universal jurisdiction offenses are violations of national criminal law, even when committed outside the forum. 325 Thus, at first blush, universal jurisdiction might seem to have little to do with efforts to harmonize procedure in civil cases. If the Hague Conference, the EU, the OAS, and others are attempting to harmonize procedural rules for “civil and commercial matters,” how do their efforts relate to a jurisdictional doctrine primarily used by courts in criminal cases?

Bernhard v. Harrah’s Club, 16 Cal. 3d 313 (1976) (applying interest analysis in the context of cross-border torts and concluding that the forum’s strong governmental interest would be significantly impaired by applying the law of the place where the negligent act occurred).

320. For example, if the forum’s ordinary choice-of-law rule for tort actions is lex loci delicti, a tortious act taking place in Iraq and producing injury in Iraq would be governed by Iraqi tort law. But if the act is a universal jurisdiction offense—torture, for instance—the forum can ignore some or all of Iraqi tort law and apply its own substantive law. Moreover, for most universal jurisdiction offenses the law of the forum incorporates elements of international law—in this case, the definition of torture. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 1465 U.N.T.S. 85 [hereinafter Torture Convention]; Rome Statute of the ICC, supra note 201, art. 7.2(e).

321. In the United States, universal jurisdiction is not a form of adjudicatory jurisdiction. Even with respect to the offenses listed in the Restatement of Foreign Relations, RESTATEMENT (THIRD) OF FOREIGN RELATIONS, supra note 227, § 404, U.S. courts cannot proceed without an independent basis for personal jurisdiction over the defendant that satisfies the Due Process Clause of either the Fifth or the Fourteenth Amendment. U.S. CONST. amends. V & XIV. Due process can be satisfied by minimum contacts, tag service, or continuous and systematic contacts. The question of personal jurisdiction is quite separate from that of which law is applied.

322. See Congo v. Belgium, supra note 311.

323. Belgian procedural law clearly would govern.

324. See INT’L LAW ASS’N, FINAL REPORT ON UNIVERSAL JURISDICTION, supra note 312; THE PRINCETON PRINCIPLES, supra note 227, Principle 1.1, at 28 (“For purposes of these Principles, universal jurisdiction is criminal jurisdiction.”); Steiner, supra note 312, at 202 (“This article refers only to criminal prosecutions.”).

325. Traditionally this last principle has not been applied in common law countries, where there is a presumption against extraterritorial application of criminal law. In the Pinochet case, the House of Lords concluded that acts of torture committed outside the United Kingdom and not involving British nationals were not crimes under English law (for purposes of the dual criminality requirement) until the late 1980s, when the United Kingdom ratified and implemented the Torture Convention. Pinochet, supra note 309 (in particular Lord Browne-Wilkinson’s discussion of extradition crimes, id. at 836-40).

326. The term “civil and commercial matters” has long been used in Hague Conference conventions. For an extensive discussion of the term and its origins, see Nygh & Pocar, supra note 48.
The answer is that there is no longer an air-tight separation between theories of jurisdiction in criminal matters, on the one hand, and civil cases, on the other—if there ever was one. Such an understanding of universal jurisdiction is based on an outdated formalism that ignores that what matters most is the nature of the proceedings and the exercise of judicial power, not the name of the forum in which they take place.\footnote{327} Civil law countries employ universal jurisdiction in courts that are labeled penal, that predominantly apply penal law, and that possess the authority to impose quintessentially penal remedies. However, a close look reveals aspects of those proceedings that resemble civil litigation: the ability of victims and victims’ rights organizations to initiate proceedings through \textit{partie civile} mechanisms (which allow victims of a criminal act to join criminal prosecution with civil claims);\footnote{328} the ability of private parties, including human rights organizations and other amici, to participate meaningfully in such proceedings; and the ability of those courts to order defendants to pay monetary compensation to those who suffer injury, much as courts routinely do in civil cases. To be sure, there are differences,\footnote{329} but there is no clear, impenetrable barrier preventing procedural concepts (such as universal jurisdiction) long applied by criminal tribunals from being used in civil courts. The more important observation is that domestic courts of both civil and criminal stripes are now invoking...
extraordinary principles of jurisdiction on an unprecedented scale and, in both
instances, they are doing so for the sake of accountability and compensation.
After being applied in a criminal context, these principles have been extended
to civil proceedings. Moreover, whatever real distinction exists between
criminal universal jurisdiction and civil universal jurisdiction may become
less clear in the future, as large numbers of states enact implementing
legislation for the Rome Statute of the ICC, a treaty that calls for expansive
jurisdiction for the sake of punishment and victim compensation.

ii. The Origins of Universal Jurisdiction

Although it is being applied in new ways, universal jurisdiction has a
long history, one that predates the Treaty of Westphalia. Its rationale largely
stems from the centuries-old use of universal jurisdiction as a tool to combat
piracy. Piracy was distinctive because attacks on commercial ships and
their crew were not easily countered through ordinary principles of
jurisdiction. The attacks took place on the high seas, outside any country’s
maritime jurisdiction. Perpetrators were not likely to be found in the territorial
waters of the country whose merchant ship had been attacked. Universal
jurisdiction allowed any state, even one not directly injured, to apprehend the
perpetrators, wherever found, and try them.

This early form of universal jurisdiction sought to promote commerce
rather than hamper it. In response to a menace to commercial shipping,
universal jurisdiction was a kind of juridical “smart bomb,” tailored to combat
a specific problem without inflicting collateral damage on the general
jurisdictional regime or prevailing concepts of state sovereignty. Universal
jurisdiction of this era was directed at truly universal undesirables, “enemies
of all mankind,” outlaws to whom no state was willing to extend its
diplomatic protection.

The doctrine ultimately rested on principles of agency. When the British
Navy, patrolling the high seas, intercepted a pirate ship that had previously
attacked a Dutch or Spanish vessel, Great Britain acted on behalf of a
community of nations with shared interests in trade and the safety of the

330. See Restatement (Third) of Foreign Relations, supra note 227, § 404 cmt. b (“In
general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law,
but international law does not preclude the application of non-criminal law on this basis, for example, by
providing a remedy in tort or restitution for victims of piracy.”).
331. Links to such implementing legislation may be found at http://web.amnesty.org/pages/-
int_jus_ice_implementation (last visited Dec. 12, 2004).
332. Rome Statute of the ICC, supra note 201, art. 75.2 (providing that ICC may order
convicted persons to pay reparations or restitution directly to victims).
333. Piracy was for many years the only offense subject to universal jurisdiction. For an
extensive analysis of the legal treatment of piracy, see Alfred P. Rubin, The Law of Piracy (2d ed.
1998).
334. See, e.g., Peter Harmony v. United States, 43 U.S. 210, 226 (1844) (explaining that
Congress had enacted legislation on piracy because “commerce was suffering”). In this respect,
traditional piracy is different from its modern forms. Modern aircraft piracy, for instance, has thrived
(defining state sponsors of terrorism).
335. The Latin term is hostis humani generis. See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d
Cir. 1980); see generally Rubin, supra note 333, at 91-95.
seas. Other states in this community were deemed implicitly to have deputized one another to act on their behalf in such circumstances. The jurisdictional power of any agent of the community (in this case the British Navy) vis-à-vis a particular pirate vessel was the sum total of the jurisdictional prerogatives belonging to all states of the community. Universal jurisdiction was a kind of pooling of jurisdictional powers.

Modern universal jurisdiction noticeably departs from this classic model, both in the number of instances in which it might apply and in the rationale for its application. After the Nuremberg trials, the list of universal jurisdiction offenses grew—genocide, crimes against humanity, war crimes, torture, slavery, and terrorism became widely regarded in this light. Additional offenses such as aggression, drug trafficking, sexual offenses against children, grave environmental harms, use of weapons of mass destruction,
and certain forms of bribery may soon become candidates. With such additions, universal jurisdiction may be poised to become more than a narrow corner of the law. Wider acceptance of the principle poses a threat to one of harmonization’s central goals—limiting concurrent jurisdiction. The very premise of universal jurisdiction is that for some offenses, more fora are better than fewer.

Second, the growth of modern universal jurisdiction tends to undermine jurisdictional harmonization because the underlying rationale has also changed. Early universal jurisdiction was directed at non-state actors: pirates and slave traders. In contrast, contemporary universal jurisdiction is typically aimed at state officials. War crimes are committed in the context of armed conflict among or within states. Crimes against humanity involve widespread and systematic abuses usually resulting from government policies, and state action is built into the definition of torture. Thus, for each of these offenses, state action is typically present in a manner quite unlike seventeenth-century piracy. This state action element makes a difference in terms of the rationale for exercising universal jurisdiction. Is the suicide bomber of today truly a common menace, prejudicial to the interests of the entire international community? Perhaps not, or at least not in the same way as was true of the rogue groups which attacked seventeenth-century merchant ships. Those who carry out acts of terrorism are not bereft of all international support and state sponsorship. Unlike the piracy of old, modern terrorism serves the interests of at least some states. If even a handful of governments regularly fund groups to carry out violence against civilians, is it not questionable to say that those prosecuted under universal jurisdiction statutes are universally regarded (rather than just denounced) as hostis humani generis?

Nor are the perpetrators of modern universal jurisdiction offenses especially elusive. Augusto Pinochet is not in hiding; Idi Amin did not take to the high seas. After their fall from power, they enjoyed the embrace of at least one nation-state. They remained heroes to some, and by virtue of that support they were able to live openly in public. While the pirate of old sought out jurisdictional lacunae and flouted territoriality, Alberto Fujimori does the


343. The comment to § 404 of the Restatement of Foreign Relations lists the following offenses: piracy, the slave trade, attacks on aircraft, genocide, war crimes, and “perhaps certain acts of terrorism,” but it does not rule out additions to the list in the future, either through treaty or through the growth of international customary law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, supra note 227, § 404 cmt.

344. See, e.g., Torture Convention, supra note 320, art. 1.1.

345. Various forms of what is labeled “terrorism” are actually calculated means by which a weak state wages a deniable, low-level armed conflict against a more powerful state. Used in this way as an instrument of state policy, modern terrorism clearly differs from forms of violence perpetrated by non-state actors which no state sees an interest in supporting.

He benefits from territorially by residing where one state has paramount jurisdiction, and that state, Japan, is not inclined to extradite or try him.

So, notwithstanding the frequent analogies to piracy, in some ways modern universal jurisdiction poorly fits the classic agency model developed with respect to piracy. A second, more persuasive rationale stems not from the reality of a complete convergence of state interests, but rather from the jus cogens nature of the offense. Perhaps war crimes are subject to universal jurisdiction because they violate universally observed customs. The jus cogens nature of torture rests on something other than its being contrary to the shared interest of all states. After all, significant numbers of war crimes take place in nearly every armed conflict. High state officials authorize or acquiesce in many such acts, having concluded that disregarding the Geneva Conventions is in their interest. Does not the frequent occurrence of torture, notwithstanding the ratification of the Torture Convention by 136 states, undermine the contention that torture is regarded as a common plague? State behavior with respect to torture, at least torture that is used to secure useful information, might be better understood in terms of a standard prisoners' dilemma—a substantial number of states actually do not want to end the strategic use of torture; they just want to restrict the ability of other states to obtain information through torture.

Jurisdiction over Augusto Pinochet did not rest on notions of agency. Had he been extradited to Spain, the legitimacy of the Spanish proceeding would not have rested on his status as a hostis humani generis. For decades he had the firm backing of the United States. Even while under house arrest in London, he enjoyed the vocal support of Margaret Thatcher. Unlike the seventeenth-century brigand, Pinochet was a general who at one time was useful to key members of the international community and then outlived his usefulness. Universal jurisdiction is appropriate in such cases, but not because state practice demonstrates that the offense is treated as lying beyond the bounds of state behavior. Rather, the proposition is that torture should lie beyond such bounds. Universal jurisdiction depends less upon the extent to which torture remains an aspect of state practice, and more upon the extent to

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348. For example, today’s occupying states increasingly conclude that it is not in their interest to abide by all the rules of occupation of the Geneva Conventions, supra note 205. Top U.S. officials concluded as much with respect to detainees captured in Afghanistan and taken to Guantánamo Bay, Cuba. See Katharine Q. Seelye, First “Unlawful Combatants” Seized in Afghanistan Arrive at U.S. Base in Cuba, N.Y. TIMES, Jan. 12, 2002, at A7.
350. See supra note 174.
which it has been formally denounced. The question is not one of customary law but rather one of peremptory norms.

What turns on this distinction? First, it is intellectually more honest to say that Augusto Pinochet faced extradition proceedings in London because he committed jus cogens offenses than it is to try to ground the legitimacy of such proceedings in an attenuated analogy to piracy. The latter may have been the origin of universal jurisdiction doctrine, but it need not be its present or future. The modern justification for universal jurisdiction is that to grant impunity to those who have committed grave human rights violations is to facilitate the commission of atrocities elsewhere.

Second, this alternative basis for universal jurisdiction may potentially lead to greater conflict with traditional principles of procedural law. The range of human behavior that over time may be seen as violative of jus cogens norms extends more broadly than the piracy analogy. If forced disappearance is to be recognized as a universal jurisdiction offense, should it turn on whether, like piracy, the practice of forced disappearance is actually treated by all states as being against their interest? Is it not better to focus on the effects that dehumanization in one country tends to bring about elsewhere? Such ripple effects may include lower human rights standards, a descent toward deeper levels of barbarism, or a sense that if genocide is taking place in Rwanda, then abridgments of free expression in nearby countries are mild by comparison.

Understood in this way, universal jurisdiction is truly an explosive idea. The list of universal jurisdiction offenses may still have much room for growth, possibly triggering substantial expansion in concurrent jurisdiction. Not two or three but potentially an unlimited number of states may have the option of applying their laws and judicial processes to a single offense.

iii. How Prevalent Is Universal Jurisdiction in State Practice?

To what extent is the growth of universal jurisdiction undermining efforts to unify procedural law? The answer depends on how prevalent universal jurisdiction has become and what trajectory it has followed. A logical place to look for an answer to this question is the Congo v. Belgium

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351. Another way of stating this rationale is as follows: Assume that the murder conviction rate in a given society is 60%. A higher conviction rate would be better, but the society may be unwilling either to spend more resources or to alter its jurisdictional and constitutional law in order to achieve a higher rate. It is conceivable, however, that it would be willing to take such steps to raise conviction rates for specific murders: e.g., terrorist killings, assassination of high government officials, genocide. States may be willing to go to extraordinary lengths to raise conviction rates for these offenses by even a small percentage.

352. With respect to the charges against Augusto Pinochet for torture and other crimes committed in Chile, Great Britain received extradition requests from Belgium, France, Spain, and Switzerland, all of which, except France, relied on universal jurisdiction. Spain’s extradition request and the British Home Secretary’s response are excerpted in Nat’l Court, Madrid, Communication to the Competent Judicial Authorities of the United Kingdom (Nov. 3, 1998), translated in THE PINOCHET PAPERS, supra note 328, at 203-10; see also Secretary of State Jack Straw to the Chief Metropolitan Stipendiary Magistrate, Authority to Proceed (Dec. 9, 1998), reprinted in THE PINOCHET PAPERS, supra note 328, at 181.
case decided by the ICJ in 2002,\(^ {353} \) in which one of the opinions purported to conduct an extensive survey of state practice in regard to universal jurisdiction. The case grew out of Belgian efforts to arrest Abdulaeye Yerodia Ndombasi (Yerodia) for grave breaches of the Geneva Conventions and crimes against humanity.\(^ {354} \) The defendant, who was the Congolese foreign minister at the time, was not Belgian. The allegations related solely to conduct outside Belgium. The alleged victims were not Belgian. The alleged offenses posed no credible threat to the security of Belgium or to its other vital state interests.

Although thirteen of the Court’s seventeen judges decided the case on the basis of their finding that a sitting foreign minister—even one accused of grave human rights offenses—possessed absolute jurisdictional immunity,\(^ {355} \) the joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal (the Concurrence) addressed whether international law could support the issuance of the arrest warrant pursuant to Belgium’s universal jurisdiction statute. In their view, it could not—at least not at the time.\(^ {356} \)

What is most significant about \textit{Congo v. Belgium} is the extent to which the Concurrence understated the current use and acceptance of universal jurisdiction. It attempted to assess the history and current prevalence of universal jurisdiction through a survey of custom, state practice, and other sources of international law.\(^ {357} \) Notwithstanding the opinion’s ultimate conclusion, however, its survey shows that universal jurisdiction is already sufficiently prevalent to create serious problems for procedural harmonization.\(^ {358} \)

The Concurrence proceeded with a narrow definition of universal jurisdiction—what it called “universal jurisdiction in absentia.”\(^ {359} \) First, it reviewed existing treaties and found that none embodied that concept.

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\(^{353}\) \textit{Congo v. Belgium, supra} note 311.

\(^{354}\) The Belgian investigating judge alleged that Yerodia had incited mobs to go on killing rampages against Tutsi civilians. \textit{See id.} para. 1.

\(^{355}\) Absolute jurisdictional immunity is subject to waiver by the minister’s home country, something more likely to take place after a change in government, which was not the case in \textit{Congo v. Belgium}. In context, this narrower holding seems like the avoidance of a difficult issue. The universal jurisdiction question was plainly before the Court, and resolving prima facie jurisdictional issues is typically a court’s first order of business, even before addressing immunities from jurisdiction. The three concurring Judges pointed out this implication of the Court’s holding:

"The Court, in passing over the question of jurisdiction, has given the impression that "immunity" is a free-standing topic of international law. It is not. "Immunity" and "jurisdiction" are inextricably linked. Whether there is "immunity" in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it." \textit{Id.} para. 3 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

\(^{356}\) \textit{See, e.g., id.} para. 59 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.").

\(^{357}\) \textit{See Statute of the International Court of Justice, June 26, 1945, art. 3.1, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 [hereinafter ICJ Statute].}

\(^{358}\) The Concurrence did conclude that universal jurisdiction had created significant exceptions to traditional jurisdictional doctrines and showed signs of significant growth in the future. \textit{Congo v. Belgium, supra} note 311, para. 75 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

\(^{359}\) \textit{Id.} para. 3.
Although many treaties after 1970 contained *aut dedere aut judicare* provisions, they addressed only the question of what states could or should do with a suspect physically apprehended in the state's territory, not whether states could issue global arrest warrants for suspects located outside the country and lacking any conventional ties to the state issuing the warrant.\footnote{360. This phrase is typically translated as "try or extradite." The Concurrence refers to this principle as *aut dedere aut prossequi.* Id., para. 30.}

Nor, according to the Concurrence, was a rule embracing universal jurisdiction to be found in the decisions of international tribunals, even in the famous *S.S. Lotus* case, a landmark decision commonly cited as authorizing extraterritorial jurisdiction. Though national courts and legislatures had repeatedly cited the *S.S. Lotus* case for the proposition that a presumption lay in favor of the forum state,\footnote{361. According to the Concurrence, some courts and scholars had referred, through "loose use of language," to treaties containing the "try or extradite" provision as incorporating the universal jurisdiction principle. In their view, however, such treaties were to be seen as embodying "an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere." Id., para. 41.} the famous dictum from the opinion of the Permanent Court of International Justice now, according to the concurring Judges, had to be seen as a "high water mark of *laissez-faire*" from which international relations had retreated.\footnote{362. *S.S. Lotus*, supra note 216, at 18-19: Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.}

An examination of state practice, according to the Concurrence, yielded mixed results. A significant number of countries have enacted legislation authorizing their courts to exercise jurisdiction over persons with few or no contacts with the forum. However, these statutes do not lead to the conclusion that state practice in favor of universal jurisdiction has taken root. Their wording and approach vary, making it difficult to draw solid conclusions. Although the cases relying on these statutes show a strong inclination toward extraterritorial jurisdiction,\footnote{363. For example, the Israeli Supreme Court relied on the *S.S. Lotus* decision in upholding Israeli courts' jurisdiction to try Adolf Eichmann. *Eichmann*, supra note 255.} they do not demonstrate a clear trend in favor of a "classical assertion of a universal jurisdiction," especially because much of the legislation is recent.\footnote{364. *Congo v. Belgium*, supra note 311, para. 51 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).}

Although technically accurate, at least regarding the specific facts before it, the *Congo v. Belgium* Concurrence greatly understated the prevalence of universal jurisdiction. This opinion needs to be seen as a less-than-reliable guide in addressing the different question posed here—the extent to which universal jurisdiction is currently, or is likely to become, a significant point of conflict between human rights enforcement and standardization of procedural
norms. The Concurrence confined its inquiry to a small subset of universal jurisdiction cases—only those in national courts, only criminal cases, and only those in which the defendant is not physically present within the forum. In terms of universal jurisdiction’s challenge to procedural harmonization, however, it matters little that states typically require the defendant’s physical presence in the forum. What matters is that, for grave human rights offenses, many states grant their courts jurisdiction over alleged perpetrators in the absence of any of the connecting factors that would be required in other cases.

To judge universal jurisdiction’s potential ability to transform the jurisdictional landscape, one must also consider the work of the ad hoc criminal tribunals and the negotiations leading to the Rome Statute of the ICC, developments that the Congo v. Belgium Court ignored, perhaps because it focused only on proceedings in national courts. Opinions rendered by the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) repeatedly refer to torture, war crimes, genocide, and crimes against humanity as being subject to universal jurisdiction. In doing so, these tribunals consistently rely on domestic court precedents. Moreover, universal jurisdiction lay at the center of debate at several junctures in the negotiations over drafts of the Rome Statute, including debates about trials in absentia, amending Article 25 so as to permit any state (not merely “interested states”) to file complaints, and whether to invest the Court with subject matter jurisdiction over more than four offenses. In response to criticisms of these proposals, supporters argued that none went further than the jurisdiction that national courts were already capable of exercising pursuant to widely accepted principles of universal jurisdiction. The new international criminal tribunal, it was maintained, should be an agent of the international community in the same way that national courts exercising universal jurisdiction already were. In short, evidence of universal jurisdiction’s growing influence lay beyond

368. Meron, supra note 169, at 464 (“There is, of course, a synergistic relationship among the statutes of the international criminal tribunals, the jurisprudence of the Hague Tribunal, the growth of customary law, its acceptance by states, and their readiness to prosecute offenders under the principle of universality of jurisdiction.”).

369. Id. at 468 (noting that recent developments in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as negotiations over the Rome statute “will surely generate further growth of universal jurisdiction”).


371. See Christopher Hall, The First and Second Sessions of the U.N. Preparatory Committee on the Establishment of an International Criminal Court, 91 AM. J. INT’L L. 177, 184 (1997) (“France and The Netherlands strongly argued that such trials should be permitted.”).

372. See id. at 132 (“Other delegations stated that, since the crimes were the concern of the entire international community, all states were ‘interested states.’”).

373. Among the other offenses proposed were hijacking, hostage taking, certain drug offenses, use of certain weapons, and attacks on U.N. personnel. See Hall, supra note 371, at 179.

374. These international courts are also widely viewed as descendants of the Nuremberg Tribunal in their disregard for immunity defenses, their ability to claim defendants for trial from any corner of the globe, and their focus on only the most serious offenses. See generally Theodore Meron, From Nuremberg to The Hague, 149 MIL. L. REV. 107 (1995). But whereas only the victors participated at Nuremberg, states with no link to the offenses committed have helped create these modern tribunals.
national court practice. Additional evidence can be found in a nuanced interaction between domestic courts and international tribunals.\footnote{375}

Con\-go v. Belgium also ignored the extent to which the United Nations has supported universal jurisdiction, as illustrated by the U.N. Security Council’s actions at a crucial point in the early life of the ICTR. Amidst perceptions that the Tribunal was floundering,\footnote{376} the Security Council urged member states to arrest and try those suspected of grave human rights offenses in Rwanda, even in the absence of a connection between the arresting state, the defendant, and the offense.\footnote{377} Several countries then did so, relying on universal jurisdiction.\footnote{378} Positions taken by the U.N. Committee Against Torture also lend support to this practice. In querying states party to the Torture Convention on their failure to exercise jurisdiction over suspects,\footnote{379} the Committee emphasized that the duty to try or extradite was mandatory, even if the exercise of universal jurisdiction was necessary to carry it out.

Finally, the growing influence of universal jurisdiction rests on what some have called “constitutional moments” in international law.\footnote{380} All the Congo v. Belgium opinions weighed the evidence pertaining to universal jurisdiction according to the formula articulated in Article 38 of the ICJ Statute.\footnote{381} That approach is defensible under current doctrine, but it has a certain static quality when applied to universal jurisdiction. The nine years from the 1993 Security Council Resolution authorizing the creation of the ICTY\footnote{382} to the Congo v. Belgium decision in 2002 include some enormously important data points—watershed events indicative of momentum and a new direction in international enforcement mechanisms. The negotiations leading to the Rome Statute included 160 countries debating under the intense scrutiny of a worldwide audience.\footnote{383} What emerged was a treaty ratified by
some ninety countries in less than five years—a work different in stature than a typical private law harmonization treaty on jurisdiction might be.

Similarly, the *Pinochet* case was not a lone data point. It was an extended drama followed daily in newspapers, on television, and over the Internet on all continents. It drew extradition requests from four countries, opinions from high courts in Spain and the United Kingdom, and legal commentary from all over the world. Despite Pinochet’s return to Chile, the U.K. proceedings produced a widely felt perception that a major blow against impunity had been struck. An important bridge had been crossed leading away from old-style diplomacy and toward more accountability. In the past decade, universal jurisdiction has been exercised over foreign nationals in courts in Austria, Belgium, Denmark, France, Germany, Israel, Senegal, Spain, Switzerland, and the United States.

If the prime goal of unification is eliminating concurrent jurisdiction and other sources of juridical uncertainty, then the expansion of universal jurisdiction, as with other forms of extraterritorial jurisdiction, may lead to somewhat of a showdown. Universal jurisdiction is concurrent jurisdiction at

384. As this Article went to press, a Chilean court ruled that Pinochet was competent to face criminal charges in Chile for human rights abuses allegedly committed while he was head of state. See Larry Rohter, *Chilean Judge Says Pinochet is Fit For Trial*, N.Y. Times, Dec. 14, 2004, at A1. While Pinochet was in the United Kingdom, U.K. authorities received extradition requests from Spain, Belgium, Switzerland, and France, each premised on some form of universal jurisdiction in absentia. See *Letters from the Home Office to the Spanish, Belgian, Swiss and French Ambassadors Announcing the Termination of Extradition Proceedings* (Mar. 2, 2000), reprinted in *The Pinochet Papers*, supra note 328, at 465-81. In all, six concurrent legal proceedings were launched in the *Pinochet* matter in Belgium, Chile, France, Spain, Switzerland, and the United Kingdom.


394. See Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985) (granting Israel’s request for extradition based on universal jurisdiction over crimes committed in during World War II).

395. See supra Part II.
its most extreme. Though other bases of jurisdiction can lead to more than one country’s involvement in adjudicating a dispute, universal jurisdiction potentially puts many courts in play, all with valid claims to jurisdiction.

The ICJ clearly found this latter development worrisome in *Congo v. Belgium*. Its concern with the stability of international dispute resolution was appropriate, but its failure to place those concerns within the larger context of expanding conceptions of jurisdiction was unfortunate. Not surprisingly, none of the opinions in the case decisively resolved the underlying jurisdictional tension. Before Part V attempts to grapple with that tension, Part IV will show that the scope of the problem is even broader than discussed thus far.

IV. JURISDICTION AND BEYOND: THE CONFLICT ILLUSTRATED IN HYPOTHETICAL CASES

Part II demonstrated that the leading efforts at global harmonization today are proceeding largely according to a European model. This model calls for (1) harmonization processes steeped in comparative law; (2) uniform texts rather than model laws or texts with opt-out provisions; and (3) a search for efficiency and regional integration. The ultimate focus is on domestic courts, and the package is one that has been shaped for decades by the European search for intellectual coherence, predictability, and political integration.

Part III showed that the harmonization movement is not alone in offering a vision of the future of domestic courts. In the last four decades, the human rights movement has shifted its focus to implementation and enforcement. Domestic courts have emerged as the institutions with the legitimacy, continuity, and coercive power to enforce the new international human rights and criminal law. However, effective enforcement of prohibitions on torture, forced labor, disappearance, and the like requires that domestic courts be free of procedural restraints that may make sense in ordinary tort and commercial cases, but that are unwarranted obstacles in suits arising out of mass atrocities.

At this point the discussion may seem abstract, and the conflict may seem limited to jurisdiction. Neither is true. This Part seeks to show, through hypothetical examples (based loosely on actual cases), that the tension experienced by national courts is quite tangible. Courts are being pulled in opposite directions across a range of procedural issues, including rules for enforcing foreign judgments, rules relating to class actions and forum non conveniens, statutes of limitations, and rules of evidence, to name just a few.

A. Case 1: The Asset Trail: Recognizing and Enforcing Human Rights Judgments Worldwide

For three years, State A has been embroiled in civil war. During the conflict, Group A forces repeatedly sack cities in the minority Christian region

396. See *Congo v. Belgium*, supra note 311, para. 5 ("One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights."). For a case currently pending before the ICJ posing issues similar to those raised by *Congo v. Belgium*, see *Case Concerning Certain Criminal Proceedings in France (Congo-Fr.),* 2003 I.C.J. 129 (July 11).
of the country, carting off artwork from the museums, looting gold and jewelry from the civilian population, and stealing valuables from churches. The looting is approved at the highest levels of State A’s military, which is controlled by the majority population. General Or, the chief of all military forces for State A, personally sees that half of the looted assets are directed to him and put in bank accounts and safe deposit boxes in Switzerland.

Two years after the war’s conclusion, with the Christian insurgency having been brutally suppressed, Or is served with a civil complaint while visiting Washington, D.C. The complaint charges him with having committed war crimes and crimes against humanity during State A’s civil war. The complaint seeks restitution of looted valuables on behalf of a class of thousands of victims. General Or enters an appearance to contest personal jurisdiction. The court rules against him. After the ruling, he takes no further actions to defend the suit, and a default judgment is entered against him. He has no assets in the United States. After three years, lawyers for the plaintiff class receive information that Or controls bank accounts and safe deposit boxes in Switzerland. They file suit there based on the presence of those assets. Will they be able to collect?

Until recently, the general answer was no. With no treaty on mutual recognition of judgments between Switzerland and the United States, Or’s assets would have been beyond reach. Under case law applying the 1987 Swiss legislation on private international law, a judgment creditor seeking enforcement in Switzerland had to meet a reciprocity requirement—a showing that the country from which the judgment originated consistently recognized Swiss judgments. Creditors seeking to enforce U.S. judgments might have difficulty satisfying this burden, because judgment recognition in the United States is governed by state law and is thus subject to varying state practices with no overarching federal treaty or legislation to govern.

But is that all there is to be said? What about the nature of the judgment? The Swiss rule on enforcing judgments rests on the principle of reciprocity. Switzerland is willing to extend benefits to other countries and their nationals based on assurances that the other country will reciprocate. Absent such assurances, Swiss courts generally will not extend the benefit since doing so would encourage the other country to free-ride.

Reciprocity is certainly a major theme that runs through all of international law and treaty relations in particular. But how relevant a principle is it in this specific context? The judgment here relates to offenses at the heart of the Geneva Conventions—brutalizing civilians and looting both national and religious treasures and civilian possessions. For these offenses, current international law supports the proposition that treaties prohibiting such conduct do not rest on reciprocity at all. The rhetorical question, “If troops of State A torture POWs of State B, can State B do likewise?,” is meant to demonstrate that the Geneva Conventions, like most treaties in humanitarian

and human rights law, rest on principles other than reciprocity. The obligations that flow from the Geneva Conventions are duties *erga omnes*, obligations owed to all.\(^{398}\)

The analysis does not end there. Treaties to which Switzerland is a party provide that states party have a duty to assure that victims of such offenses “obtain[] redress” and “an enforceable right to fair and adequate compensation” within any signatory country’s legal system.\(^{399}\) Does Switzerland thus have a treaty-based obligation, or an obligation grounded in customary international law, to recognize a judgment ordered by a U.S. court for the sake of providing redress to victims of atrocities?

Swiss courts took a position close to this view in the *Marcos* litigation.\(^{400}\) There, the Swiss Federal Supreme Court did not apply its standard approach to recognizing foreign judgments. Rather than insist on strict reciprocity, it held that the nature of the rights at stake—rights that were the subject of human rights treaties, customary law, and jus cogens norms—dictated that Swiss courts be willing in principle to recognize at least some aspects of a U.S. judgment, even in the absence of a treaty.\(^{401}\)

That judgment in particular, along with a general pressure on Swiss banks to ease bank secrecy laws in cases relating to the criminal acts of foreign dictators, money laundering, drug trafficking, and other international crimes, introduced instability into Swiss procedural law. The standard for recognition of foreign awards has become less clear-cut than before. The rules for obtaining an asset freeze, formerly quite clear and rigid, are now difficult to predict in individual cases. In short, developments in international human rights law and international criminal law have brought about less certainty in Swiss procedural law in the areas of mutual recognition and preliminary relief.

B. **Case 2: Class Actions and Forum Non Conveniens**

Suit is filed in British courts on behalf of the plaintiffs described in the case at the end of Part II.\(^{402}\) Assume this time that the case is not governed by the Brussels Convention because the wine company is located outside the EU. Assume also that, under U.K. law, British courts are authorized to exercise

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399. *Torture Convention, supra* note 320, art. 14; *cf.* Rome Statute of the ICC, *supra* note 201, art. 75.5 (describing duty of states party to “give effect” to reparation orders of the ICC).


402. *See The Case of the Migrant Workers, supra* Part II.D.
jurisdiction over the wine company. The suit is brought as a group action, a British procedural device that allows a large number of plaintiffs to litigate as a group in a manner somewhat analogous to a class action in the United States. The defendant seeks to have the suit dismissed under the common law doctrine of forum non conveniens. The company argues that in terms of expense, access to evidence, burden on the judicial system, and local interest in the controversy, the courts of State A are the proper forum for litigation.

The suit has nothing to do with England, other than the defendant’s technical amenability to suit there.

The briefs for the plaintiffs respond as follows: “There are thousands of us, including many for whom we do not yet have names and addresses. In British courts we are able to proceed under procedural rules that allow us to litigate as a group. A group action promotes efficiency, both by spreading the costs of litigation among us and by preserving judicial resources. It enables us to commence litigation (and hence meet the statute of limitations) on behalf of those who are not yet identified by name. Group actions also avoid competition among us for what may be fixed and inadequate assets for recovery. Because State A’s procedural rules do not permit group actions, we are limited in the State A legal system to numerous small suits. By virtue of that reality and other barriers to litigating in State A (such as distance, expense, and language), State A is not an adequate forum.”

How will British courts rule? If they stick to precedent, they will hold that the absence of any group action mechanism in State A does not make it an inadequate forum. Legal systems differ in terms of procedure. Courts outside of Great Britain are quite capable of reaching a just result without employing all the mechanisms that are a familiar part of British justice. But will they reach that result where the class claims relate to torture and forced disappearance? The answer to that question is less clear. To the extent that British courts will consult practice in the United States, they will find that human rights class actions have greatly complicated the law on forum non conveniens.

403. FED. R. CIV. P. R. 23.
405. See Lubbe v. Cape plc, [2000] 1 W.L.R. 1545 (H.L.) (holding that the absence of a group action mechanism in South Africa does not preclude forum non conveniens dismissal).
406. In the United States, the Second Circuit followed this line of reasoning in In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986), aff’d in part, 809 F.2d 195 (2d Cir. 1987).
C. **Case 3: Statutes of Limitation and Retroactivity**

Statutes of limitations constitute another category of procedural rules in the crossfire of this conflict. Efforts are under way, especially in the EU, to harmonize prescription periods and thereby eliminate commercial advantages that result when the window of liability ends sooner for some commercial actors than for others. On the other hand, with respect to human rights offenses, there are still important differences in how national legal systems approach prescription. Some EU member states have enacted legislation reviving causes of action that expired long ago. In some instances, courts have upheld these statutes. In other instances, these revival statutes have been struck down. In still other states, statutes of limitations have been lengthened judicially, rather than legislatively, by tolling them during periods in which facts on the ground presented obstacles to filing suit. An analysis of these approaches to the prescription problem supports the conclusion that domestic courts and their procedural rules lie at the intersection of two competing movements in international law.

Consider another hypothetical case. The country of Zandor is composed of two main ethnic groups. The minority population, Group A, ruled the country from 1979 to 1999. A military junta had a firm grip on the capital and tenuous control over the rural provinces, where the junta had informal alliances with local strongmen. With the tacit approval of the junta leaders, these locals systematically oppressed the Group B civilian population, denying basic civil and political rights and committing grave crimes against humanity. Group A soldiers periodically rounded up teenage boys, to be sold abroad in countries with mining operations. Many were badly injured. Young girls were rounded up and sold abroad to prostitution rings. The junta leaders received kickbacks on both forms of trafficking.

In 1999, the junta is overthrown. Two priorities for the new majority government are establishing the rule of law and righting past injustices. An obstacle to the latter goal, however, is a statute passed in 1995 setting the limitations period for all civil and criminal actions. That statute, which


shortened the limitations period from the prior statutory period of twenty years, was enacted soon after the junta came under intense international criticism for its human rights record. Under the statute, a common law tort action, for example, became time-barred within three years of the statute’s entry into force or three years of the act or omission giving rise to the claim, whichever came later. Two aspects of the 1995 prescription statute are especially problematic from the viewpoint of victims of the 1979–1999 period. First, the statute expressly abolishes the doctrine of equitable tolling, with the result that thousands of claims became time-barred even though any victim seeking legal redress in Zandor before 1999 would have been putting his or her life at risk. Second, the statute specifies relatively short limitations periods for what are widely regarded as very serious offenses, and these shorter limitations periods are applied retroactively. A claim that arose in 1989 suddenly has its expiration date changed from 2009 to 1998.

For the new government, the 1995 prescription statute is unacceptable. If applied by Zandor’s courts, the statute would shield thousands of perpetrators from accountability. The new legislature enacts the following statute:

**Law of January 1, 2000: Statute of Limitations for Grave Human Rights Offenses**

*Whereas* widespread and systematic offenses against fundamental human rights were committed in Zandor during the period from 1979 to 1999; *Whereas* the 1995 prescription statute unjustly confers impunity on those who perpetrated these offenses and denies just compensation to their victims;

*Now therefore:*
1. The prescription statute of January 1, 1995 is hereby repealed.
2. The statute of limitations for any criminal offense listed in (4) is hereby abolished;
3. The statute of limitations for any civil action arising out of any offense listed in (4) shall be twenty-five years;
4. Applicable offenses:
   (a) Crimes against humanity, as defined in the Rome Statute of the International Criminal Court;
   (b) Slavery or involuntary servitude, as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;
   (c) Torture, as defined in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;
   (d) Forced disappearance, as defined in the Inter-American Convention on Forced Disappearance of Persons.

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411. Assume that Zandor is a common law country with little statutory law in the fields of torts, contracts, or other private law subjects.
412. Under the doctrine of equitable tolling in the United States, the statute of limitations ceases to run, for instance, during periods when wrongful conduct by the defendant prevents the plaintiff from filing suit. It may also be tolled when extraordinary circumstances (e.g., natural disasters or wartime) prevent the plaintiff from filing suit on a timely basis. See, e.g., Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (defendant’s fraudulent concealment of facts); Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 540 (1867) (statute tolled during U.S. Civil War).
413. Let us assume that other legal systems provide for longer prescription periods for slave trading and offenses of comparable severity.
414. Under the twenty-year prescription period of the 1979 law, a cause of action that arose in 1989 would expire in 2009. Under the 1995 statute, the three-year prescription period starts running from the date the statute entered into force, so the statute of limitations ran out in 1998.
5. The courts of Zandor shall, where appropriate, apply the doctrine of equitable tolling in actions within the scope of this statute.
6. This statute shall enter into force on January 1, 2000. It shall apply retroactively to applicable offenses committed on or after January 1, 1979.

This hypothetical statute poses some extremely difficult issues. Some are familiar questions of due process and constitutionalism. Others are less familiar. For example, is it desirable for statutes of limitations in Country A to be similar to those in Country B? Is it desirable enough for governments to conclude that there is little room for doctrines such as equitable tolling that rely for their implementation on judicial discretion? Is it important enough to conclude that all states must abolish statutes of limitations for an agreed-upon list of crimes under international law? How important is it that all perpetrators of atrocities be prosecuted? Is it important enough for states to depart from ordinary legal principles barring retroactivity? Is it important enough for courts to look behind facially neutral procedural rules and probe the reasons for their enactment? How important are continuity and predictability? Surely, not every law and judicial act of the old regime should be suspect. Much unnecessary dislocation would be caused by calling into question every zoning ordinance, every divorce decree, and every environmental regulation just because they came from the same courts and legislatures that were used to administer a grossly unjust regime. On the other hand, underneath some facially neutral laws, including procedural rules, may lie a legislative history suggesting that a rule of law was changed for the purpose of conferring impunity. That motive seems to have been present in the Zandor example above. Should the new courts in Country A dig deep into the legislative history of laws enacted during the 1979–1999 period, even those of a procedural character? If they do, should courts elsewhere follow their lead?

These questions have arisen repeatedly in the past half-century—at Nuremberg, in multilateral treaty negotiations, in national legislation,

415. Creating uniformity in this way has been attempted, with mixed results. Two treaties were drafted in the 1970s—a U.N. convention and a European convention. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970); European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, Europ. T.S. No. 82 (has not entered into force). Both are limited in scope, and neither has gathered a large number of state ratifications. More recently, the Rome Statute addressed the issue as follows: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.” Rome Statute of the ICC, supra note 201, art. 29.

416. That is, in the aftermath of oppressive regimes, should courts scour every law and judicial decision, looking for signs of intent to confer impunity or to deny judicial remedies to specific groups of people?

417. The Nuremberg defendants were indicted for crimes against peace and crimes against humanity even though crimes with those titles had not been articulated in treaties or statutes before the war. See Louis Henkin et al., International Law 986 (2d ed. 1987) (“The Nuremberg Charter applied a customary international law of human rights in charging the Nazi war criminals, inter alia, with ‘crimes against humanity.’”).

418. See supra note 415.

and in regional human rights courts. The newly created ICC may also confront these issues soon, and similar questions have been posed before domestic courts repeatedly over the past fifty years, with national legal systems taking widely divergent approaches.

What competing norms underlie this conflict? On the one hand, substantial social benefits flow from short and relatively uniform statutes of limitations. When statutes are short and when their length is easy to determine, they perform the following functions: (1) free courts from the inefficiency and uncertainty of adjudicating cases based on old and unreliable evidence; (2) curtail the power of government officials to conduct interminable investigations, forcing suspects to function for prolonged periods under the shadow of liability; (3) allow private actors to use capital that would otherwise be held in contingency funds; and (4) spare potential litigants complex choice-of-law analyses to determine the applicable period of prescription.

On the other hand, short, inflexible statutes of limitations also have drawbacks, in that they (1) inevitably confer impunity on some percentage of criminals and tortfeasors; (2) leave some victims without redress; and (3)

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421. Imagine a defendant accused of committing acts of forced disappearance. Imagine further that three different statutes of limitations potentially apply to this offense: the statute of the place where the victims disappeared, the statute of the defendant's state of nationality, and a customary international law rule abolishing prescription for disappearance. Now imagine an ICC indictment that is brought after the defendant has been acquitted by a national court that held that the relevant statute of limitations had run. In reaching its conclusion, the national court (after applying its choice-of-law rules) applied its own statute of limitations. Would a subsequent action in the ICC be admissible? Article 17 of the Rome Statute partially addresses the question. Under that provision, the relationship between the ICC and domestic courts is one of complementarity, meaning that cases brought before the ICC are generally inadmissible if a member state is investigating or prosecuting them. An exception, however, is triggered when a state is "unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute of the ICC, supra note 201, art. 17.1(a). But under Article 17, the following question would arise: if a national court, acting in good faith, dismisses an action because the relevant statute of limitations has expired, can the ICC nonetheless conclude that the national court was unwilling or unable to carry out the prosecution? Would the answer more likely be in the affirmative if the offense at issue were not subject to prescription under international law?


424. Once the statute has run, individuals and business entities can write potential liabilities off their books, and capital held in reserve in anticipation of claims or legal expenses can be put to other uses.

425. The sources of such complexity include questions about how to characterize the claim, how to determine which jurisdiction's law applies with respect to the statute of limitations for that claim, and how to determine whether a particular jurisdiction's rule on equitable tolling or similar doctrines will apply.

426. The plaintiff may not be at fault for failing to bring suit; in some cases, it may be quite difficult to file suit in a court with jurisdiction over the defendant that is also accessible and affordable for the plaintiff.
may promote unnecessary litigation. In transitional democracies like Zandor, these drawbacks are accentuated. Thousands of victims who had no real opportunity to seek justice before the junta was ousted from power will be further deprived if the 1995 prescription statute is applied now. The credibility of the new government is also on the line. A large portion of the population is expecting it to deliver justice and to right some of the wrongs of the past. However, the new government and its courts cannot respond with vindictiveness or lawlessness. Citizens need to see that the new regime is different from the old.

Complicated issues in applying statutes of limitation often lie at the intersection of these two competing demands. A transitional democracy that subordinates accountability to procedural technicalities puts its credibility at risk. To some, this policy will suggest that the new government lacks a firm grip on power, that it is corrupt, or that it has skeletons of its own to bury. But the opposite scenario, zealous prosecution with no regard for procedural fairness, raises different fears. To some, Zandor’s law of January 1, 2000, may plant seeds of doubt. Will the new regime uphold the rule of law any better than the old? Will such key procedural values as evenhandedness, neutrality, notice, and accuracy play any meaningful role in the new legal system? Are the longer prescription periods, applied retroactively, simply a way of settling old scores? If at this critical constitutional juncture the courts allow themselves to be co-opted into retribution, will they ever be truly independent? Effective enforcement of global human rights norms may come at the cost of procedural regularity. Conversely, at some point extraordinary procedural efforts to vindicate substantive rights may exact a huge price in terms of fairness, putting all rights at risk.

The international community grappled with these legal questions during the Nuremberg and Tokyo trials, and then during successive efforts a generation later to draft treaties eliminating statutes of limitations for crimes against humanity. The first of these treaties, the U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, strongly leaned toward accountability. It wholly embraced retroactive application of new and longer statutes of limitations. Thus, for example, if the domestic statute of limitations for murder had been twenty years in 1942, the Convention called for the cause of action to be revived, even after 1962, and for it to continue indefinitely in the future.

The clarity of this approach came at the expense of concerns about procedural fairness. The U.N. Convention went too far for much of Western

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427. Parties facing a statutory deadline may file suit prematurely—without adequate investigation or efforts at settlement—rather than risk losing a claim. Although tolling agreements are widely used in the United States to avoid this problem, in other legal systems such agreements are not so clearly enforceable.

428. Supra note 415.

429. See id. art. 1 (“No statutory limitation shall apply to the following crimes, irrespective of the date of their commission.”) (emphasis added).

430. See id. (discussing “eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide”).
Europe, which voiced domestic constitutional objections. Allowing extinguished actions to be revived was viewed as inconsistent with fundamental principles of procedural law such as legal certainty, justified reliance, and protection against stale claims and unreliable evidence. The Convention never bridged this gap between accountability and procedural fairness. Only forty-eight countries have ratified it.

The Council of Europe took a different approach, leaning more toward procedural fairness. Thus, the European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes was intended to be applied prospectively—to eliminate the statute of limitations only with respect to offenses committed after the treaty’s entry into force. In reducing retroactivity problems, however, the European Convention sacrificed much in terms of impunity. Had it entered into force, which it has not, notorious war criminals from World War II would have escaped prosecution.

These conflicting impulses—one in favor of extraordinary steps to combat impunity and the other in favor of maintaining the stability and integrity of procedural law—also surface in national legislation and yield different results even in legal systems that are otherwise quite similar. For example, although the German and Hungarian legal systems similarly emphasize legal certainty and clear adherence to procedural rules, their treatment of statutes of limitations and retroactivity has been different.

In postwar Germany, retroactivity and prescription have been at the center of an extended legal drama, with much internal inconsistency. The former Federal Republic of Germany (FRG) declined to ratify the 1968 U.N. Convention because reviving statutes of limitations that had already run out was widely viewed as unconstitutional. Yet, with respect to Nazi crimes, the FRG repeatedly enacted legislation extending statutes of limitations that had not yet run out. Finally, in 1979, legislation was enacted eliminating


432. Among the non-ratifying countries are the United States, Australia, Canada, China, Japan, New Zealand, nearly all the South and Central American states, and all the EU member states except for the formerly communist countries. See Office of the U.N. High Commissioner for Human Rights, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Ratifications and Reservations, at http://www.ohchr.org/english/countries/ratification/6.htm (Nov. 24, 2004).

433. See European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, supra note 415, art. 2.1 (“The present Convention applies to offenses committed after its entry into force . . . .”) (emphasis added). The treaty’s goal of regional harmonization is set out in the Preamble’s references to “a common criminal policy” and “greater unity” among members of the Council of Europe. Id. art. 2.2. Under Article 2.2, the Convention also extended the limitations period for offenses whose prescription period had not yet expired as of the time the Convention entered into force. Id.

434. The European Convention was also broader in scope than the 1968 U.N. Convention. It covered not only the short list of grave offenses enumerated in the latter, but also “any other violation of a rule or custom of international law [of a “comparable nature”] which may hereafter be established.” Id. art. 1.3.

435. The FRG repeatedly extended the period of time for bringing criminal cases against Nazi perpetrators. These actions came in response to inadequate commitment of resources early on and
prescription altogether for those Nazi offenses for which the limitations period (with extensions) had not yet expired as of 1979. FRG courts upheld these extensions, drawing a distinction between extending a limitations period not yet expired and reviving one already expired.436

The issue gained new currency after German reunification. With respect to state-sanctioned killings and other grave offenses committed before 1991 in the former German Democratic Republic (GDR), German courts have been selective in their willingness to apply the laws of the former GDR. In the Border Guards cases, the German Constitutional Court upheld the conviction of former GDR officials responsible for the deaths of East Germans shot while attempting to flee to the West.437 It brushed aside arguments that applying post-unification German law (including its statute of limitations), rather than the law of the former GDR, would undermine legal certainty. The Court did so even though the principle of legal certainty had been repeatedly cited by German courts and legislators as an obstacle to genocide prosecutions.438 In contrast, Hungarian courts have rejected attempts to extend statutes of limitation or to apply post-1989 laws to offenses committed during the Communist period. When in 1991 the new, democratically elected Hungarian Parliament enacted a law purporting to toll the statute of limitations for certain offenses that had been committed during the Communist period, the Hungarian Constitutional Court struck it down.439 In a landmark ruling, the Court openly wrestled with what had motivated the political branches—widely voiced demands by ordinary citizens that the sins of the old order be exposed and punished. The Court nonetheless rejected these demands. Popular calls for substantive justice could not trump something more fundamental to inadequate evidentiary coordination with Eastern European countries. See generally Monson, supra note 419. External pressure also played a role. Id. at 607. Initially, the statute of limitations for murder was deemed to be tolled from 1933 to 1945 because of the “inadequacies” of the Nazi judicial system. With the twenty-year statute on murder set to expire in 1965, the Bundestag reset the beginning of the tolled period for murder from 1945 to 1949, the year the FRG came into being. Id. at 610. In 1969, with the limitations period set to expire again, the Bundestag acted again, this time lengthening the prescription period for murder to thirty years. Id. at 615. Finally, in 1979, the FRG passed legislation entirely and retroactively eliminating the statute of limitations period on murder. Id. at 618-25.

436. Where the old statute of limitations had not yet expired, lengthening the statute of limitations was believed not to violate Article 103 of the German Basic Law, which bars retroactive legislation. This view rested in part on the theory that statutes of limitations are rules of procedural law, not grants of substantive rights. See id. at 611. It is unclear why, in terms of legal certainty, there is a meaningful difference between the two. Imagine two offenses committed in 1945: murder and enslavement. The statute of limitations is thirty years for the former and twenty years for the latter. The commencement of the statute for both crimes was tolled until 1949. In 1979, efforts to allow prosecution in perpetuity for Nazi murders committed in 1945 are deemed constitutionally permissible. But similar efforts to extend, even for a shorter time period, prosecution for slave labor in 1945 are deemed unconstitutionally retroactive. Why the difference in conclusion?

437. The ECHR agreed. See Streletz, Kessler, & Krenz, supra note 420 (holding that these convictions did not violate Article 7.1 of the European Human Rights Convention, supra note 98, which bars prosecution under retroactively applied laws). Under GDR law it was lawful for guards to use lethal force to prevent people from seeking to cross the border without authorization. Id.

438. Legislation introducing the crime of genocide into the FRG penal code in 1954 barred prosecution under that section of acts of genocide committed before 1954. Though the crime of genocide was introduced into the penal code in 1954, crimes of genocide committed before 1954 could not be prosecuted because of the constitutional prohibition on ex post facto laws. Monson, supra note 419, at 615, 623.

the Hungarian legal order: procedural fairness. The latter, according to the Court, was "an indispensable component of the rule of law" in Hungary.\textsuperscript{440} Citizens were entitled to know in advance their potential liability. They were entitled to rely on a statute of limitations and to rest secure once the statute had run, no matter what the alleged offense. The Court did little to answer the opposing arguments: Can a new republic succeed in instantiating the rule of law if it fails to address profound wrongs of the past? Only momentarily and obliquely did the Court pause to consider the conflict between procedural regularity and substantive justice: "The certainty of the law based on formal and objective principles is more important than the necessarily partial and subjective justice."\textsuperscript{441}

The U.S. legal system offers yet a third model for balancing these competing principles. U.S. courts have repeatedly referred to the liberty interest served by statutes of limitations and the extent to which limitations periods also reinforce the separation of powers by restraining overzealous or discriminatory prosecution.\textsuperscript{442} With these concerns in mind and against the backdrop of the Due Process and Ex Post Facto Clauses, the U.S. Supreme Court has struck down legislation reviving expired causes of action, whether civil or criminal.\textsuperscript{443} State courts have done likewise,\textsuperscript{444} and just last term, in \textit{Stogner v. California},\textsuperscript{445} the U.S. Supreme Court reaffirmed this view by a vote of five to four in a decision emphasizing that statutes of limitations should be viewed primarily as procedural laws, akin to rules of evidence.\textsuperscript{446} Although U.S. courts have struck down legislative efforts to revive statutes of limitations, they have achieved similar results in other ways. The U.S. case law on equitable tolling in the context of ATCA and TVPA cases, for instance, is very permissive. Courts typically have tolled the relevant statute of limitations throughout the period of time in which the alleged victim was unable to leave the country in which the violation took place. They have also tolled the limitations period throughout the time in which the alleged perpetrator was in power, or while government-to-government restitution

\textsuperscript{440.} \textit{Id.} at 136.

\textsuperscript{441.} \textit{Id.; see also id.} at 137-38 ("The attainment of social justice . . . is not guaranteed by the Constitution."). The Court did, however, try to even the scales by observing that in the abstract, if not necessarily in the concrete historical circumstances of Cold War Hungary, statutes of limitations also serve a rights-protecting function—they protect individuals from arbitrary governmental action and a potentially unending threat of trial for acts done long ago. \textit{Id.}


\textsuperscript{444.} A notable exception is \textit{People v. Frazer}, 982 P.2d 180 (Cal. 1999).

\textsuperscript{445.} \textit{Stogner}, 539 U.S. 607 (2003) (invalidating California statute permitting prosecution of sex-related child abuse crimes even when the prior statute of limitations has expired).

\textsuperscript{446.} \textit{Id.} at 615 ("[A] statute of limitations reflects a legislative judgment that after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns . . ."); see also \textit{United States v. Marion}, 404 U.S. 307, 321-22 (1971); \textit{Wood v. Carpenter}, 101 U.S. 135, 139 (1879) (describing statutes of limitations as creating "a presumption which renders proof unnecessary").
negotiations were under way, even when such negotiations were stalled for decades.\footnote{447}

Zandor’s courts are in a quandary. They can try to choose among the different approaches discussed above or investigate others. They can reject all existing approaches and go off in their own direction. They can point to their unique circumstances, such as the fact that the junta drastically shortened the statute of limitations in what seems to have been a purely self-serving act. But no matter what Zandor’s courts do, they are not likely to arrive at a solution that addresses both the system’s needs for predictability and the claims of the many who suffered.\footnote{448}

D. Case 4: Rules of Evidence and Testimonial Privileges

Rules of evidence are another category of procedural rules\footnote{449} in which efforts to enforce global human rights norms seem destined to conflict with the movement to unify procedural laws. The problem in this instance is not so much with rules the sole or even primary function of which is to ensure accuracy. Evidentiary rules of that sort appear gradually to be undergoing a preliminary degree of harmonization, but not in a way that especially impacts human rights claims.\footnote{450} The rub is with evidentiary rules that embody some conscious tradeoff between accuracy and other societal values, such as promoting frank communication with attorneys, assuring the safety of

\footnote{447. A counter-example is judicial interpretation of a statute enacted by the California legislature in 1999. \textsc{Cal. Civ. Proc. Code} § 354.6 (West 2004). That law extended until December 31, 2010 the statute of limitations on claims “to recover compensation for labor performed as a Second World War slave labor victim or a Second World War forced labor victim.” \textit{Id.} § 354.6(b). A federal district court struck down the statute as an unconstitutional infringement on the federal government’s exclusive power over foreign affairs. \textit{In re} World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001); \textit{see also} In the Matter of the Requested Extradition of Suarez-Mason, 694 F. Supp. 676, 686-87 (N.D. Cal. 1988) (refusing to toll statute of limitations on kidnappings during Argentina’s so-called “dirty war”).}

\footnote{448. The proceeding against John Demjanjuk provides a cautionary tale. Alleged to be the infamous “Ivan the Terrible,” a sadistic guard at Treblinka, Demjanjuk became the target of extradition proceedings in the early 1980s. The proceedings resulted in the revocation of his U.S. citizenship and his extradition to Israel. Demjanjuk v. Petrovsky, 612 F. Supp. 571 (N.D. Ohio 1985). In Israel, Demjanjuk was convicted after a long public trial in the Jerusalem District Court rivaling that of Adolf Eichmann, at least in terms of public outrage and media attention. Dozens of Holocaust survivors gave eyewitness testimony, based on events that took place fifty years earlier, that Demjanjuk and Ivan the Terrible were the same person. In 1993, the Israeli Supreme Court reversed the conviction, observing that eyewitness testimony was inherently suspect after the passage of a great length of time. Based in part on newly discovered documents from the former Soviet Union, the Court concluded that the documents established a reasonable doubt that the testimony of even dozens of witnesses corroborating one another could not overcome. Cr.A. 347/88, Demjanjuk v. State of Israel, 47(4) P.D. 221 (1993).

449. Though subject to some debate, most legal systems regard rules of evidence as rules of procedural law. \textit{See}, e.g., Prosecutor v. Simic, Separate Opinion of Judge David Hunt on Prosecutor’s Motion for a Ruling Concerning the Testimony of a Witness, Case No. IT-95-9, para. 25 (Trial Chamber, \textit{Int’l Criminal Tribunal for the Former Yugoslavia}, July 27, 1999), \url{http://www.un.org/icty/simic/trialc3/decision-e/90727EV59551.htm} (“Whether or not evidence which is relevant should nevertheless not be permitted to be given is a matter of procedural rather than substantive law.”).

450. In the past decade, advances in technology have spurred treaties and model laws pertaining to certain forms of evidence, such as electronic signatures and polygraph tests. Recently, efforts have been directed toward the creation of a common European law of evidence. \textit{See}, e.g., Acad. of European Law—Trier, Seminars for Practitioners: The Law of Evidence and Judicial Cooperation in the European Union, \url{http://www.era.int/www/en/c_599.htm} (Nov. 25-26, 2002).}
witnesses, or providing media outlets with access to information that benefits
the democratic process.

To see the growing conflict between those who seek to bring about a
convergence among national evidentiary rules and those who view existing
evidentiary rules as an often-encountered obstacle to enforcing human rights
law, let us look at a modified version of Case 3.

Imagine that the facts in Case 3 give rise to two legal proceedings, one
in Europe and one in the United States. The U.S. proceeding is a civil class
action brought in federal court under the ATCA. The plaintiffs are a class of
Zandorese men who allege that as teenage boys they were abducted and sold
into forced labor in Zimbabwe, in violation of treaties and customary
international law.\footnote{See European Human Rights Convention, supra note 98, art. 4.2 ("No one shall be
required to perform forced or compulsory labour."); ICCPR, supra note 191, art. 8.3(a) ("No one shall
be required to perform forced or compulsory labour."); Slavery Convention, supra note 199, art. 3; African
The defendant is a French mining company, Société des Mines (SdM), alleged to have purchased the plaintiffs and forced them to
labor in its mines.\footnote{Assume that SdM is subject to personal jurisdiction under N.Y. C.P.L.R. § 301 by virtue
(upholding jurisdiction over a London hotel because a centralized reservation service located in New
York "does all the business which Hilton (U.K.) could do were it here by its own officials").} The European proceeding is an action in a Dutch court
by Zandorese women who claim that as teenage girls they were forcibly
brought to The Netherlands from Zandor and sold into forced prostitution in
Amsterdam. They allege that they were kept in brothels run by organized
crime syndicates and that the Dutch police knowingly looked the other way in
exchange for bribes. The action in The Netherlands is a criminal suit against
those who allegedly ran the brothels and the officials who allegedly were
bribed.

Suppose further that a key evidentiary issue lies at the heart of each case.
In the United States, the plaintiffs rely on photographs taken at SdM's mining
facilities by a clandestine British journalist who visited SdM posing as a
prospective investor. The pictures, which were later published, show young
boys with horrific scars and bruises on their bodies, working in facilities under
appalling conditions. At a deposition, the defendant questions the reporter as
to the dates on which the photos were taken, the names of the people in the
photos, and whether other, unpublished photographs exist. The reporter
refuses to answer the questions, claiming that because the pictures were an
integral part of journalistic work, her sources and methods are privileged. The
defendants file a motion to compel. Who will win?

Meanwhile in The Netherlands, mobsters and corrupt officials are on
trial for trafficking in child prostitutes in violation of Dutch law and
international treaties. Prosecutors want the victims to testify. The victims are
reluctant to do so. At a minimum, they want their identities to be withheld
from both the public and the defendants. The prosecution proposes that the
court allow the witnesses to use pseudonyms and to testify from a location
outside of the courtroom through an electronic connection and technology that
will alter the appearance of their faces and the sound of their voices. The lawyers advance the following reasons: (1) the women have a well-founded fear of retribution by the criminal organizations that run the brothels; (2) this fear is accentuated by the criminal involvement of state officials; (3) the women are being asked to testify about the most painful events of their lives; requiring them to do so in the physical presence of those who traumatized them as children will likely traumatize them again; and (4) the women risk becoming pariahs in the Zandorese community, where women who engage in sexual activity outside of marriage become social outcasts. The defense objects: anonymity will make it impossible to test the witnesses’ credibility and to verify the accuracy of their testimony. How will the Dutch courts rule?

These two hypothetical cases also lie at the intersection of harmonization (in this case the harmonization of evidentiary rules) and the potentially conflicting drive to brush aside evidentiary privileges that in practice tend to work to the advantage of human rights violators. In one case, a European court must determine whether a witness can testify anonymously in a criminal proceeding. In the class action above, a U.S. court must first determine whether a testimonial privilege exists for journalists and, if it does, what is covered by the privilege. Under U.S. law, the privilege does cover non-confidential sources, but in a form weaker than that for confidential sources. What should the U.S. court do in the forced labor class action before it?

One approach would be for the court to look closely at decisions from other countries to determine if those decisions form a consistent pattern. If they do, there may be great benefits in terms of predictability and efficiency of falling into line with these other courts. In doing so, the court’s thought process might be based on the following rationale: Journalism is a global business. There are clear benefits to some degree of global similarity in the laws bearing on the conduct of journalists. A reporter working for a worldwide news organization may work in India for several years and then be assigned to London. If the basic rules on source confidentiality greatly differ

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453. The ruling of the highest Dutch court may ultimately be subject to review by the ECHR. See European Human Rights Convention, supra note 98, arts. 34 & 35 (holding that the Court may receive applications from “any person” or “group of individuals claiming to be the victim of a violation” of the Convention by a state that is a party to the Convention, provided the claim is filed within six months of exhausting all domestic remedies). If Dutch courts rule in favor of permitting anonymous testimony, the criminal defendants may seek review in the ECHR on the ground that The Netherlands has infringed their rights under Article 6.3(d) of the Convention (right to examine witnesses).

454. The convergence among national procedural laws, although incomplete, has been actively sought by transnational media companies seeking greater predictability in their efforts to investigate and report news. Indeed, in Prosecutor v. Talic, Decision on Interlocutory Appeal, Case No. IT-99-36-AR73.9 (Appeals Chamber, Int’l Criminal Tribunal for the Former Yugoslavia, Dec. 11, 2002), http://www.un.org/icty/brdjinain/appeal decisión- e/ randall021211.htm [hereinafter Talic], over thirty news organizations filed an amicus brief asking the ICTY to adopt a set of “clear bright line rules” capable of “uniformity of application.” Brief of Amicus Curiae on Behalf of Various Media Entities and in Support of Jonathan Randall’s Appeal of Trial Chamber’s Decision on Motion To Set Aside Confidential Subpoena To Give Evidence, Prosecutor v. Talic, Case No. IT-99-36-T, para. 20 (Appeals Chamber, Int’l Criminal Tribunal for the Former Yugoslavia, Aug. 17, 2002). For another example of briefs recently filed in various venues around the world by media companies and organizations on similar matters, see Brief of Amicus Curiae Committee for the Protection of Journalists in Support of Abdullah Keskin, Gov’t of Turkey v. Abdullah Keskin, State Security Court (2002) (Turk.), http://www.cpj.org/news/2002/TurkeyAmiciBriefKeskin.doc.
in the two places, her job will be more difficult. Large media organizations
with thousands of reporters will be unable to produce useful internal policies
on a range of legal questions affecting reporters and sources. In some
instances, it may be better to reach a result in harmony with that of other legal
systems than to strike out unilaterally with what, in a vacuum, might be
considered the right result.

Thus, a court concerned with uniformity would likely grant the motion
to compel. There was no understanding of confidentiality between the sources
that were photographed and the British journalist. Were the court to extend the
privilege covering confidential sources to non-confidential sources, U.S. law
would step further out of sync with the laws of other countries on this
question. In order to prevail, SdM need only show that the photos are “of
likely relevance to a significant issue in the case” and that they are “not
reasonably obtainable from other available sources.” SdM should prevail on
both issues.

Alternatively, the court could place less emphasis on uniformity. The
complaint alleges appalling human rights abuses. Perhaps what matters most
is for the legal rule to maximize incentives for exposing abuses, even at the
cost of departing from a consensus reached among several legal systems. A
court inclined to take this route might reason as follows: This case concerns
alleged violations of international law, including violations of jus cogens
norms. In determining the scope of evidentiary privileges, judges must
place primary emphasis on whether a rule will encourage or discourage the
exposure of such atrocities. In doing so, the court must recognize that the
media has been indispensable over the past century in uncovering atrocities. A
rule that would require journalists regularly to testify with respect to people

455. Absent some degree of uniformity, a reporter and a publisher are in a difficult spot. When
the interviewee asks for an assurance of confidentiality, should the reporter assume that the validity of
such an assurance is governed by English law because she is a British national, or U.S. law because her
publisher is based in the United States? Should she look to French law because the interviews are to be
done in France and the interviewees are French? Does she need to consider the laws of other countries
where legal proceedings may eventually be brought? When the legal rules are similar, news
organizations can apply the same guidelines regardless where the interview is conducted and regardless
of the nationality of the people involved.


457. In Talic, the Office of the Prosecutor argued that a privilege for journalists concerning
non-confidential matters would be “unprecedented in international or national legal systems.” Talic,
supra note 454, para. 25. That assertion was an overstatement. Such a privilege has found some
acceptance in the United States. See, e.g., Gonzales, 194 F.3d at 36 (“[W]hile nonconfidential press
materials are protected by a qualified privilege, the showing needed to overcome the privilege is less
demanding than the showing required where confidential materials are sought.”). It is unclear whether
the reporters’ privilege is a doctrine of U.S. constitutional law or of federal common law. See id. at 35-
36 n.6; Shoemake v. Shoemake, 5 F.3d 1289, 1294 (9th Cir. 1993); see also 28 C.F.R. § 50.10 (2002) (U.S.
Justice Department Guidelines on issuing subpoenas to members of the media); Alan S. Wasserstrom,
Annotation, Reportorial Privilege as to Nonconfidential News Information, 60 A.L.R.5th 75 (1998 &

458. Gonzales, 194 F.3d at 36.

459. See, e.g., Ian Brownlie, Principles of Public International Law 515 (5th ed. 1998);
Antonio Cassese, International Law 140-41 (2001); Maurizio Raggazi, The Concept of
International Obligations Erga Omnes 43-73 (1997); cf. Restatement (Third) of Foreign
Relations, supra note 227, § 404 n.1 (referring to a draft of the International Law Commission’s
Articles on State Responsibility that classifies slavery offenses as being subject to universal
jurisdiction).
they interview or investigate would put many reporters in untenable positions. In the course of investigating everything from conditions for detainees at Guantánamo Bay to the global sex trade, reporters seeking to expose unconscionable violations of international human rights run the risk of being viewed not as neutral observers but as investigative extensions of prosecutors. The existing precedents that support a narrow privilege arise from much different factual contexts. They were intended to balance the public’s need to know against a defendant’s access to evidence in the context of ordinary civil and criminal offenses, not offenses of the magnitude of slavery, genocide, and torture.

Recently, the Appeals Chamber of the ICTY adopted a substantially similar approach in a case in which the reporters’ privilege was raised as a possible bar to obtaining evidence for prosecution of war crimes and crimes against humanity. At issue in the Talic case was the validity of a trial subpoena for the testimony of a Washington Post reporter, Jonathan Randal, with respect to his interviews with a non-confidential source in 1993. In a criminal case against the interviewee, the ICTY Prosecutor obtained a subpoena for Randal’s testimony regarding the source’s statements quoted in the article. Vacating the subpoena, the Appeals Chamber announced a new rule: in ICTY proceedings, the reporters’ privilege extends, at least in part, to non-confidential sources.

In reaching this result, the Appeals Chamber acknowledged that it was going beyond the general consensus among both national courts and the ECHR that a crucial distinction existed between confidential and non-confidential sources. However, the rule developed in those cases had derived from entirely different factual contexts. In the Talic court’s view, a different rule was needed for journalists operating in the context of war crimes and genocide. An interview with a non-confidential source about ethnic cleansing in Bosnia was simply different from an interview in the United

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460. In 1993, Randal wrote a series of articles based in part on interviews with Radoslav Brdjanin, a Serb nationalist later indicted for war crimes and crimes against humanity. The articles claimed that Brdjanin, a housing administrator, had said that he was preparing laws to expel non-Serbs from government housing to make room for Serbs. The articles also quoted Brdjanin as saying that non-Serbs in Bosnia needed to be ethnically cleansed. Talic, supra note 454, para. 3.

461. Id. paras. 48 & 49.

462. Id. para. 41 (“Many national jurisdictions afford a testimonial privilege for journalists only when it comes to protecting confidential sources.”).

463. According to opinions in these cases and the prosecution’s argument in Talic, deterring sources from talking to the press is less of an issue with non-confidential sources. The absence of a privilege likely will not deter people from talking to journalists; these sources by definition are ones for whom assurances of confidentiality are not especially important. Id. para. 23.

States about possible price fixing. Both pertain to serious matters, but, the Appeals Chamber seemed to say, the need to remove all disincentives for people with valuable information to talk to the press was greater in the former case. Where what is at stake are human rights offenses that may destabilize entire societies, courts must view skeptically evidentiary rules that inhibit the media’s ability to uncover atrocities—even where the interference is arguably marginal and even if doing so comes at the cost of departing from a growing legal consensus. The Tribunal then articulated a privilege even more protective of journalists than that articulated by courts in the United States.

_Talic_ is not the only case in which the ad hoc international criminal tribunals have crafted new evidentiary rules departing from those of other international tribunals and national courts. In the _Simic_ case, the ICTY created a testimonial privilege for employees of the International Committee of the Red Cross, who do not enjoy a similar privilege in national courts. In _Delalic_, the Tribunal created a privilege for wartime interpreters. In _Blaskic_, it granted protective measures for public servants in the interest of national security.

Even more significantly, the ICTY has staked out a position on anonymous testimony that is notably more permissive than that of the ECHR and national courts. In the ICTY’s first case, _Tadic_, the Prosecutor sought protective orders allowing rape victims to testify anonymously. Ruling on the motion, the conflicting opinions of Judge McDonald (for the majority) and Judge Stephen (in dissent) illustrate the underlying conflict between promoting procedural uniformity and departing from widely shared procedural norms in the interest of preventing impunity. Over defense objections, the

465. See _Talic_, supra note 454, para. 35:
In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal.

466. _Id._ para. 36 (unhindered access of war correspondents to information “may be vital to assisting those who would prevent or punish crimes under international humanitarian law”).

467. _Id._ paras. 48 & 49 (holding that the Trial Chamber can compel a war correspondent to testify only when the evidence sought is “direct and important to the core issues of the case” and such evidence is not “reasonably available” from another source).


471. This conflict is also apparent in the sharply divided reactions to the case in the literature. See Christine M. Chinkin, _Due Process and Witness Anonymity_, 91 AM. J. INT’L L. 75 (1997) (defending majority opinion in _Tadic_); Monroe Leigh, _The Yugoslav Tribunal: Use of Unnamed Witnesses Against
majority granted the protective orders. Repeatedly stressing the ICTY’s unique character, Judge McDonald maintained that the Tribunal should not regard itself as bound by the procedural rulings of national courts or other international tribunals. Although the ECHR had repeatedly disallowed anonymous testimony, the ICTY did not need to follow that court’s lead. The ECHR was meant to apply in “ordinary criminal and . . . civil adjudications,” not cases arising from mass rape, torture, and killings amidst armed conflict.

In contrast, Judge Stephen’s dissent emphasizes the need to follow ECHR precedents. In Kostovski v. Netherlands, the leading ECHR case on point, the Court had adopted an approach under which anonymous testimony could almost never be consistent with the rights of the accused. Judge Stephen noted that Kostovski had been repeatedly affirmed and explained by the ECHR, and he argued that it should be followed because “internationally recognized standards regarding the rights of the accused” should be uniform, and because the relevant articles of the ICTY Statute had been inspired in part by the ECHR.

Judge McDonald’s opinion ultimately prevailed in Tadic and subsequent ICTY cases. On the issue of anonymous testimony, the Tribunal has repeatedly taken the view that trials involving horrendous human rights abuses cannot be conducted under the same evidentiary rules as those in national courts, or even specialized human rights tribunals. As with evidentiary privileges regarding journalists, the ICTY has rejected appeals for uniformity.

So after Tadic, where does the law stand on testimonial privileges for journalists? Some would say it is in flux. Before Tadic, the question of whether a testimonial privilege should exist for journalists had arisen mostly in cases involving common crimes and allegations of libel. In those factual contexts, many jurisdictions had arrived at a qualified privilege that applied only in criminal proceedings and only with respect to confidential sources. The ICTY’s ruling in Tadic springs from an importantly different factual context—an armed conflict that left hundreds of thousands dead, caused the largest exodus of refugees in generations, and produced an anti-immigrant backlash throughout much of Europe. The Tribunal did make some effort to point out that its new rule emerges from that unique context. Nonetheless, it is


472. Tadic, Majority Opinion, supra note 464, para. 70.


474. Tadic, Majority Opinion, supra note 464, para. 28.


476. Tadic, Dissenting Opinion, supra note 464.

hard to see how the Talic holding—that the privilege can apply to non-confidential sources—can remain confined to war correspondents and criminal trials. Journalists play equally important roles in exposing grave human rights abuses that take place in peacetime, such as in the case of terrorist attacks, unconscionable prison conditions, police brutality, or the production of weapons of mass destruction. Moreover, the socially useful role of interviewing and investigating is not confined to journalists. It is shared by scholars, documentary filmmakers, photographers, and many others. In short, as litigants repeatedly refer to Talic in national courts and other tribunals, the ICTY’s holding is likely to disrupt the rough convergence that had taken shape earlier. Were a U.S. court to rule in the hypothetical case above, it might reflect on the decision in Talic (if the case were brought to its attention) and ultimately conclude that the privilege should cover the factual situation before it for two reasons. First, the human rights violations alleged, though presented by way of a civil complaint, are similar in severity to those in Talic and present an equally pressing societal need for the exposure of atrocities. Moreover, at the moment when an interview takes place, neither the journalist nor the source knows for sure whether any eventual legal proceeding, if there should be one, will be civil or criminal.

V. TOWARD COMMON PRINCIPLES OF PROCEDURE FOR ADJUDICATING GRAVE HUMAN RIGHTS OFFENSES IN DOMESTIC COURTS

Each of the hypothetical cases in Part IV illustrates that a specific segment of the new transnational public law litigation—transnational human rights litigation involving atrocities and other grave human rights violations—is placing new and serious pressures on domestic courts. In particular, fundamental aspects of domestic procedural laws are coming under strain at the precise point in time when a competing constituency (the advocates of juridical unification) is looking to these same courts for a wholly different approach. One possible result is a new variation on an ongoing conflict waged in some domestic legal systems: an ideological battle that pits rules against standards, law against equity, substance against procedure.478

The parallels between transnational public law litigation today and domestic public law litigation in the United States a generation ago have been examined by Dean Koh and others.479 The cases in Part IV show additional parallels between the two developments, revealing similar pressures to reevaluate procedural law and the conception of the judicial function. In a seminal article reflecting on the domestic public law litigation in the 1960s and 1970s, Abram Chayes revealed an important change in the role of U.S. courts.480 Judges who had been schooled in a standard two-party, private law model of litigation were being asked to adjudicate cases with a complex

configuration of parties and interested non-parties. These new disputes pushed
courts to assume a new societal role, one that exposed weaknesses in such key
procedural matters as standing, group actions, and remedies. Courts
responded in different ways. Some tried to tackle public law litigation while
working within the existing procedural framework. Other courts and
commentators concluded that existing tools were inadequate, that innovation
was preferable to trying to do too much with too little.

Domestic courts in the United States and elsewhere face a similar
predicament today. First Generation Human Rights Treaties generated high
expectations. A catalogue of rights took treaty form, similar in scope and
substance to rights enumerated in domestic constitutions and statutes. The
rights-codification process in turn generated a demand for rights-enforcing
institutions on the international plane comparable to the domestic institutions
in constitutional democracies. Today, facing that same demand, some
domestic court systems have taken up the challenge. These courts have
adopted, in part or in whole, the following approaches designed to enable
domestic litigation of a core group of grave international human rights
violations: (1) asserting jurisdiction over disputes with little connection to the
forum; (2) refusing to dismiss such suits on forum non conveniens grounds,
despite procedural difficulties in litigating cases so far from the places where
the atrocities occurred; (3) eliminating or liberally tolling statutes of
limitations; (4) improvising with respect to choice-of-law rules; (5) applying
rules of evidence less uniformly and consistently than in non-human rights
cases; and (6) more readily recognizing transnational human rights judgments
than other kinds of foreign judgments.

These procedural innovations were not introduced systematically, in one
identifiable moment of procedural revolution. They evolved over the course of
decades in which victims of atrocity could not find vindication anywhere. For
the most part, innovation has occurred on an ad hoc basis; it has been born of
necessity and, like many other responses to necessity, the fit is less than
perfect. In attempting to adjudicate claims arising out of severe and systematic
human rights abuses, domestic courts are trying to fill an enforcement gap, a
task for which they were not designed. In the process, they are being pulled in
opposite directions. Global business demands that reforms in procedural law
come through multilateral processes. In contrast, the enforcement goals of the
human rights movement seem to require unilateral action, at least in the short-
to-medium term. Faced with just a skeletal system of international tribunals
and the inability or unwillingness of many domestic court systems to police

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481. For example, theories of notice and jurisdiction designed for simple two-party law suits
were not easily applied in complex class actions. See Abram Chayes, Foreword: Public Law Litigation
and the Burger Court, 96 HARV. L. REV. 4, 26-45 (1982). As for remedies, the new cases presented
demands for new and broad forms of injunctive relief. Id. at 45-56.

482. See, e.g., Stephen B. Burbank, The Bitter with the Sweet: Tradition, History, and
(questioning Chayes’s celebration of the “triumph of equity” over procedure in public law litigation).

483. See supra Part III.B.

translated in 42 I.L.M. 1200, 1205 (2003) (“[O]ne can speak about a principle of necessity of
jurisdiction, which is derived from the very nature and from the finality of universal jurisdiction.”).
systemic human rights abuses, the movement urges domestic courts in constitutional democracies to put equity ahead of restraint. It entreats national courts and legislatures, acting unilaterally, to come to the rescue of the global human rights system and its credibility. As the Hague Conference, the EU, and others pursue private law harmonization, the human rights community has cause to be wary. Harmonization efforts are dominated by constituencies that either oppose or show little interest in improving human rights remedies through actions in domestic courts. Conversely, to date the human rights community has offered little outward reflection on whether an aggressive agenda focused on domestic courts may harm the very institutions to which these advocates have turned.

Any attempt to lessen the underlying friction must first confront some basic, though difficult, questions. First, are courts suited to evaluating claims that originate from complex political conflicts such as violence stemming from oppressive regimes, failed states, or armed conflict? Second, if courts are at least minimally suited to such a task, what sorts of courts should undertake it—international tribunals, domestic courts, or some combination of or variation on the two? Third, if there is to be a continuing role for domestic courts, how can they function effectively while, at the same time, not poisoning their relations with courts elsewhere through overreaching and by failing to view the interests of other legal systems in a spirit of comity?

A. Enforcing Human Rights Law: Why Abandoning a Judicial Role Is Not Viable

The age-old criticism of international law is that it is not really law. Some niches like international trade might be on their way to becoming hard law, but the areas that touch upon core aspects of sovereignty, such as whether a state goes to war and how it treats its own citizens, are at best soft law riddled with compliance problems. In the absence of international institutions that wield clear coercive authority, the argument goes, human rights instruments will remain merely aspirational.

The response most often heard is that given nearly four decades ago by Professor Louis Henkin: “Almost all nations observe almost all principles of international law . . . almost all of the time.” Stated differently, no domestic legal system achieves total compliance either. People are murdered in Los Angeles nearly every day. New Yorkers act as though jaywalking were their

485. It might be suggested that neither movement needs to take steps to avoid or lessen this growing friction. One or both may prefer to let the conflict play itself out in the global economic, political, and intellectual marketplace. That conclusion is shortsighted. What the unification movement and the human rights movement have long shared is a common opposition to responses to globalization grounded in chauvinism and inward-looking parochialism. Both movements have been relentless proponents of a more cosmopolitan perspective. A future in which human rights organizations and private international law organizations are perpetually at odds with one another is one in which their common roots in liberal internationalism will be damaged. Partisans in one camp may be tempted to discredit the other camp—either for a myopic preoccupation with procedural justice or for a myopic fixation on results over means. If the camps so divide, those most likely to “prevail” will be their common foe: those who disparage multilateralism across the board.

486. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).
birthright. Yet few people conclude that California lacks laws on murder or that New York’s laws do not address traffic flow.

Every international lawyer carries these responses in her briefcase. They are clever because they question a certitude that is rarely challenged—the character of domestic law as law, even when its limited efficacy is exposed. Set against this backdrop, it is more difficult to see the relationship between domestic law and international law as a dichotomy. The difference in compliance levels more plausibly seems to be a difference in degree rather than in kind. But, cleverness aside, there is still a problem, at least where the international law at issue is core human rights norms. Even if all nations obeyed almost all human rights law almost all of the time, noncompliance would still be a reason for worry. Noncompliance with traffic laws is not a trivial matter. It is a source of many deaths and injuries, probably more than result from terrorism or torture, at least in the United States. But the prevalence of traffic violations, even over a prolonged period of time, does not cause a society or the international community as a whole to come unglued. A country’s connection to the rule of law rarely turns on speeding. The case is different where noncompliance relates to core human rights: systematic racial profiling, mass deportations based on religion and national origin, calculated race- or ethnicity-based challenges to voting qualifications, intentional abuse of U.S.-held prisoners of war. Such instances of noncompliance, whether frequent or not, have recently had highly corrosive effects on the stature of law in the United States. Similarly, the prolonged, flagrantly brutal televised siege of Sarajevo caused many around the world to doubt the existence of humanitarian law and to question whether powerful nations were ever prepared to defend victims when neither oil nor strategic advantage were present.

From a compliance point of view, what is most distinctive about human rights law is that it requires extraordinarily high compliance levels. Human rights norms are so fundamental—so much a baseline barometer—compliance


488. For the current debate on just how far nations are from that level of compliance, compare Hathaway, supra note 204, at 1939, with Ryan Goodman & Derek Jinks, Measuring the Effects of Human Rights Treaties, 14 EUR. J. INT’L L. 171 (2003) (disagreeing with Hathaway on extent of noncompliance and approach to measuring it).

489. The recent scandals over the torture and sexual abuse of prisoners of war in facilities that were under the control of the U.S. military in Iraq has put in doubt what many people had taken for granted after Vietnam—careful training of all U.S. personnel in adherence to the Geneva Conventions, supra note 205. See Editorials Raise Heat on Iraq Prison Abuse Scandal, EDITOR & PUBLISHER, May 6, 2004, http://www.editorandpublisher.com/candnp/news/article_display.jsp?vnu_content_id=1000505870 (surveying editorials that had been published across the United States). The sense of disillusionment was then heightened when it was revealed that the violations had taken place in a context in which the highest-ranking lawyers in the Bush administration had put forward narrow, highly legalistic interpretations of both the Geneva Conventions and the Torture Convention, supra note 320. See, e.g., Memorandum from the Office of Legal Counsel, United States Dep’t of Justice, to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002), reprinted at http://antiwar.com/rep2/dojinterrogationmemo20020801.pdf.

levels comparable to those expected of domestic laws are not enough.\footnote{491} No one expects the number of murders in New York City to drop to zero. No one really even expects a conviction for every murder. Neither shortfall from perfection, however, causes a large segment of the public to conclude that New York's murder laws are merely "aspirational," a characterization frequently leveled at war crimes laws. With human rights law and international criminal law, failure to obtain higher compliance levels worldwide may ultimately unravel much of the consensus that was achieved in First Generation Treaties.

When the human rights movement turned to domestic courts to improve the level of accountability and compliance, there was an implicit assumption that such courts would be effective and that the availability of these additional fora would make a difference. As a preliminary matter, any judgment as to how to resolve a growing conflict in procedural law between domestic courts acting as international human rights courts and as agents of harmonization and comity ought to take into account whether domestic courts are effective in their relatively new role of adjudicating transnational human rights cases. Are the legal and factual issues generated by large-scale atrocities fundamentally unsuited to adjudication?

Despite the importance of the question, it is one for which we have little data on the aspects that would seem to matter most. For example, atrocity trials can become a substitute for active engagement to prevent massive human rights abuses in the first place, revealing a lack of will in the international community to address deep-seated historic grievances before they ripen into atrocities, or to intervene to stop atrocities once they have started. Post hoc actions in the legal sphere may serve principally as a cover for the failures of great powers to do more ex ante. Although there is some indication that this motive played a role in connection with the creation of the ICTY and ICTR,\footnote{492} we lack enough information and analysis to determine whether this will often be the case.\footnote{493} If we could determine with any certainty that the option of conducting atrocity trials played a systematic role in

\footnotesize{\begin{itemize}
\item 493. For a nuanced defense of humanitarian intervention under the current text of the U.N. Charter, see Thomas M. Franck, Interpretation and Change in the Law of Humanitarian Intervention, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 204, 216 (J.L. Holzgrefe & Robert O. Keohane eds., 2003) [hereinafter HUMANITARIAN INTERVENTION] (concluding that "[a]s in domestic cases of 'extreme necessity,' it appears that evidence, facts, and process trump absolute legal principles, at least within a narrow, but significant, margin of flexibility"); Michael Ignatieff, State Failure and Nation Building, in HUMANITARIAN INTERVENTION, supra, at 299-311.
\end{itemize}}
preventing atrocities from occurring in the first place, one would have to question whether courts should be involved at all.

There are other judicial weaknesses to consider. Trials tend to individualize guilt, a phenomenon lauded by those concerned with a speedy process of reconciliation but not entirely desirable where complicity has widely and deeply penetrated a society. Moreover, it is by no means clear that putting yesterday's tyrants on trial plays any discernible role in deterring future atrocities.

Although these concerns give pause, those who argue that the human rights movement's turn to courts was misguided are mistaken. The atrocity trials conducted thus far have done much good. Opinions issued by both the ICTR and ICTY have been helpful in developing the substantive law of human rights now codified in the Rome Statute of the ICC. The trial arising out of the bombing of PanAm Flight 103 over Lockerbie, Scotland, and the subsequent financial settlement provided a credible pathway for the United States and the United Kingdom to normalize relations with Libya.

Because much that is productive has come out of human rights adjudication to date, because the phenomenon is still fairly recent, and because there is not much that suggests it is harmful, we should go forward with a series of rebuttable presumptions: that victims of fundamental human rights treaty violations should not be beyond effective judicial protection; that alleged perpetrators should not enjoy impunity; that courts, as institutions best designed to provide fair process and decision-making insulated from political pressure, are appropriate for dealing with guilt, punishment, liability, and compensation.

As we go forward with a willingness to test these presumptions and acquire the experience and data to answer our queries, we should realize that


495. Collective guilt may be warranted when atrocities could not have been carried out without legions of underlings and the tacit acquiescence of an entire society. See DANIEL JONAH GOLDBIAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST (1996). For thoughtful discussion of this question, see COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS (Larry May & Stacey Hoffman eds., 1991); KARL JASPERS, THE QUESTION OF GERMAN GUILT (1947); George P. Fletcher, The Storrs Lectures, Liberals and Romantics at War: The Problem of Collective Guilt, 111 YALE L.J. 1499 (2002).

496. This deterrence rationale is reiterated with the creation of each new international criminal tribunal. See, e.g., Rome Statute of the ICC, supra note 201, pmbl. ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . ."). Notwithstanding these assertions, we have essentially no empirical evidence that figures such as Augusto Pinochet, Slobodan Milosevic, or Sadaam Hussein would have been deterred by the prospect of foreign or international judicial proceedings at some time in the future. Nor do we know much about the effect of such trials on people under their command.

497. See, e.g., JEREMY RABKIN, JUDICIAL COMPULSIONS (1989); Goldsmith & Krasner, supra note 314.


atrocity trials likely will be with us for the foreseeable future. Whether or not such trials deter future atrocities, whether or not they promote reconciliation, and whether or not they truly benefit victims, they are a low-cost response to tragedy. If the number of deaths in Darfur, Sudan, were to reach the hundreds of thousands, the international community would likely be shamed into doing more than it currently is doing, and its response might well include some kind of judicial process, as in past responses to wholesale atrocity. Given that likelihood, the pressing question is: What form should any such judicial solution take? Is this a job for ordinary domestic courts or for newly created, specialized international tribunals?

B. International Courts or Domestic Courts?

National judges are in a bind. As they look out at the world beyond the courthouse, they see two inconsistent trends headed their way. On the one hand are the many treaties and other instruments produced by the unification movement. As the executive and legislative branches produce a broader range of treaties designed to harmonize both procedural and substantive law, the message to national courts is that globalization requires that they cooperate with courts elsewhere; that they avoid interpretations of these instruments at odds with those of courts in other countries; and that they avoid unilateral actions that tread upon the turf of foreign courts, whose help may be needed at another time. On the other hand are a set of far-reaching developments in the field of human rights. Cases, treaties, U.N. studies, specialized tribunals, and scholarship have generated an explosion of work that points out that the existing mechanisms for accountability and compensation in the field are terribly inadequate. The odds that acts of torture will come before an international tribunal are low. As a result, domestic courts are being asked to be the primary judicial bodies charged with bringing accountability to this area. In many instances, however, established principles of procedural law do not easily permit domestic courts to do the job.

Obvious problems arise when national courts seek to perform two inconsistent functions. Often they perform neither one well. How can such a result be avoided? One plausible solution is to free national courts of one set of demands, either the demands of pursuing legal harmonization or the demands of acting as primary enforcers of international human rights law. The
latter is more likely to be removed from municipal legal systems. Domestic courts lie at the center of the harmonization movement, at least as it pertains to procedural law. Efforts at substantive harmonization could possibly seek to achieve harmonization of contract law, for instance, by moving all contract disputes to highly unique and specialized fora. Harmonization of procedural law, however, is quite different. It is more process-oriented than result-oriented, as it seeks to foster a smoother set of relationships among national court systems. An attempt to move the process of procedural harmonization from domestic courts to some other kinds of tribunals—international courts, for instance—would be somewhat illogical.

By contrast, the goals of the human rights movement today are driven by substantive results—greater accountability and better access to remedies. Its turn to domestic courts was instrumental, a means of securing more credible judicial protection for basic rights. Could similar or even better results be achieved by looking elsewhere and reversing developments over the last few decades that have put domestic courts at the front lines of efforts to punish and deter massive rights deprivations? Can the growing conflict discussed above be managed by channeling most, if not all, atrocity claims to international or regional tribunals? Should cases such as *Filartiga* no longer be heard in U.S. courts? Should claimants seeking reparations from corporations for alleged misdeeds in South Africa be directed to new supranational tribunals specifically created for that purpose? Stated differently, can we simply wall off civil claims arising from extreme rights deprivations? Should our strategy be to prevent such atypical claims from distorting the procedural law that works relatively well for the vast majority of other civil actions?

This approach has a certain appeal. In fact, legal developments over the past decade are somewhat consistent with it. In the decade since the Bassiouni Report on the atrocities in the former Yugoslavia, the United Nations has created five geographically specific atrocity courts—two international criminal tribunals (the ICTR and the ICTY) and three hybrid courts (the special courts for Cambodia, East Timor, and Sierra Leone)—with the hybrid courts blending certain characteristics of both domestic courts and international tribunals. All of these tribunals are highly specialized. They adjudicate only the most serious human rights offenses. These are criminal courts that nonetheless operate under statutes enabling victims to seek compensation in conjunction with criminal cases. They were created with the intent of removing a set of especially complicated and sensitive controversies from the domestic courts that otherwise would have jurisdiction over them.

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These tribunals are expected to acquire expertise with respect to specific countries, bodies of law, and factual contexts. Supranational tribunals enjoy procedural advantages over domestic courts. In these fora, the tension between harmonization and innovation is less acute. The procedural rules of the ICC were written with genocide, war crimes, and crimes against humanity in mind. Rules 34 and 96 of the ICTR Rules of Procedure and Evidence address witness protection in greater detail than most national statutes do. They do so in a distinct context—providing protection to those who have witnessed horrific offenses—and thus need not wrestle with difficult legal issues over a broad range of criminal and civil matters, where the strength of the case for anonymous testimony varies greatly.

The potential advantages of these supranational tribunals extend beyond the procedural sphere. They offer expertise and continuity. They present a plausible claim to being representative of the international community as a whole and free of the potential biases that make the judgments of even widely respected national courts suspect. They offer a response to those

506. The ICC functions on a different plane. The Rome Statute incorporates the principle of complementarity. Domestic courts have the primary role in adjudicating the crimes that come within the Statute's scope unless they are unable or unwilling to do so. Rome Statute of the ICC, supra note 201, art. 17 (articulating the general rule that the ICC shall determine a case to be inadmissible when it is being investigated or prosecuted by a state with jurisdiction over it).


508. A tribunal such as the ICTR adjudicates such claims continually, not episodically. In the course of hearing many cases, the ICTR has developed not only an intimate knowledge of the applicable law but also a factual understanding of the Rwandan massacres more thorough and nuanced than that attained by national courts in Belgium, France, the United States, and elsewhere.

509. This representativeness typically results from the process by which the tribunal is created, whether by the United Nations (the ICTR and the ICTY) or by a widely ratified multilateral treaty (the ICC). See, e.g., Rome Statute of the ICC, supra note 201, art. 36 (prescribing that states party may nominate no more than one candidate for election to the Court, and "[n]o two judges shall be nationals of the same State"). Permanent regional tribunals share in these virtues, though their jurisprudence tends to reflect the legal traditions of a geographic region rather than those of the world community.

510. In a recent article, Professor Vagts argues that the best venue for terrorism trials is civilian courts because "judges of the U.S. federal system enjoy a reputation at home and abroad for independence and impartiality" making conviction in such courts "convincing to all fair minded observers." Detlev F. Vagts, Which Courts Should Try Persons Accused of Terrorism?, 14 EUR. J. INT'L L. 313, 316 (2003). Doubts may be raised not so much as to whether trials would be conducted with independence and impartiality—though even the most scrupulous judge lives and works within a specific social and political context—but as to whether they would be widely perceived that way abroad. There is ample anecdotal evidence that the stature of U.S. courts, viewed from abroad, has declined in recent years, in part because of their reluctance to cooperate with international tribunals, their involvement in administering the death penalty, and the theatrics of a system that relies on juries and incorporates nearly unsupervised punitive damages. A vivid example of the weaknesses of civil justice in the United States came in O'Keefe v. Loewen Group, No. 91-67-423 (Cir. Ct., Hinds County, Miss. 1991), a commercial dispute in which a jury in Mississippi awarded $400 million in punitive damages against a Canadian corporation sued by a local plaintiff. At trial the judge repeatedly permitted plaintiff's counsel to make prejudicial references to the defendant's race and nationality. Under Mississippi law, the defendant was required to post a bond of $625 million in order to appeal the verdict. Notwithstanding the extraordinary size of the bond requirement, the Mississippi Supreme Court refused to reduce it. Rather than appeal, the Canadian defendant tried, unsuccessfully, to obtain relief through the NAFTA dispute resolution process. Loewen Group, Inc. & Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3 (Nov. 19, 1998), reprinted in 42 I.L.M. 811 (2003) (dismissing all claims for lack of jurisdiction). The case was widely criticized in Canada and elsewhere. See, e.g., Jane Bussey, Loewen Files U.S. Suit, HAMILTON SPECTATOR, Nov. 26, 1998, at C3. For more general criticism of the U.S. justice system, see, e.g., Regina Kiener & Raphael Lanz, Amerikanisierung des
critical of the fact that recent human rights cases have involved courts of a former colonial power in effect sitting in judgment on a former colony, thus presenting serious questions of legitimacy.\textsuperscript{511} International tribunals are better constituted to stand apart from those elements that can politicize atrocity trials.\textsuperscript{512}

Unlike domestic courts, international and regional tribunals routinely draw upon multiple legal traditions. Adapting general principles of procedural law to the unique features of atrocity trials demands drawing upon the many legal traditions of the countries involved and great flexibility to compromise and hybridize. The task calls for balancing the virtues of juries against those of bench trials as well as the clarity of separate civil and criminal proceedings against the efficiency of combining the two. In trying to find the right balance on such questions, national courts may suffer from limited room for innovation and compromise. Although many procedural problems of conducting atrocity trials in the United States stem from jury fact-finding,\textsuperscript{513} jury trials are mandated by the U.S. Constitution.\textsuperscript{514} Resistance is widespread to recognizing and enforcing civil judgments that appear to be punitive in character, thus posing major obstacles for victims, even those already awarded a judgment in another legal system. In contrast, the rules of international tribunals leave more room for judicial pragmatism.\textsuperscript{515} They are the product of multinational negotiations in which there are fewer absolutes than in national

\textsuperscript{511} These questions of legitimacy are particularly problematic when there has never been a full moral or legal accounting between the former colony and the former colonial power. Examples of recent cases set against the backdrop of a prior colonial relationship are: Pinochet, supra note 309 (Chile and Spain); Congo v. Belgium, supra note 311 (Congo and Belgium); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992) (the Philippines and the United States); the Spanish trial of Argentine military officers, summarized in Richard J. Wilson, Argentine Military Officers Face Trial in Spanish Courts, ASIL INSIGHTS, Dec. 2003, http://www.asil.org/insights/insigh122.htm (Argentina and Spain); and In re Bouterse, Hof, Amsterdam, Nov. 20, 2000, Nos. R 97/163/12 Sv & R 97/176/12 Sv (Indonesia and The Netherlands). The existence of the prior colonial relationship does not per se delegitimize the proceedings, but it does point to sources of bias that are more likely to be present in national court proceedings than in those before an international tribunal. See Henry J. Steiner, supra note 312, at 235; Thomas W. Donovan, Jurisdictional Relationships Between Nations and Their Former Colonies, 1 ACROSS BORDERS INT'L L. J. 5 (2003), http://www.across-borders.com/Articles/Donovan/.

\textsuperscript{512} In the Pinochet proceedings, for example, the Audiencia Nacional came under considerable pressure from the political branches of the Spanish government to abandon the case. See Wilson, supra note 328, at 23-32. Thus far, nothing comparable has happened at the ICTR or the ICTY, at least with respect to individual cases. In fact, the lengths to which these courts go with respect to procedural fairness have brought complaints that the proceedings are too lengthy (especially the Milosevic trial) and that the offices of the Prosecutor should focus on bringing the tribunals’ work to completion.

\textsuperscript{513} The right of criminal defendants in the United States to confront witnesses is constitutional in stature. U.S. CONST. amend. VI. This constitutional guarantee implicates not only face-to-face confrontation with witnesses who take the stand, but also the bar on hearsay, which can result in the exclusion of much evidence in jury trials. Allowing sensitive military or national security information to be made public is also of particular concern if the fact-finder is a jury rather than a judge.

\textsuperscript{514} The Seventh Amendment provides that “in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .” U.S. CONST. amend. VII. For present purposes, among the most important exceptions to the right to jury trial in civil cases are suits against foreign states. See FSIA, supra note 166, § 1330.

Thus, in negotiating the rules of procedure and evidence of the ICC, the United States did not insist on juries. Civil law countries did not object to provisions for cross examination. The creation of an international tribunal fostered a useful hybridization of procedural law that is more difficult to create in national legal systems.

All of these considerations offer strong reasons to favor international and regional tribunals over domestic ones. But a system with the latter structure would also have disadvantages. A system that keeps atrocity cases entirely out of domestic courts is also likely to be one in which core principles of human rights law remain far from the populations that need to absorb them. A system in which the trials of both the major perpetrators and the underlings take place far off in The Hague or some other distant forum is one in which the critically important principles underlying such trials are unlikely to come within the grasp of local communities, where they may be needed in order for a culture of human rights to take root from the bottom up.

In terms of the best long-term solution for mitigating conflicts between harmonized procedural rules and emerging processes for generating new procedural rules tailored to the needs of the human rights movement, these pros and cons make the case for separation a close call. On balance, in the age of the Internet and the global village, directing atrocity cases away from domestic courts and toward new international tribunals may succeed. In the short term, however, this option is not viable. In order to compensate for the complete lack of available domestic courts, the creation of a startling number of new international or regional tribunals would be necessary. There is virtually no chance of this happening anytime soon. In terms of expense and the scope of institution-building, a development of that magnitude is not possible in the current political environment. Far more modest endeavors—the negotiation of the Rome Statute of the ICC and the creation of the WTO Appellate Body—came about only after many false starts and painful compromises that limit their effectiveness. The creation of not just one new


518. Compare this development with the hybridization that takes place in international arbitration. See supra Part II.B.2.

519. Moreover, where the line between grave human rights offenses and other claims is not so clear, there will be difficult issues related to severing claims or aspects of a case, so that one part goes to the international tribunal while the rest remains in a domestic court. Aspects of the Holocaust restitution litigation in U.S. courts illustrate this problem. Some of the suits arose from forced labor and enslavement, surely a grave human rights offense. The principal claim, however, was for restitution of the value of labor that had been misappropriated fifty years earlier. Such a claim is at least similar to other unjust enrichment claims adjudicated by domestic courts. For an overview of the Holocaust litigation, see supra Part I.

520. See Steiner, supra note 312, at 208 (arguing that “at least for the while” domestic courts will remain the primary institutions for application of developing international criminal norms).

521. The three most populous countries—China, India, and the United States—declined to ratify the Rome Statute, even after extensive modifications were made to earlier drafts at the insistence of the U.S. delegation. These modifications moved the new court away from an early model premised on universal jurisdiction. Under the final statute, the ICC is able to hear only actions against natural persons; it affords very limited opportunity for involvement by victims and non-parties; its ability to adjudicate is secondary to that of domestic courts; its jurisdiction is limited to genocide, crimes against
court but of a well-developed system of tribunals with the resources and mandate to adjudicate large numbers of atrocity-related cases would be a far bigger step toward a real global culture of accountability.\textsuperscript{522} There are no signs that such a bold step is near.

C. Toward Common Principles of Procedural Law for Human Rights Claims

If domestic courts will continue to play some role in this field for the foreseeable future, how can they do so without acting in ways that frustrate the fulfillment of their duties under the growing number of initiatives in private law harmonization?

Perhaps the immediate solution to the conflict confronting domestic courts does not lie in separation and a search for alternative fora. If it is not immediately feasible to create a network of ICC-type tribunals, it is feasible to have all ICC-type cases adjudicated under the same procedural law. The heart of the conflict is not that domestic courts are incapable of adjudicating both human rights cases and commercial cases. The problem is that their existing procedural rules do little to differentiate between the two, a state of affairs that produces two kinds of pathologies. First, domestic courts or legislatures that adjust their existing procedural rules to the exigencies of human rights enforcement typically do so unilaterally. For example, in crafting an exception to mainstream choice-of-law rules for the German slave labor case discussed in Part I,\textsuperscript{523} a court might fail to pay attention to how courts and legislatures elsewhere confront similar challenges. Second, such adjustments typically are done on an ad hoc basis rather than systematically. Not only does a U.S. court adjudicating a decades-old slave labor claim feel little inclination to study foreign choice-of-law principles, but its efforts are likely to be limited to solving just one small piece of the harmonization-versus-human rights puzzle. Neither that court nor Congress will take on the larger problem. One is left with a series of unilateral, ad hoc adjustments.\textsuperscript{524}

Long-term reliance on equity and ad hoc balancing in enforcing human rights has its costs. Repeatedly departing from well-paved paths of legal rules for the sake of equity may put the legitimacy of courts at risk by virtue of the seemingly unpredictable nature of legal developments. The proceedings against Augusto Pinochet in the United Kingdom, for example, were received

\[\text{humanity, war crimes, and aggression; and its capacity is quite limited by virtue of it being just one court with only eighteen judges. See Rome Statute of the ICC, supra note 201, art. 5. The ICC will not be able to adjudicate cases involving aggression until the crime of aggression is defined in accordance with Article 5.2 of the Statute.}\]

\[\text{522. See id. art. 36. A well-funded system of courts loosely modeled on the ICC could do what a single permanent international criminal court cannot do: ensure wide geographic diversity of judges, hold proceedings close to the place where the atrocities occurred, adjudicate significant numbers of cases, including those involving relatively small players, and do so with reasonable speed.}\]

\[\text{523. See supra text accompanying notes 6 & 7.}\]

\[\text{524. For all the common law's virtues, there are costs to a human rights regime that relies upon a series of ad hoc adjustments. Such adjustments raise troublesome questions for lawyers and potential litigants: Will the repeated use of transient jurisdiction in the United States lead to a broader revival of territoriality as a principle of jurisdiction and choice of law? Does the assertion of universal jurisdiction over those alleged to have committed torture signal a broader application of this principle on the way, perhaps to hijacking and various Internet-related offenses?}\]
that way. Foreign ministries around the world suddenly reevaluated the travel plans of top officials, fearing their susceptibility to arrest abroad. Similarly, the e-commerce world received the Yahoo! litigation with immediate dismay. Multinational corporations involved with mineral extraction projects in various parts of the world had to reevaluate the profitability of their operations in light of human rights cases alleging corporate complicity in government-sponsored human rights abuses. Widespread uncertainty with respect to basic principles of procedural law is not a small price to pay, even if it permits courts to come closer to ensuring optimal levels of human rights compliance.

There is an alternative way to deploy domestic courts as human rights courts of first instance. Ironically, it also involves harmonization. The growing conflict described in Parts II through IV results not so much from the presence of both commercial disputes and litigation over extreme human rights abuses in the same courts. The greater problem (at least in terms of private international law) is that courts in different legal orders (or even within the same one) are coping in inconsistent ways. In expanding access to court, for example, some have reinvigorated principles of territoriality. Others have turned to universal jurisdiction. Still others have enacted numerous passive personality statutes. The result can be labeled experimentation or anarchy, depending on one's point of view.

A better approach would be to develop a set of common principles applicable to adjudicating grave human rights offenses, no matter where the claims are brought. Such an effort would narrow the range of national procedural practices in this area. It would thus limit uncertainty. A widely and internationally endorsed set of such principles might dissuade a domestic judge struggling with a difficult problem from turning first to familiar, though inapposite, domestic sources of law in an effort to adapt them to the new context. Instead, that judge might look to multilateral principles.

Harmonization projects somewhat like this one, though on a much smaller scale, have been suggested. A decade ago, Ralph Steinhardt argued that the U.S. legal system was suffering from great uncertainty and a lack of rigor in its handling of remedies in ATCA cases. His complaint still rings true today. U.S. judges in ATCA cases look to standard principles applied with respect to tort remedies, principles that have been borrowed from car

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525. See Yahoo!, supra note 328.
526. See, e.g., Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003) (dismissing suit for violations of right to health, life, and sustainable development brought against a U.S. mining company operating in Peru); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (upholding jurisdiction in suit against Dutch and British defendants relating to killings associated with oil exploration in Nigeria; lower court’s forum non conveniens dismissal reversed); Beanal v. Freeport-McMoran, 197 F.3d 161 (5th Cir. 1999) (dismissing suit for genocide and environmental degradation brought against U.S. mining companies operating in Indonesia).
527. See supra Part III.C.2.a.
528. See supra Part III.C.2.c.
529. See supra Part III.C.2.b.
530. See Ralph G. Steinhardt, Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos, 20 YALE J. INT’L L. 65, 93-103 (1995). Unfortunately, there has been little follow-up to this proposal.
accident cases, toxic tort cases, libel cases, and so forth.\textsuperscript{531} None of these areas of tort law provides an especially apt analogy. Genocide and apartheid produce rather distinctive kinds of injuries, especially when one considers harms to communities and effects that visit subsequent generations.\textsuperscript{532} More recently, several blue-ribbon committees have attempted to articulate common principles governing extraterritorial assertion of jurisdiction by national courts and legislatures with respect to a narrowly defined set of human rights abuses.\textsuperscript{533}

Although these efforts address a narrow portion of the problem at hand,\textsuperscript{534} they have broken important ground. Domestic courts have been enlisted in the battle against crimes against humanity and their profound and multi-generational effects on victims. Although this experiment is still quite young, problems have begun to surface. What needs to be done from this point is to take steps to make the adjudication of such causes of action in national courts less of an ad hoc and unilateral process. Courts and scholars must survey the various approaches that have been tried to date and begin the process of finding common ground. Common principles must be distilled. Such principles must be chosen based on their effectiveness in the field of human rights and in terms of their compatibility (perhaps at a high level of abstraction)\textsuperscript{535} with the principles being developed by the more general movement to harmonize procedural law.

This article will not attempt to provide a thorough analysis of such common principles or even a comprehensive list of what they might be. Instead, it concludes by providing some brief illustrations of how such principles might be identified and applied.

1. Compensating Victims

One place to begin is with the principle that victims of grave human rights offenses should be able to obtain individual compensation for their injuries. This is already the case in a large number of legal systems. In the United States, this principle finds expression in the case law applying the ATCA and in Congressional ratification of the ATCA line of cases by the enactment of the TVPA in 1991. In civil law countries, the victim compensation principle is expressed through the \textit{partie civile} mechanism, which enables victims to intervene in criminal proceedings initiated by the state. In regional human rights instruments, the victim compensation principle

\textsuperscript{531} Id. at 94-97, 102-03 (arguing that an international treaty on the redress of human rights violations could "fill the void").

\textsuperscript{532} For further discussion of this point, see Paul R. Dubinsky, \textit{Justice for the Collective: The Limits of the Human Rights Class Action}, 102 MICH. L. REV. 1152 (2004) (advancing arguments in favor of collective remedies in some atrocity cases).

\textsuperscript{533} See, e.g., INT'L LAW ASS'N, FINAL REPORT ON UNIVERSAL JURISDICTION, supra note 312; THE PRINCETON PRINCIPLES, supra note 227.

\textsuperscript{534} For example, THE PRINCETON PRINCIPLES, supra note 227, address solely universal jurisdiction and solely in the context of criminal law.

\textsuperscript{535} For example, the principle common to many legal systems that forum shopping should not be encouraged.
can be found in the Islamic world,536 the African human rights system,537 the Inter-American system,538 and the European one.539 In terms of global legal instruments, the principle is enshrined in the Universal Declaration of Human Rights,540 in the work of the United Nations,541 and in the Rome Statute of the ICC.542 More specific but widely ratified treaties also incorporate the principle unambiguously.543

Variations on implementing the principle should also be taken into account. For example, ten countries have ratified a Council of Europe treaty that requires them to provide victims of violent crime with compensation from the public purse when no other source is available.544 This provision reflects the treaty's position that victims have a right not only to the state's protection but also to a remedy when the state has failed to secure the right. Legislation enacted in the United States on behalf of victims of the attacks of September 11th conveys a similar message as to the importance of compensation.545 More generally, the expectation that all national legal systems with adjudicative jurisdiction must provide a procedural means by which victims of atrocities can receive compensation finds support in the widely shared principle that the violation of a right necessitates the provision of a remedy.

The variety and authoritativeness of this material strongly suggest that at some level of generality the principle is universal and that national procedural laws that significantly dilute it (e.g., by denying access to the courts to rape victims, or by retaining overly broad immunity doctrines that are out of step with customary international law) must be revised. But, of course, that is only a beginning. Sources like those cited above, along with customary international law and actual state practice, must be consulted in order to determine at what level of generality the principle is widely accepted in the context of grave human rights violations.

2. Exhaustion of Local Remedies

In many instances, victims of human rights violations will be unable to obtain a remedy in the place in which they were harmed. Usually, they were

537. See African Charter on Human and Peoples' Rights, supra note 451, art. 25.
540. Universal Declaration, supra note 190, art. 8.
542. See Rome Statute of the ICC, supra note 201, art. 79.
543. See, e.g., Torture Convention, supra note 320, art. 14.
injured because the regime in power was ineffectual, excluded them from its protection, or actively persecuted them. Those failures in governmental protection will usually create serious doubts as to whether the courts in that country can be reliable guardians of fundamental human rights. But this grim scenario will not always be the case. Societies can emerge from dark periods with independent and effective judiciaries able to adjudicate the wrongs of the past. Complain[]ts relating to the military, the police, or other facets of society do not necessarily suggest a lack of meaningful access to courts in the society where the abuses allegedly took place.

Where any reasonable means exists for victims to pursue compensation in courts with traditional and uncontroversial bases of jurisdiction, such as territoriality or nationality, there must be a presumption that they should do so. This principle of exhaustion of local remedies is widely adopted not only by the fields of international criminal law and human rights law, but also in other transnational legal regimes. Regional human rights systems require that petitioners exhaust all available judicial avenues in their home countries before appealing to supranational mechanisms. In the United States, the TVPA contains an express requirement to this effect, and Spain’s highest court recently concurred in that approach. The ICC’s complementarity principle also can be understood as conforming to the exhaustion requirement; prosecutions cannot go forward in the ICC unless national courts endowed with jurisdiction are “unwilling or unable” to try the defendants.

Wide adherence to such a principle of exhaustion will minimize instances in which domestic courts will need to engage in the kind of jurisdictional overreaching that will undermine their legitimacy, provided that pursuit of local remedies is not required in the face of futility or of physical or legal danger to the claimants, a caveat that also enjoys widespread support.

3. Choice of Law: International Law over National Law

Those legal systems that have taken the lead in opening their courts to atrocity victims have done so through national legislation. By itself, that fact is certainly not objectionable. The situation becomes problematic when courts allow national law to supplant the body of international human rights law, humanitarian law, and criminal law.

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548. See, e.g., American Convention on Human Rights, supra note 538, art. 46; European Human Rights Convention, supra note 98, art. 35 (referring to the exhaustion requirement as a “generally recognized rule of international law”).

549. See Torture Victim Protection Act of 1991, 28 U.S.C. § 1350.2(b) (2004) (“A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”).


551. Rome Statute of the ICC, supra note 201, art. 17.
This privileging of national law has occurred in Spain, where legislation relating to genocide differed materially from the definition of the crime in the Genocide Convention. In the United States, the Ninth Circuit has wrestled with the question of whether aiding and abetting in the context of extrajudicial killings should be defined with reference to the case law of the new international criminal courts or to U.S. federal common law.

Both of these examples illustrate a growing problem. Even if the basic choice-of-law principles applicable in this area should be those of the forum, courts of the forum should not apply those rules in a manner than subordinates or ignores established or even emerging principles of international human rights law. A common principle—the primacy of international law in international atrocity litigation—ought to govern even in those legal systems that remain dualist.

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This Article is intended as a beginning. It points to the conflicts emerging from our efforts to create a more coherent worldwide private law regime and to strengthen compliance with fundamental and universal human rights norms. If national courts will continue to be called upon in both endeavors (and all signs suggest that they will), then further work is needed. The most promising approach is to establish a set of common principles meant to harmonize the procedural means by which national courts adjudicate grave human rights violations.

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552. At the time of the Pinochet case, genocide as defined under Spanish law extended not only to "national, ethnical, racial or religious groups," but political and social groups as well. See Order of the Criminal Chamber of the Spanish Audiencia Nacional Affirming Spain's Jurisdiction (Nov. 5, 1998), translated in THE PINOCHET PAPERS, supra note 328, at 95, 101-04.

553. See Doe v. Unocal Corp. 2002 WL 31063976 (9th Cir. 2002), vacated by 2003 WL 359787 (9th Cir. 2003) (ATCA suit against a U.S. corporation for aiding and abetting human rights violations in Myanmar perpetrated by the Myanmar military). As this Article was going to press and on the eve of en banc oral argument in the Ninth Circuit, Unocal reached a tentative settlement with the plaintiffs in the case. The terms of the settlement are protected by a confidentiality agreement. See Lisa Girion, Unocal to Settle Rights Claims, L.A. TIMES, Dec. 14, 2004, at A1.

554. The term "dualism" characterizes those legal systems for which developments in international law do not immediately become part of the internal legal order in the absence of a statute, a court decision, or some other authoritative domestic act. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 85-86 (4th ed. 2003).