NEW DIRTY WAR JUDGMENTS IN ARGENTINA: NATIONAL COURTS AND DOMESTIC PROSECUTIONS OF INTERNATIONAL HUMAN RIGHTS VIOLATIONS

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A new approach to national interpretations of international law suggests that, to be successful, national courts must engage in flexible, culturally conscious translations of international norms. Transitional justice projects, however, pose a challenge to this approach. This Note proposes that when criminal prosecutions function as truth-seeking processes, the ability of domestic groups to influence how national courts interpret international law is heightened. In these instances, nonstate actors understandably attempt to capitalize on courts' awareness of the critical role legal judgments play in engendering national reconciliation in order to secure favorable legal outcomes. Accordingly, courts have the challenge of adjudicating egregious human rights violations while also complying with the strict limitations of international criminal law. This Note suggests that the exigencies of transitional justice may lead national courts to issue interpretations that deviate from the existing body of international law. It examines this thesis through the lens of recent criminal prosecutions in Argentina for massive human rights violations during the Dirty War, in which a federal court greatly expanded the legal definition of genocide, contradicting long-standing international jurisprudence.

INTRODUCTION

In 2005, the Supreme Court of Argentina overturned laws that for decades had impeded the investigation and prosecution of crimes committed during the period of military dictatorship known as the

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Dirty War.[1] With prosecution finally possible, the human rights and legal communities debated whether the perpetrators could or should be charged with the crime of genocide. In 2006 and 2007, an important federal court, the Tribunal Oral en lo Criminal Federal Nº 1 de La Plata (Federal Oral Criminal Tribunal No. 1 for La Plata) in the province of Buenos Aires, convicted former police commissioner Miguel Etchecolatz and former police chaplain Christian Von Wernich for crimes against humanity and stated in dicta that these crimes were "committed in the context of genocide."[2] By alluding to the Dirty War as genocide without actually convicting its perpetrators of that crime, the court left open the question of whether the Dirty War was in fact genocide.

Domestic prosecutions of international crimes like those committed during the Dirty War form part of the transitional justice repertoire.[3] "Transitional justice" refers to the institutional efforts of states to respond to systematic human rights violations by promoting accountability and reconciliation.[4] As part of this strategy, criminal prosecutions are intended not only to ensure accountability but also to promote national reconciliation and define collective memory.[5] National prosecutions are thus extremely sensitive in countries recovering from traumatic events: They play a role in shaping the community's rebuilding and are shaped by the community in turn. In order

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[1] Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor y otros," La Ley [L.L.] (2005-2-2056) (Arg.), *available at* http://acnur.org/biblioteca/pdf/3560.pdf. See *infra* notes 84–88 and accompanying text for an overview of these laws and their reversal.

[2] Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/9/2006, "Etchecolatz, Miguel Osvaldo" (Arg.), *available at* http://apdhlaplata.wordpress.com/2006/09/18/sentencia-etchecolatz/ (follow "la sentencia" hyperlink); Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/2007, "Von Wernich, Christian" (Arg.), *available at* http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf.

[3] This Note is limited to analyzing the role of national courts *when* prosecutions *do* occur, rather than tackling the question of whether prosecutions *should* take place at all. For discussion of whether prosecutions are an appropriate vehicle for establishing national reconciliation, see, for example, Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2000).

[4] *See infra* notes 37–44 and accompanying text (discussing definition and goals of transitional justice).

[5] *See* CAROLINE FOURNET, THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE xxix–xxxiii (2007) (arguing that creation of collective memory may depend on production of legal memory through trials); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 18 (1997) ("As an aim for criminal law, the cultivation of collective memory resembles deterrence in that it is directed towards the future, where enhanced solidarity is sought. But like retribution, it looks to the past, to provide the narrative content of what is to be shared in memory."); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 147 (1996) ("The disclosure of the truth through the trials feeds public discussion and generates a collective consciousness and process of self-examination. . . . Public discussion also serves as an escape valve for the victims' emotions and promotes public solidarity . . . .").

to fulfill that role, prosecutions must be sensitive to local historical, cultural, and political dynamics.[6]

In this Note I propose that the recent criminal prosecutions in Argentina expose an important but underanalyzed tension in the transitional justice literature about national prosecutions of human rights violations. While national courts are well situated to play a critical role in the reconciliatory process and must be sensitive to local actors and trends, they are also prone to being overly influenced by local nonstate actors. This Note argues that, while courts must always remain responsive to local conditions, undue influence by nonstate actors must be avoided, because too much flexibility on the part of courts creates the risk that judgments will stray so far from the existing body of international law as to undermine it by creating inconsistent and incoherent doctrine.

The Note examines this thesis through the lens of the aforementioned Dirty War prosecutions in Argentina. In Part I, I review recent literature on the domestic interpretation and application of international law, which suggests that national courts must be sensitive to local culture and history. I argue that this theory is especially significant for domestic prosecutions that occur in a transitional justice context. In Part II, I turn to the Argentine prosecutions and examine how nonstate actors influenced the legal process by advocating that the Dirty War constituted genocide. I then argue that the court's finding that the victims constituted a "national group" within the definition of genocide conflicts with international jurisprudence. In Part III, I propose that the nature and purpose of criminal prosecutions in the transitional justice context heighten the ability of domestic groups to influence courts. Finally, in Part IV, I consider the risk posed by this dynamic, namely that national interpretations of international law—even when contained in dicta—can be indicative of state practice and thus alter international law.

I
Domestic Judicial Interpretations of International Law in Transitional Justice

This Part provides the theoretical background for the Note's analysis of national courts.[7] In the first Section, I discuss scholarship suggesting that when national courts interpret international law, they

[6] *See infra* Part I.B (discussing how criminal trials can effectuate national reconciliation).

[7] I follow the international practice of using the terms "national," "municipal," and "domestic" interchangeably to refer to national courts and national law as distinguished from international tribunals and international law.

must be sensitive to local contexts. I then describe the ways in which national courts may apply international law domestically. In the second Section, I turn my attention to how courts in criminal prosecutions struggle to balance the demands of a transitional justice project with the need to be fair and just in their interpretations of the law.

A. International Law in Domestic Prosecutions

1. Interpretation or Translation? How National Courts Apply International Law

According to conventional understanding of the domestic enforcement of international law, national courts and international law are in a "static relationship."[8] In this model, there is no cultural, philosophical, or jurisprudential exchange between the two. Rather, domestic courts "act primarily as passive conduits through which fixed and immutable international law norms become part of domestic law."[9] National courts are tasked with applying international law as it stands and do not function as "norm creators."[10] This "all-or-nothing" approach supposes that states and their courts are concerned only with whether international law is binding on them.[11] National courts perfunctorily apply international law exactly as it exists in the international arena.[12] Thus, national courts are strictly *enforcers*, rather than generators, of international law.

However, the drawbacks of this approach are evident: It does not recognize the importance of local culture, history, or politics to the work of courts and their processes of legal interpretation. Instead, it assumes that the application of international law is purely mechanical. According to this view, "domestic judges are reduced to bureaucrats" charged with implementing international law.[13] The theory does not consider how judges and courts may mold international law to fit local circumstances while maintaining its integrity.

In contrast to the traditional model, some scholars have argued that when national courts interpret international law, their reading is

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[8] Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490 (2005).

[9] *Id.*

[10] *Id.*

[11] Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501, 503, 515–16 (2000).

[12] *See id.* at 515–16 ("Whatever the particular mode of incorporation, the general interest of [the traditional] model is the hard-wiring of international law into domestic law, the existence of vertical connections that require the courts of a state to enforce that state's international legal obligations.").

[13] *Id.* at 516.

necessarily contextualized and localized.[14] Karen Knop identifies this model as the "comparative law approach," writing that "comparative law's horizontal vantage point allows it to see the place of the domestic, as well as the foreign, legal system in giving meaning to a foreign law within that system."[15] This view rejects the depiction of national court application of international law as simplistic and one-dimensional: National courts are not merely "conveyor belt[s] that deliver[ ] international law to the people,"[16] and international law is not preconstituted, neutral, or transcendent.[17] Instead, when international law is applied domestically by national courts, it is imbued with values shaped by local factors.[18]

The concept of "translation" is central to this thesis. Courts do not merely apply or interpret international law but are actively engaged in its translation.[19] National courts applying international law may be "more conscious both of the need to translate norms from one community to another and of the relationship between that translation and the persuasiveness of their judgment to both communities."[20] The comparative law approach conceives of adaptive and flexible judicial interpretation of international law that is responsive to local circumstances.[21] Other scholars have also suggested that national courts can play a unique role in mediating between the international and national spheres. Thomas Franck and Gregory Fox indicate that, with regard to the international legal system, national courts "protect[ ] space for varied local experimentation and [give] due deference to socio-cultural sensibilities."[22] Local communities may con-

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[14] *See, e.g.*, *id.* at 525–35 (discussing comparative law model that views national courts as actively engaged in use of international law); Waters, *supra* note 8, at 491, 554, 559–64 ("[D]omestic courts choosing to participate in transnational judicial dialogue should view their roles as key mediators between international legal norms and domestic society and culture.").

[15] Knop, *supra* note 11, at 528–29.

[16] *Id.* at 505.

[17] *Id.* at 525–35.

[18] *See id.* at 528 ("By recognizing the role of the local in interpreting a law from elsewhere, the comparative perspective disturbs both the conventional comfort of international lawyers in portable neutral meaning and the anxiety of their critics about unmodified imperialism.").

[19] *See id.* at 529–30 ("As a form of translation, comparative law is attentive to the fact that a foreign law often will need to be adapted.").

[20] *See id.* at 504.

[21] *See id.* ("[A]ll justice may be understood and appraised as translation between different communities, whether communities of time, place, or both.").

[22] Thomas M. Franck & Gregory H. Fox, *Introduction* to INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 1, 4 (Thomas M. Franck & Gregory H. Fox eds., 1996).

sider law that ignores these local factors—as in the traditional model—illegitimate.[23]

Judges necessarily play an important role in the comparative law approach because they are conscious of which local factors should, or could, influence their decisions. As interpreters of the law, judges are "key mediators between international legal norms and domestic society and culture."[24] Not only are judges aware of which local factors matter, but they are also more sensitive to how local communities may respond to their judgments and how they will assess their social and legal validity.

However, the comparative law approach is silent about how the advocacy of domestic groups, in drawing attention to local interests and goals, can affect the criminal justice process. This Note seeks to fill this theoretical vacuum by showing, in Part III, that courts may be heavily influenced by domestic groups, and by suggesting, in Part IV, that domestic prosecutions during transitional justice moments must be careful to protect the established doctrines of international law.

2. Application of International Law in Domestic Courts

National courts vary in the ways they may apply international law domestically. Most domestic prosecutions rely on municipal law alone to establish criminal responsibility.[25] However, national courts also have recourse to international law. When international law is independently incorporated into the national law, states can more easily access those provisions to secure convictions for violations of internal law.[26] This is where the Argentine case differs significantly from other cases and why it is so instructive. The Federal Oral Criminal Tribunal No. 1 for La Plata examined whether Dirty War officials could be

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[23] *Cf*. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 551 (2005) (arguing that international criminal law, which may "exclude[ ] the local," can lead to "a democratic deficit" because "the excluded local often represents the precise population that was traumatized by the criminality").

[24] Waters, *supra* note 8, at 491.

[25] *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 168 (2d ed. 2001) (stating that in recent years "[m]ost charges have been brought under domestic rather than international law").

[26] As discussed below, *see infra* note 49, many international legal instruments require states to incorporate their legal provisions into the municipal legal scheme. Many states have accepted that obligation and incorporated different international instruments and treaties in their national legislation. *See generally* EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 228–35 (2008) (reviewing which states have criminalized offenses in their domestic penal codes that are contained in 1949 Geneva Conventions and Rome Statute of the International Criminal Court).

charged and convicted for violations of international law that were not expressly incorporated into Argentine penal law.[27] This tactic could become more common as states that are emerging from conflict, particularly those whose municipal legal systems do not provide penalties for war crimes, utilize the international legal system to establish criminal accountability.

A deeper understanding of how international law binds state actors will help illuminate how the Argentine court applied it to Dirty War crimes. The relationship between domestic and international law is generally divided into monist and dualist approaches.[28] Monism considers international and domestic law as part of the same system, meaning that municipal law must conform to international law.[29] In this view, international law is superior to domestic law.[30]

The opposing view, dualism, considers the two legal systems to be distinct. In a dualist system, international law may affect the municipal legal order only with "explicit consent of the state involved."[31] Treaties are non-self-executing and are enforceable domestically only when implemented by national legislation.[32] Thus, in dualist systems it is typically more difficult to invoke international law as an independent ground or basis for criminal accountability because it has not been explicitly incorporated into the municipal legal system.

The Argentine legal system is monist. Article 75, Section 22 of the Argentine Constitution explicitly ensures that international law applies domestically: "Treaties and concordats have a higher hier-

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[27] See *infra* notes 33–36 and accompanying text for a discussion of this feature of the Argentine legal system and Part II for an analysis of the Argentine court's efforts to interpret and apply international law.

[28] *See, e.g.*, LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 160 (4th ed. 2001) (describing monism and dualism as "two principal 'schools'").

[29] *See* Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 204 (outlining precepts of monism and dualism).

[30] *Id.*; Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 327 n.1 (2006) ("Monists argue that international law and domestic law are part of the same system, in which international law is hierarchically prior to domestic law."); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 641 (2007) ("Indeed, to the extent that monism recognizes a distinction between domestic and international law, the predominant strand takes the view that international law is of a higher order and thus trumps conflicting domestic law.").

[31] Ginsburg, *supra* note 29, at 204.

[32] *See* Waters, *supra* note 30, at 639–40 (discussing American legal system's dualist approach to human rights treaties).

archy than laws."[33] This "expressly confer[s] constitutional law status on various international human rights treaties," including the Convention on the Prevention and Punishment of Genocide.[34] When the Supreme Court overturned the amnesty laws that had prevented prosecution of Dirty War criminals,[35] it interpreted Article 75, Section 22 to mean that international norms are an independent source of law alongside the Constitution and need not be incorporated piece by piece through national legislation.[36]

B. Criminal Prosecutions in the Transitional Justice Context

Transitional justice lends itself well to the flexible, locally conscious approach described in Part I.A.1. The term "transitional justice" refers broadly to the efforts of countries emerging from periods of conflict, usually war or dictatorship, to address the legacies of the human rights violations that occurred during those eras.[37] Transitional justice efforts should have two broad objectives: "to prevent the recurrence of such abuses and to repair the damage they caused."[38] The term covers an enormous range of measures that include, for example, truth commissions,[39] international criminal

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[33] CONST. ARG. art. 75, § 22, *available at* http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf.

[34] Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 218 (1997) (discussing Argentine incorporation of these treaties and instruments). Article 75 was added in 1994 as part of a movement to constitutionalize international human rights instruments. MARCELO A. SANCINETTI & MARCELO FERRANTE, EL DERECHO PENAL EN LA PROTECCIÓN DE LOS DERECHOS HUMANOS [PENAL LAW IN THE PROTECTION OF HUMAN RIGHTS] 411–12 (1999).

[35] *See infra* note 88 and accompanying text.

[36] Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor y otros" La Ley [L.L.] (2005-2-2056) (Arg.), Part VIII.B, *available at* http://acnur.org/biblioteca/pdf/3560.pdf.

[37] Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1, 1 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006). Transitional justice consists of "that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law." *Id.* at 2. Several important works provide foundational analyses and overviews of transitional justice projects. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) (theoretical analysis of different tools and models employed by states to transition from conflict to liberal democracy); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) [hereinafter Kritz, TRANSITIONAL JUSTICE] (three-volume series providing key reports, rulings, case analysis, and overview of major issues in transitional justice).

[38] José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, *in* Kritz, 1 TRANSITIONAL JUSTICE, *supra* note 37, at 3, 5.

[39] Roht-Arriaza, *supra* note 37, at 4 (stating that truth commissions have become "a staple of the transitional justice menu"). *See generally* PRISCILLA B. HAYNER, UNSPEAK-

tribunals,[40] hybrid tribunals,[41] vetting programs,[42] and reparations measures.[43] The idea that nations must engage in reconciliation is central to transitional justice theory.[44] Because transitional justice mechanisms are generally victim-oriented processes,[45] the success of any transitional justice project is partly determined by how well it considers the interests, goals, demands, and needs of local communities in this project of national reconciliation.[46]

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able Truths: Confronting State Terror and Atrocity (2001) (providing seminal review of truth commissions).

[40] *See generally* Ratner & Abrams, *supra* note 25, at 187–227 (reviewing creation of international criminal courts).

[41] A newer development in the transitional justice arsenal, hybrid courts incorporate elements of both national and international tribunals. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 Ariz. J. Int'l & Comp. L. 347, 352 (2006). They are marked by the fact that they apply law that is a "blend of the international and the domestic" and seat both foreign and national judges on the bench. Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 New Eng. L. Rev. 1059, 1059 (2003); *see also* Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 Cornell Int'l L.J. 725, 746–47 (2005) (positing that hybrid tribunals are best solution because they mitigate representational problems of international justice).

[42] This term refers to the removal of human rights violators from the government or security forces. *See generally* Justice as Prevention: Vetting Public Employees in Transitional Societies (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007) (analyzing vetting practices in different countries).

[43] *See generally* The Handbook of Reparations (Pablo de Greiff ed., 2006) (providing comprehensive overview of reparations efforts in various countries and analyzing normative aspects of reparations projects).

[44] Many of the first transitional justice efforts, such as the South African Truth and Reconciliation Commission and the Chilean National Commission on Truth and Reconciliation, revolved around the need for reconciliation. *See generally* Audrey R. Chapman & Hugo van der Merwe, *Introduction* to Truth and Reconciliation in South Africa 1, 8–12 (Audrey R. Chapman & Hugo van der Merwe eds., 2008) (noting key role of reconciliation in South African commission); Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 Notre Dame L. Rev. 1455, 1457–58, 1463, 1482 (1992) (identifying reconciliation as key reason for creation of truth commission following regime of Pinochet in Chile); Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 Colum. Hum. Rts. L. Rev. 661 (2004) (investigating nuanced and complicated meaning of "reconciliation" in transitional societies and discussing efforts to achieve reconciliation).

[45] *See, e.g.*, Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 Int'l Legal Persp. 73, 97–99 (2002) (discussing challenges of balancing "victim orientation" in transitional justice institutions).

[46] Ratner & Abrams, *supra* note 25, at 343 ("Any [transitional justice] mechanism can only work with the support of the people of the particular state. Although the crimes concern all mankind, it is ultimately the people of a state—past, present, and future—who remain most affected."); Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. Int'l Aff. 17, 18 (2006) ("[T]ransitional justice offers a deeper, richer and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation."); Harry Mika, *Community-Based Peacebuilding: A Case Study from Northern Ireland*, 8 J. Inst. Just. & Int'l Stud. 38, 41 (2008) ("While it is possible that . . . tribunals or truth commissions or

While the focus in transitional justice literature is primarily on the development of international criminal tribunals,[47] national prosecutions in the country where the human rights abuses occurred are increasingly common.[48] This is consistent with a vision of the international legal system in which domestic courts should have primary responsibility for the enforcement of international norms.[49] This preference derives in part from the perceived advantages of domestic

criminal courts can promote change, it is only in their capacity to successfully engage local communities and the needs of individuals living in those communities that peace dividends, such as peaceful coexistence amongst diverse populations, are attainable."); Dan E. Stigall, *Comparative Law and State-Building: The "Organic Minimalist" Approach to Legal Reconstruction*, 29 LOY. L.A. INT'L & COMP. L. REV. 1, 22 (2007) ("[T]he most successful programs to restore the rule of law in weakened or failed states have been those rooted in the traditions of the local citizenry. This is true not only because pre-existing organic legal systems often have the advantage of being tested through years of legal practice, but also because organic institutions are more likely to be perceived as legitimate."); Zalaquett, *supra* note 38, at 9 (noting that for transitional justice policy to be legitimate it must, among other requirements, "represent the will of the people").

47 An exhaustive listing of the enormous body of literature on international criminal tribunals would be impossible. *See generally, e.g.*, M. CHERIF BASSIOUNI, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996) (analyzing case law of International Criminal Tribunal for the Former Yugoslavia (ICTY) and its contribution to development of international criminal law); STEVEN D. ROPER & LILIAN A. BARRIA, DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS (2006) (tracing development of international tribunals from World War II to modern hybrid tribunals and evaluating their effectiveness); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006) (reviewing creation, organization, and jurisprudence of three main ad hoc tribunals).

48 *See* RATNER & ABRAMS, *supra* note 25, at 168 ("[R]ecent years have seen a surge in the use of national courts for the prosecution of wide-scale human rights abuses. Most charges have been brought under domestic rather than international law."). "National prosecutions" are defined as prosecutions conducted in the country where the human rights abuses were committed. Kathryn Sikkink & Carrie Booth Walling, *Argentina's Contribution to Global Trends in Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 37, at 301, 311.

49 National courts remain the "primary fora for holding individuals accountable." RATNER & ABRAMS, *supra* note 25, at 160. Responsibility for trying crimes remains with the states because it is part of the "state's duty to uphold the rule of law." *Id.* at 160. Even where individuals violate international law, "[b]oth treaties and customary law have envisaged domestic courts as the primary arena for the trials of those accused of [these] acts." *Id.* at 162; *see also* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 160 (1993) ("International law assumes that national courts can be instrumental in enforcing international obligations upon recalcitrant governments."). The International Criminal Court, for example, will only prosecute cases where national courts are unable, or unwilling, to proceed. Rome Statute of the International Criminal Court arts. 17, 20, July 17, 1998, 2187 U.N.T.S. 90. Further evidence of this trend is available in various international conventions themselves, whose texts often require state parties to explicitly criminalize acts prohibited by the convention in their municipal legal systems. *See, e.g.*, Convention on the Elimination of All Forms of Discrimination Against Women art. 2(b), Dec. 18, 1979, 1249 U.N.T.S. 13 (requiring signatories "[t]o adopt appropriate legislative

prosecutions over international ones, such as the superior capacity of domestic courts to enforce sanctions.[50]

Criminal prosecutions are crucial tools in transitional justice projects. Proponents point out that prosecutions punish perpetrators, reconstruct a moral order, satisfy an obligation to victims, and establish and promote democracy.[51] They investigate the truth[52] and are "the most effective insurance against future repression."[53] Prosecutions can also "establish a new dynamic in society"[54] and "enhance the legitimacy and credibility of a fragile new government."[55] These various functions and values reflect the two different philosophies associated with criminal trials. On one hand, to effectuate reconciliation (either individual or national), legal mechanisms should engage in the act of translation and interpretation. Each country "adapts, develops, and shapes its own transitional justice experience in light of its own context and culture. There are no 'off-the-shelf' answers."[56] Taking into account local culture is indispensable for any long-term solution to post-atrocity rebuilding.[57] On the other hand, criminal trials that occur in transitional justice contexts, like all trials, must be efficient, fair, and just.[58] They must promote the rule of law, espe-

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and other measures, including sanctions where appropriate, prohibiting all discrimination against women").

[50] *See, e.g.*, Knop, *supra* note 11, at 502 ("[I]t is the ability of the domestic legal system to enforce law through sanctions . . . that recommends domestic courts."); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 14 (2005) (noting that local trials, compared to international prosecutions, "rarely encounter serious enforcement problems").

[51] Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, *in* Kritz, 1 TRANSITIONAL JUSTICE, *supra* note 37, at 337, 339–41.

[52] David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43, 51 (1999) ("[O]wing to subpoena power and adversarial cross-examination, [trials] are usually superior to truth commissions in establishing truths relevant to the guilt or innocence of particular individuals . . . .").

[53] Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

[54] Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 127, 128.

[55] *Id.* at 132.

[56] Ellen Lutz, *Transitional Justice: Lessons Learned and the Road Ahead*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY, *supra* note 37, at 325, 334.

[57] Higonnet, *supra* note 41, at 358.

[58] David Crocker argues that transitional justice projects in general should reflect rule of law principles, including "respect for due process, in the sense of procedural fairness, publicity, and impartiality." Crocker, *supra* note 52, at 56. In postconflict societies, it is especially important for new regimes to respect due process rights. In doing so, they evince the commitment to democracy and rule of law that the previous regime lacked. *See id.* ("Rule of law is especially important in a new and fragile democracy bent on distinguishing itself from prior authoritarianism, institutionalized bias, or the 'rule of the gun.'"). It is equally important for criminal trials to reflect these principles. *See* Lutz, *supra* note

cially since they often follow a period marked by complete disregard for the rule of law. Thus, domestic prosecutions must be responsive to local contexts while also remaining, like any legitimate criminal process, transparent and consistent.

II
THE DIRTY WAR AND THE ARGENTINE FEDERAL COURT DECISIONS

Before proceeding to analyze the Argentine cases, I provide in this Part a brief overview of the Dirty War and discuss the role played by human rights groups in the aftermath of the war and throughout the prosecutions of Miguel Etchecolatz and Christian Von Wernich. Having provided this context, I turn to criticizing the legal reasoning underlying the court's finding that the defendants committed crimes in the "context of genocide."

A. The Dirty War: Mechanisms, Victims, and the Response of the Human Rights Organizations

In 1976, the Argentine military, led by Jorge Rafael Videla, seized control of the country and established a military dictatorship.[59] The period of military rule—known as the Dirty War[60]—lasted from

56, at 336–37 (noting that criminal trials must respect due process rights of defendants and are thus more constrained than truth commissions); Theodore Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 564 (2006) (stating that "significant benefits would accrue" from national trials that comply with "due process rights for the defendant, impartial judging, and protection of witnesses from intimidation"); Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 95 (2001) ("[A] fair trial by capable judges is indispensable to the [ICTY's] reputation as a legitimate vehicle of international accountability."). The right to a fair trial is given particular import in the human rights regime and is codified in several human rights instruments. For example, the Universal Declaration of Human Rights requires that trials comply with due process rights and that individuals have the right to "a fair and public hearing by an independent and impartial tribunal." Universal Declaration of Human Rights art. 10, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

[59] *See* Gabriela Aguila, *Dictatorship, Society, and Genocide in Argentina: Repression in Rosario, 1976–1983*, 8 J. GENOCIDE RES. 169, 169 (2006).

[60] *See, e.g.*, Jose Sebastian Elias, *Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina's "Amnesty Laws,"* 31 HASTINGS INT'L & COMP. L. REV. 587, 587–88 (2008) (noting that period of military dictatorship, "commonly known as the 'Dirty War,'" resulted in "systematic commission of countless crimes, establishing a parallel criminal, yet state-run, organization aimed at annihilating the subversive element at any cost"). The military junta nominally organized its rule around a plan for economic development called the *Proceso de Reorganización Nacional*, or National Reorganization Process. MARGUERITE FEITLOWITZ, A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE 22 (1998).

1976 to 1983.[61] The military junta consolidated executive and legislative power and suspended certain constitutional guarantees.[62] Although ostensibly a program of economic development, the Dirty War involved the brutal and sadistic repression of enormous sections of Argentine society. Human rights violations, including torture, rape, and extrajudicial killings, were widespread and systematic.[63]

The military forces eliminated a broad sector of society. While official estimates indicate there were 9000 victims, human rights organizations suggest the number could be closer to 30,000.[64] Most victims became *desaparecidos* (the disappeared), abducted by security forces, held in detention, tortured, and never released.[65] Victims of different political, social, religious, economic, and cultural backgrounds[66] were targeted for being subversives. While there has been no consensus on how many people were actually active in guerrilla groups, it seems likely that large numbers of innocent individuals were targeted by the regime.[67]

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[61] ALISON BRYSK, THE POLITICS OF HUMAN RIGHTS IN ARGENTINA 34 (1994). For a detailed history of this time period, see generally MARTIN EDWIN ANDERSEN, DOSSIER SECRETO: ARGENTINA'S *DESAPARECIDOS* AND THE MYTH OF THE "DIRTY WAR" (1993) (providing general history of events leading up to military coup and analysis of Dirty War), and COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (1986) [hereinafter NUNCA MÁS].

[62] Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 290–93 (1987) (describing tactics of military junta, including arresting individuals under executive authority, detaining them without trial, and suspending their constitutional right to leave the country).

[63] In 1976, for example, Amnesty International reported on the widespread use of torture, including electric shocks, water torture, and sexual abuse. AMNESTY INT'L, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO ARGENTINA 6–15 NOVEMBER 1976, at 24, 36–39 (1977). When the Inter-American Commission on Human Rights visited in 1979, it received 4153 complaints of human rights abuses. Inter-Am. C.H.R., *Annual Report of the Inter-American Commission on Human Rights 1979–1980*, OEA/Ser.L/V/II.50, doc. 13 rev. 1, at 26 (Oct. 2, 1980), *available at* http://www.cidh.org/annualrep/79.80eng/toc.htm; *see also* SANCINETTI & FERRANTE, *supra* note 34, at 142–48 (describing discovery of mass graves and burials of unknown victims).

[64] *See* Alison Brysk, *The Politics of Measurement: The Contested Count of the Disappeared in Argentina*, 16 HUM. RTS. Q. 676, 685–87 (1994) (reviewing different data and discussing challenges of accounting for number of individuals who died during Dirty War).

[65] *See* FEITLOWITZ, *supra* note 60, at 51–53 (describing treatment of *desaparecidos*).

[66] *See* NUNCA MÁS, *supra* note 61, at 284–385 (providing description of victims by age, sex, profession, and religion). For a detailed chart of the victims by their occupation, see SANCINETTI & FERRANTE, *supra* note 34, at 139.

[67] Efforts to account for the number of individuals active in left-wing organizations in Argentina during this time have led to differing results. For example, estimates for membership in the Montoneros, one of the main groups, varies from 3000 to over 10,000 individuals. Richard Gillespie, *Political Violence in Argentina: Guerillas, Terrorists, and*

Several of the main human rights organizations during that time, such as the Madres de la Plaza de Mayo, were made up primarily of victims and their families.[68] Other groups were based on legal or religious advocacy.[69] Although advocacy was limited during the regime by repression and fear, many organizations steadfastly sought information and collected evidence regarding the location of the *desaparecidos* throughout the crisis.[70] They filed habeas claims in national courts[71] and petitioned foreign governments for help.[72] These groups were the only sector of society that "consistently and effectively resisted" the state's regime of terror.[73] Once the Dirty War ended, they "helped set the agenda for transition"[74] and continued their call to address outstanding rights violations.[75]

When he was elected following the fall of the military regime, President Raúl Alfonsín ordered the prosecution of the nine commanders who formed the three ruling juntas from 1976 to 1983.[76] The

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Carapintadas, *in* TERRORISM IN CONTEXT 211, 212 n.1 (Martha Crenshaw ed., 1995) (identifying various figures put forward by scholars and media).

[68] In her typology of the human rights movement in Argentina, Alison Brysk classifies these organizations as "family-based groups." *See* BRYSK, *supra* note 61, 47–49 (identifying "family-based" human rights groups and describing their advocacy); *see also* Alison Brysk, *From Above and Below: Social Movements, the International System, and Human Rights in Argentina*, 26 COMP. POL. STUD. 259, 264 (1993). During the prosecutions of Christian Von Wernich and Miguel Etchecolatz, the main human rights organizations functioned as the legal representatives of the victims in the Dirty War. *See infra* note 110 and accompanying text. Therefore, for purposes of this Note, I will use the terms "victims' rights organizations" and "human rights organizations" interchangeably when referring to the human rights movement that helped shape these criminal prosecutions.

[69] Brysk divides the remainder of the human rights movement into civil libertarian and religious movements. BRYSK, *supra* 61, at 45–51; Brysk, *supra* note 68, at 264–65.

[70] *See* BRYSK, *supra* note 61, at 48–49 (describing how organization composed of grandmothers of *desaparecidos* "solicit[ed] information from the general public on the location of their grandchildren," some of whom were born in detention); Brysk, *supra* note 68, at 265 ("[C]ivil libertarians were gathering information that documented the nature and scope of human rights violations.").

[71] *See* BRYSK, *supra* note 61, at 43 (noting that Argentine courts generally rejected habeas claims during this time).

[72] *Id.* at 51–56 (describing how Argentine human rights groups mobilized international actors).

[73] Brysk, *supra* note 68, at 262.

[74] BRYSK, *supra* note 61, at 156.

[75] *Id.* at 155 ("[After the] democratic regime emerged . . . the human rights movement launched a triple challenge . . . for truth, justice, and the institutionalization of human rights . . . .").

[76] Decreto No. 158, Dec. 13, 1983, [1983-B] A.L.J.A. 1943; *see also* AMNESTY INT'L, ARGENTINA: THE MILITARY JUNTAS AND HUMAN RIGHTS 14 (1987) (providing list of accused). President Alfonsín also created a truth commission known as the *Comisión Nacional sobre la Desaparición de Personas* (CONADEP or National Commission on the Disappeared), whose mandate was to investigate and make known the truth about what happened by giving witnesses and victims an opportunity to testify. HAYNER, *supra* note 39, at 33–34.

defendants were charged with various crimes, including torture, illegal detention, robbery, and murder, but not genocide or crimes against humanity.[77] They were eventually tried in a civilian court[78] after a military tribunal effectively refused to prosecute them.[79] Some of the defendants were acquitted altogether, while others were acquitted on some charges only.[80] President Carlos Menem later pardoned all of the convicted leaders.[81]

Military pressure eventually put a stop to most prosecutions[82] that Alfonsín's presidency had ushered in.[83] In 1986, Congress passed Law No. 23492, known as *Punto Final* or the Full Stop Law.[84] The law created a sixty-day deadline to present new formal charges against perpetrators of the Dirty War, after which the courts were not allowed to accept any more cases.[85] Congress also passed Law No. 23521,

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[77] They were charged under various provisions of the Argentine Penal Code. AMNESTY INT'L, *supra* note 76, at 39–41.

[78] The trial ran for nearly eight months and included 800 witnesses. *Id.* at 21.

[79] The military tribunal issued a report "declaring its inability and unwillingness to complete proceedings against the junta members," explaining that, if the commanders were guilty of anything, it was only of "failing to exercise adequate supervision over their subordinates in order to prevent possible excesses." Emilio Fermin Mignone, Cynthia L. Estlund & Samuel Issacharoff, *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 140 (1984). The tribunal stated that to prove "illegitimate deprivation of liberty," prosecutors would need to show that victims had *not* engaged in subversive activities, hinting that this would be a challenge in most cases. *Id.* The tribunal also noted that a fair inquiry would be difficult given the "biased" nature of the victims. *Id.*

[80] Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal [National Appeals Chamber for Criminal and Federal Corrections], 12/9/1985, "Juicio a los ex comandantes," *reprinted in* MARCELO A. SANCINETTI, DERECHOS HUMANOS EN LA ARGENTINA POSTDICTATORIAL [HUMAN RIGHTS IN POSTDICTATORSHIP ARGENTINA] 221–28 (1988) (providing detailed explanation of charges, convictions, and acquittals). The Supreme Court partially confirmed the verdict of the Federal Court of Appeals. Corte Suprema de Justicia [CSJN], 30/12/1986, "Juicio a los ex comandantes," *reprinted in* SANCINETTI, *supra*, at 243–44.

[81] DIANA TAYLOR, DISAPPEARING ACTS: SPECTACLES OF GENDER AND NATIONALISM IN ARGENTINA'S "DIRTY WAR" 14 (1997).

[82] The military for the most part resented the new prosecutions. The central command expressed their disapproval by refusing to quash a small rebellion that arose in some military units in 1987 and President Alfonsín acceded to their demand for an end to prosecution. Garro & Dahl, *supra* note 62, at 337; *see also* TERENCE ROEHRIG, THE PROSECUTION OF FORMER MILITARY LEADERS IN NEWLY DEMOCRATIC NATIONS: THE CASES OF ARGENTINA, GREECE, AND SOUTH KOREA 72–73 (2002) (describing causes and outcome of military's rebellion).

[83] Approximately 2000 criminal complaints were filed by 1984. Kathryn Lee Crawford, *Due Obedience and the Rights of Victims: Argentina's Transition to Democracy*, 12 HUM. RTS. Q. 17, 23 (1990).

[84] Law No. 23492, Dec. 24, 1986, [1986-B] A.L.J.A. 1100, *available at* http://www.nuncamas.org/document/nacional/ley23492.htm.

[85] Crawford, *supra* note 83, at 25. Human rights activists managed to file an additional 300 complaints before the deadline passed. *Id.*

Obedencia Debida or the Due Obedience Law.[86] The law created an affirmative defense and irrebuttable presumption that military and police officers acted under orders that they were unable to question.[87] Until the Supreme Court overturned them in 2005,[88] the two laws posed serious obstacles to criminal investigations.

B. Searching for Genocide: Etchecolatz *and* Von Wernich

During two of the most important trials following the initiation of criminal prosecution against Dirty War perpetrators, those of Miguel Etchecolatz and Christian Von Wernich,[89] the human rights community exerted both legal and extrajudicial pressure on the Federal Oral Criminal Tribunal No. 1 for La Plata, demanding that it consider local historical and cultural claims in determining the outcomes of these prosecutions. The human rights movement—which for decades had sought justice[90]—was naturally concerned about how the Dirty War would be characterized. As zealous advocates for victims and survivors of human rights abuses, their efforts to secure justice were admirable. The courts were faced with the challenge, however, of balancing victims' interests with their own judicial function. In the end they issued criminal judgments contravening the existing international law of genocide. This Section will provide the background of these cases. It will then describe how nonstate actors applied pressure on the court and how they influenced the definition of genocide that was ultimately adopted.

1. Background of the Cases

Miguel Etchecolatz was Commissioner General of the Buenos Aires provincial police during much of the Dirty War.[91] A notorious

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[86] Law No. 23521, June 8, 1987, [1987-A] A.L.J.A. 260, *available at* http://www.derechos.org/ddhh/arg/ley/ley23521.txt.

[87] Crawford, *supra* note 83, at 28.

[88] The case at issue was that of Julio Héctor Simón, an officer in the Buenos Aires police force charged with kidnapping and torture. Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor y otros," La Ley [L.L.] (2005-2-2056) (Arg.), *available at* http://acnur.org/biblioteca/pdf/3560.pdf; *see also* Douglas Jacobson, *A Break with the Past or Justice in Pieces: Divergent Paths on the Question of Amnesty in Argentina and Colombia*, 35 GA. J. INT'L & COMP. L. 175, 193 (2006). On appeal, the Supreme Court of Argentina held that the amnesty laws violated several articles of the American Convention on Human Rights and thus violated Argentina's obligations under international law. *Id.* at 193–94.

[89] In this and following Sections, unless otherwise cited, my description of the trial of Christian Von Wernich is based on personal observations.

[90] *See supra* notes 68–75 and accompanying text (outlining important activities and role of human rights movement during and following Dirty War).

[91] Larry Rohter, *After 30 Years, Argentina's Dictatorship Stands Trial*, N.Y. TIMES, Aug. 20, 2006, at A3.

torturer, Etchecolatz was first tried in 1986 and sentenced to twenty-three years of incarceration—only to be released the following year.[92] In 2006, the Federal Oral Criminal Tribunal No. 1 for La Plata convicted Etchecolatz of homicide, illegal deprivation of liberty, and torture.[93] The judgment contained in dicta the first official treatment of the Dirty War as genocide. The court affirmed that "the offenses for which Etchecolatz was convicted were crimes against humanity committed in the context of the genocide that occurred in our country between the years 1976 to 1983."[94]

The next verdict issued—that of Christian Von Wernich—grappled with these same issues. Von Wernich served as chaplain of the Buenos Aires police during the military dictatorship.[95] He was closely associated with the military and police forces[96] responsible for human rights abuses and was charged with multiple counts of torture, kidnapping, and homicide.[97] During the trial, a parade of witnesses described encounters with Von Wernich at various detention centers where he pressured detainees to collaborate with their torturers.[98] In finding him guilty on all counts,[99] the court asserted that these crimes were committed "in the context of genocide"[100] and that the atrocities

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92 *See* Larry Rohter, *Death Squad Fears Again Haunt Argentina*, N.Y. TIMES, Oct. 8, 2006, at A6 (noting that Etchecolatz's first conviction was overturned with passage of amnesty laws).

93 Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/9/2006, "Etchecolatz, Miguel Osvaldo" (Arg.), *available at* http://apdhlaplata.wordpress.com/2006/09/18/sentencia-etchecolatz/ (follow "la sentencia" hyperlink).

94 *Id.* at 228 (translation by author).

95 Alexei Barrionuevo, *Church Condemned for Role in 'Dirty War' Argentine Priest*, INT'L HERALD TRIB., Sept. 18, 2007, at 2.

96 *See generally* HERNÁN BRIENZA, MALDITO TÚ ERES: EL CASO VON WERNICH: IGLESIA Y REPRESIÓN ILEGAL [YOU ARE DAMNED: THE CASE OF VON WERNICH: THE CHURCH AND ILLEGAL REPRESSION] 64–66, 68–69 (2003) (describing Von Wernich's close relationship with military).

97 *See* Dan Fastenberg, *The Von Wernich Case, and Argentine Reckoning*, BUENOS AIRES HERALD, Aug. 11, 2007, at 7.

98 One witness, Rubén Schell, described an encounter with Von Wernich as "torture." *"La peor tortura fue la moral," dijo un testigo* [*"The Worst Torture Was Moral," Witness Testifies*], LA NACIÓN (Arg.), Aug. 6, 2007, http://www.lanacion.com.ar/932193. The prosecution argued that Von Wernich knew about the torture and murders taking place, and, in some instances, explicitly collaborated with the main perpetrators. *See* Larry Rohter, *Back in Argentina, Priest Faces 'Dirty War' Charges*, N.Y. TIMES, Apr. 26, 2004, at A3 (highlighting prior testimony of police officer who stated that Von Wernich observed students being injected in their hearts with poison).

99 Alexei Barrionuevo, *Argentine Priest Receives Life Sentence in 'Dirty War' Killings*, N.Y. TIMES, Oct. 10, 2007, at A7.

100 Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/2007, "Von Wernich, Christian" (Arg.), 2, *available at* http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf (translation by author).

of this period of history "must be categorized as genocide."[101] The convictions of Etchecolatz and Von Wernich, though only two in a number of ongoing trials, are politically and legally significant because they set a model for federal prosecutions of other Dirty War criminals across Argentina. Both Etchecolatz and Von Wernich were tried and sentenced by a panel of the Federal Oral Criminal Tribunal No. 1 for La Plata, a prestigious federal court. The court has jurisdiction over a large number of other Dirty War cases because the military juntas conducted a disproportionate amount of their repressive activities in its jurisdiction.[102] Most importantly, the two cases are part of the state's first real attempt to grapple with its long and bloody history. While a few trials took place during the 1980s, subsequent legal developments nullified those judgments.[103] As noted earlier, Etchecolatz and Von Wernich were among the first individuals convicted following the Supreme Court's decision to overturn the amnesty laws.[104] The two decisions are strikingly similar: They rely on the same precedents and arguments, and often employ identical language. Moreover, these decisions mark the beginning of a shift in Argentine courts toward greater reliance on international law in prosecuting Dirty War crimes.[105]

2. The Legal and Extralegal Force of the Human Rights Movement

The human rights community occupied both a symbolic and institutional role in these criminal proceedings. In both these roles an important goal was to obtain an official declaration that the Dirty War constituted genocide.[106] As I suggest in Part III.A, this was due to the human rights movement's desire to assign an objective meaning to the Dirty War that recognized its severity.[107]

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[101] *Id.* at 363 (translation by author).

[102] This is in large part because the province is Argentina's most populous, home to one of its largest and most important universities, and close to the federal capital.

[103] *See supra* notes 84–88 and accompanying text.

[104] *See* Paz Rodriguez Niell, *Sólo se dictaron 12 condenas en todo el país* [*Only 12 Convictions in the Entire Country*], La Nación (Arg.), Dec. 30, 2008, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=1085423 (noting that conviction of Julio Simón marked beginning of new prosecutions, followed shortly thereafter by trials of Miguel Etchecolatz and Christian Von Wernich).

[105] In the original trials, the "Government's legal strategy was to confine the charges to the municipal legal framework." Garro & Dahl, *supra* note 62, at 303.

[106] The human rights community was not completely in agreement on this point. There were questions about whether the Dirty War fit the technical definition of genocide and whether a long debate over the merits of genocide might overshadow the goal of obtaining criminal convictions.

[107] See *infra* notes 165–71 and accompanying text for an analysis of the special meaning the human rights community attributed to the crime of genocide.

The institutional presence of the human rights organizations in the Argentine trials, primarily consisting of victims and their families, is secured by the *querellante* system.[108] In Argentina, victims are considered *querellantes*, or plaintiffs, in the criminal process. They are represented by their own attorneys and act as parties to the action. Their lawyers are seated separately from the defense and the prosecution, and they have the right to present their own witnesses, make motions, and cross-examine any witnesses presented by the defense. They function as an accessory to the criminal process, and their interests are autonomous from those of the prosecutor.[109]

During the two trials, the *querellantes* were represented primarily by the major national human rights organizations in Argentina[110] created during and shortly after the Dirty War.[111] These organizations were instrumental in paving the way for criminal accountability, and the *querellante* system gave them access to the criminal trials, enabling them to directly affect the legal process.

The most significant legal tactic they employed was seeking to amend the *calificación*, or charges, against the defendant to include the crime of genocide at the start of both trials.[112] During the Etchecolatz trial, several *querellantes* and their legal representatives argued that the charge was justified because the offenses "were not isolated crimes, not just a summation of crimes, but a plan for systematic extermination."[113] This request was reiterated during Von Wernich's proceeding.[114] While the court rejected each motion to change the charges, in its final judgments the court acknowledged that

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[108] The *querellante* (complainant, complaining witness, or plaintiff) arrangement has been described by some as a "plaintiff-prosecutor" system. Mignone, Estlund & Issacharoff, *supra* note 79, at 123.

[109] CARLOS CREUS, DERECHO PROCESAL PENAL [CRIMINAL PROCEDURE LAW] 256 (1996).

[110] *See* Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/2007, "Von Wernich, Christian" (Arg.), 1, *available at* http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf (naming *querellantes* and organizations that represented them); Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/9/2006, "Etchecolatz, Miguel Osvaldo" (Arg.), 1–2, *available at* http://apdhlaplata.wordpress.com/2006/09/18/sentencia-etchecolatz (follow "la sentencia" hyperlink) (same).

[111] See *supra* notes 68–75 and accompanying text for an overview of these organizations.

[112] *See Von Wernich*, Trib. Oral Crim. Fed., at 5–6, 168 (identifying groups that were party to motion); *Etchecolatz*, Trib. Oral Crim. Fed., at 6, 253 (same).

[113] *Etchecolatz, camino a la perpetua* [*Etchecolatz, Path to Life Sentence*], EDICIÓN NACIONAL (Arg.), Sept. 19, 2006, *available at* http://www.edicionnacional.com/edicion/2006/9/19/articulo/36622 (translation by author).

[114] *Piden perpetua para Von Wernich* [*Life Sentence Requested for Von Wernich*], PÁGINA 12 (Arg.), Oct. 8, 2007, *available at* http://www.pagina12.com.ar/diario/ultimas/20-92671-2007-10-08.html (noting request of *querellante* lawyers that Von Wernich be charged with crime of genocide).

these motions inspired it to examine the genocide question.[115] This practice appears to have been a crucial way for the organizations to assert their interests.

The organizations also levied their power outside the courtroom. They shaped public discourse, publicized their interests, and garnered public support through protests, articles, newsletters, and websites.[116] The symbolic value of the trials, which took place in the public eye, should not be underestimated. On the first day of Von Wernich's trial, the media packed the small courtroom and broadcast the proceedings live over national television. Some subsequent proceedings were also broadcast live. The print and television media followed the two trials closely; major newspapers ran daily stories highlighting the testimony of witnesses and interviewing the human rights lawyers.[117] In the public debate that surrounded both trials, the Dirty War was repeatedly referred to as genocide.[118] Protesters and posters during Von Wernich's trial referred to him as a *genocida*, one who commits genocide,[119] and Etchecolatz was similarly depicted by the human rights

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115 *See Von Wernich*, Trib. Oral Crim. Fed., at 168–69 (explaining that significance of motion to amend charges required inquiry into genocide issue); *Etchecolatz*, Trib. Oral Crim. Fed., at 253 (same).

116 For example, the human rights organization Asamblea Permanente por los Derechos Humanos created blogs that tracked the Etchecolatz and Von Wernich trials. *See* Juicio a Etchecolatz-APDH La Plata [Trial of Etchecolatz-APDH La Plata], http://juicioaetchecolatz.wordpress.com/ (last visited Feb. 4, 2009); El Juicio a Christian Von Wernich [The Trial of Christian Von Wernich], http://juicioavonwernich.wordpress.com/ (last visited Feb. 4, 2009). The websites, which were updated daily, identified which witnesses testified and explained other legal developments.

117 *See* Pablo Morosi, *Condenaron a reclusión perpetua a Von Wernich* [*Von Wernich Sentenced to Life Imprisonment*], La Nación (Arg.), Oct. 10, 2007, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=951794; *Declaró una querellante en el juicio contra Von Wernich* [Querellante *Testified in the Trial of Von Wernich*], La Nación (Arg.), Sept. 3, 2007, *available at* http://www.lanacion.com.ar/nota.asp?nota_id=940528 (reviewing day's testimony); *Dos nuevos testimonios incriminaron a Etchecolatz en delitos aberrantes durante la dictadura* [*Etchecolatz Implicated in Unusual Crimes During the Dictatorship by Two New Witnesses*], Clarín.com, July 10, 2006, http://www.clarin.com/diario/2006/07/10/um/m-01231220.htm.

118 For example, Justicia Ya!, a human rights group that represented several of the victims, explained in a press release that their strategy was "directed at proving that [Von Wernich] was a key piece of the genocide" perpetuated in Argentina during the period of state terrorism. Victoria Ginzberg, *Un cura que bendijo la represión* [*A Priest Who Blessed the Repression*], Página 12 (Arg.), July 5, 2007, *available at* http://www.pagina12.com.ar/diario/elpais/1-87642-2007-07-05.html (translation by author).

119 A poster created by Justicia Ya! included a photo of Christian Von Wernich in his priest frocks and called for "Jail for all Genocidists. Justice for all our comrades!" The poster included the location, dates, and time of Von Wernich's trial, under the title "Trial of the *Genocida* Von Wernich." Justicia Ya!, http://www.justiciaya.org/imagen/afficheVW.jpg (last visited Feb. 4, 2009).

organizations as a perpetrator of genocide.[120]

3. The Court's Definition of Genocide

In both judgments, the court affirmed in dicta that the Dirty War was genocide. Since the Argentine penal code does not contain any provisions on genocide, the court relied on Article 75 of the Argentine Constitution to apply international law to the municipal legal order.[121] However, the court's analysis of the genocide question is deeply problematic. First, it asserted a definition of "national group" that is incompatible with the definition ultimately agreed upon by the drafters of the Genocide Convention and now enshrined in genocide jurisprudence. Second, the court was unjustified in relying so heavily on two Spanish court decisions that it considered persuasive.

Article 2 of the Genocide Convention limits the application of genocide to certain acts "committed with intent to destroy, in whole or in part, a *national*, *ethnical*, *racial* or *religious* group."[122] Political groups were deliberately excluded from the Convention.[123] Article 2 is usually read restrictively,[124] resulting in the narrow applicability of

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120 *See, e.g.*, Press Release, Asamblea Permanente por los Derechos Humanos La Plata, Etchecolatz sale de la cárcel: la Cámara lo benefició con arresto domiciliario [Etchecolatz Leaves Jail: Court Granted House Arrest] (Sept. 1, 2005), *available at* http://www.apdhlaplata.org.ar/prensa/2005/010905pen.htm (press release from major human rights organization referring to Etchecolatz as perpetrator of genocide).

121 CONST. ARG. art. 75, § 22, *available at* http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf ("Treaties and concordats have a higher hierarchy than laws."). See *supra* Part I.A.2 for a discussion of the monism of the Argentine legal system.

122 Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (emphasis added).

123 For discussion of the decision to exclude political groups from the text of the Convention, see generally WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 454–55 (2000), Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 423–35 (1998), and Beth Van Schaack, Note, *The Crime of Political Genocide: Repairing the Convention's Blind Spot*, 106 YALE L.J. 2259, 2262–68 (1997). At least one expert has suggested that customary law and treaty law differ in that the customary *jus cogens* prohibition of genocide is broader and includes "political groups." *See* Van Schaack, *supra*, at 2280. This argument finds that earlier definitions of genocide that included political groups constitute *jus cogens*, or customary and peremptory norms of international law from which no derogation is permitted, and that subsequent interpretations contained in the Convention constitute treaty law only. *Id.* at 2280–84. However, the Argentine court did not make an argument that clearly distinguished between customary law and treaty law.

124 *See, e.g.*, David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 CORNELL INT'L L.J. 293, 299 (2003) (stating that Convention "sets forth four restrictive categories"); *see also* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 165 (2007) ("The legal concept of genocide is narrowly circumscribed . . . even if colloquially the word is used for any large-scale killings.").

the genocide classification.[125] Given that genocide covers only the attempted destruction of these four groups and that the victims of the Dirty War were not characterized by any of them, the Dirty War does not qualify as genocide under the Convention.[126]

The Argentine court began its analysis in both cases by noting that political groups were not protected under the Convention,[127] concluding that the victims of the Dirty War instead were protected under the rubric of "national group."[128] In reaching its decision, the Argentine court relied on an earlier decision from a Spanish national court that defined "national group" as a human group differentiated and characterized by something distinct from the majority.[129] The court also consulted writings of influential Argentine scholars to support its argument that the Dirty War constituted genocide. For example, it cited Daniel Feierstein, a noted sociologist, for his conclusion that "part" of the Argentine national group was exterminated, presumably by members of the same group, and thus that a "national group" was targeted.[130] Both these arguments reveal the court's broad understanding of the term "national group" as protecting indi-

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[125] *See* Nersessian, *supra* note 124, at 299. ("If the victim in question lacks membership in a protected group, genocide has not occurred with respect to that victim, even if the actor's ultimate intention is to facilitate the destruction of a protected group.").

[126] Were "political groups" a protected group, one could argue that the victims would have been protected under that designation. *See* JOHN QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 188 (2006) (suggesting that if Spanish court had found that customary law definition of genocide included political groups, it might have deemed Dirty War genocide on those grounds). There is strong evidence that the military junta viewed its targets as a *political* collective of left-wing subversives. General Vilas, a high-ranking army member, described the Dirty War as cultural warfare on the part of an army of ideologues and stated that the enemy lacked a national identity. ANDERSEN, *supra* note 61, at 195; *see also* LUIS RONIGER & MARIO SZNAJDER, THE LEGACY OF HUMAN-RIGHTS VIOLATIONS IN THE SOUTHERN CONE: ARGENTINA, CHILE, AND URUGUAY 21 (1999) (citing governor of Buenos Aires boasting that government killed "subversives" and "their sympathizers").

[127] *See* Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/2007, "Von Wernich, Christian" (Arg.), 169–70, *available at* http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf (reviewing drafting history of Convention and finding that political groups were excluded); Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/9/2006, "Etchecolatz, Miguel Osvaldo" (Arg.), 255–58, *available at* http://apdhlaplata.wordpress.com/2006/09/18/sentencia-etchecolatz/ (follow "la sentencia" hyperlink) (same).

[128] *Von Wernich*, Trib. Oral Crim. Fed., at 172; *Etchecolatz*, Trib. Oral Crim. Fed., at 268–69. As noted above, the perpetrators of the Dirty War appeared to consider the victims a political group not a national group. *See supra* note 126. Thus, the court's classification of the victims conflicts with how the military junta viewed them.

[129] *Von Wernich*, Trib. Oral Crim. Fed., at 171; *Etchecolatz*, Trib. Oral Crim. Fed., at 263. See *infra* notes 146–58 and accompanying text for analysis of the decision from the Spanish National Audience.

[130] *Von Wernich*, Trib. Oral Crim. Fed., at 172; *Etchecolatz*, Trib. Oral Crim. Fed., at 267–69.

viduals who are distinct from the remaining national majority because of *any* specific shared characteristics.

However, the term "national group" in international law does not encompass the definition espoused by the Argentine court. Because international law scholars thoroughly criticized this new definition of "national group" when it was first proposed by the Spanish court,[131] this Note will merely point out the most significant inconsistencies. The meaning of "national" in international law is subject to some debate. Legal experts suggest that the term "national" is grounded in one of two relationships, either one related to "nation and citizenship"[132] or a bond with a state based on cultural or historical connections.[133] Only one international criminal court has examined how these two theories inform the definition of "national group" within the Genocide Convention. In *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda held that the term refers to "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[134]

In either analysis, the term "national group" is unmistakably affiliated with a nation, either through citizenship or culture. As William Schabas explains, the "core concern" of the Genocide Convention is to protect "national minorities."[135] This understanding informed Raphael Lemkin,[136] who coined the word "genocide."[137] The *travaux*

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131 *See, e.g.*, SCHABAS, *supra* note 123, at 149–50 (criticizing Spanish court's definition as "hardly compelling" and "lead[ing] to an absurdity that trivializes the very nature of genocide"); Anthony J. Colangelo, *The Legal Limits of Jurisdiction*, 47 VA. J. INT'L L. 149, 180 (2006) ("Spain's *Audiencia Nacional* defied international law when it upheld jurisdiction over . . . Pinochet for genocide based on crimes allegedly committed against a 'national group' by stretching this victim class designation beyond its customary definition . . . ."); Alicia Gil Gil, *The Flaws of the* Scilingo *Judgment*, 3 J. INT'L CRIM. JUST. 1082, 1083–84 (2005) (arguing that court's interpretation of genocide is far-fetched and cautioning that "shortcomings in the Spanish Code . . . should not lead us to deform or extend by analogy the crime of genocide"); Carlos Malamud, *Spanish Public Opinion and the Pinochet Case*, *in* THE PINOCHET CASE: ORIGINS, PROGRESS AND IMPLICATIONS 145, 149, 150 (Madeleine Davis ed., 2003) (describing court as "twisting its interpretation of genocide to the limit" and creating "a broad and diffuse definition lending itself to the wildest aberrations").

132 *See* Nersessian, *supra* note 124, at 301–03 (emphasizing relationship between national group and International Court of Justice's definition of "nationality" in Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6)).

133 *See* SCHABAS, *supra* note 123, at 115 (arguing that *Nottebohm* analysis is incomplete because it does not reach situation of "national minorities who, while sharing cultural and other bonds with a given State, may actually hold the nationality of another State").

134 Case No. ICTR-96-4-T, Judgment, ¶ 511 (Sept. 2, 1998).

135 SCHABAS, *supra* note 123, at 116. Note that the United States' Genocide Convention Implementation Act of 1987 defines the term as "a set of individuals whose identity as such is distinctive in terms of nationality or national origins." Genocide Convention Implementation (Proxmire) Act of 1987, 18 U.S.C. § 1093(5) (2006).

136 *See* SCHABAS, *supra* note 123, at 27–30 (describing Lemkin's original conception of genocide as including extermination of national minorities); Lippman, *supra* note 123, at

préparatoires[138] of the Genocide Convention also support this reading of the text. They indicate that member states believed national groups were characterized by "cohesiveness, homogeneity, inevitability of membership, stability, and tradition."[139]

However, this relationship is not reflected in the Argentine analysis. Compared with the traditional interpretation of the Genocide Convention, the flexible understanding of "national group" employed by the Argentine court is remarkably constructivist. It suggests that a group can be characterized by "something" (and thus, *anything*) that distinguishes it from a larger group. As a result, the definition becomes unmanageable. The Argentine court's interpretation implies that any distinctiveness vis-à-vis the dominant hierarchy can transform a group of individuals into a national group. If extermination of any group differentiated by *something* were considered extermination of a national group, then the definition of genocide would be rendered meaningless.

The Argentine court's analysis also gives short shrift to other elements of the crime of genocide as laid out in the Genocide Convention. First, it gives undue weight to the systematic nature of the human rights violations that occurred during the Dirty War. Both decisions repeatedly note that the Argentine military, police, and intelligence services developed a systematic, planned, targeted, and organized campaign of extermination.[140] The Argentine court, citing

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423 ("Lemkin proposed that the neologism genocide should be employed to describe the destruction of a 'nation or of an ethnic group.'" (citing RAPHAËL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 79 (1944))).

137 LEMKIN, *supra* note 136, at 79–95.

138 *Travaux préparatoires* are the legislative or drafting history of treaties, often consisting of transcripts and reports of statements made by the states leading up to and through the drafting process. The Vienna Convention on the Law of Treaties considers the *travaux préparatoires* a "supplementary means of interpretation" that can be invoked to confirm or determine meaning. Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331.

139 Lippman, *supra* note 123, at 455. The International Criminal Tribunal for Rwanda declared in *Akayesu* that

> On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups.

Case No. ICTR-96-4-T, Judgment, ¶ 511 (Sept. 2, 1998).

140 For example, the court accepted the characterization of the state's plan as a "calculated and systematic extermination" that was not "undertaken randomly" or indiscriminately. Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/2007, "Von Wernich, Christian" (Arg.), 171, *available at* http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf (translation by author); Tribunal Oral en lo Criminal

the earlier Spanish decisions, saw this widespread and methodical system of kidnappings, detention, torture, and murder as revealing purposeful and organized state action,[141] which, the court seems to suggest, qualifies as genocide.

Second, the acts prohibited by the Genocide Convention[142] do not qualify as genocide unless they are carried out with the requisite specific intent[143] directed against members of particular protected groups.[144] The nature and structure of the state's repressive tactics are not dispositive. The Argentine court's suggestion that the systematic killing and disappearance of thousands of victims not belonging to one of the four protected categories nonetheless qualified as genocide is inconsistent with this standard. While it can be devastating for victims of large-scale violations of human rights to learn that the crimes that were directed against them fall outside the scope of the Convention,[145] that concern cannot make up for missing elements of the crime of genocide.

The Argentine court's approach is also flawed for failing to justify its invocation of Spanish jurisprudence. The definition adopted by the Argentine case was originally proposed by the Spanish *Audiencia Nacional* (National Audience), a high federal court in Spain, in the case of Adolfo Scilingo, a former Argentine Navy captain,[146] and

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Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/9/2006, "Etchecolatz, Miguel Osvaldo" (Arg.), 262, 264, *available at* http://apdhlaplata.wordpress.com/2006/09/18/sentencia-etchecolatz/ (follow "la sentencia" hyperlink) (translation by author). Instead, the plan conveyed the "desire to destroy a specific section of the population, an exceedingly heterogeneous group." *Von Wernich*, Trib. Oral Crim. Fed., at 171; *Etchecolatz*, Trib. Oral Crim. Fed., at 262.

141 *Von Wernich*, Trib. Oral Crim. Fed., at 170–71; *Etchecolatz*, Trib. Oral Crim. Fed., at 261–64.

142 Genocide Convention, *supra* note 122, arts. II–III.

143 *Id.* art. II (requiring intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such"). The prosecution must prove that defendants acted with the appropriate mens rea and that the targeted individuals belong to a protected group. *See* William A. Schabas, *The* Jelisic *Case and the* Mens Rea *of the Crime of Genocide*, 14 LEIDEN J. INT'L L. 125, 128–33 (2001) (analyzing question of intent in jurisprudence of international criminal tribunals).

144 That is, "a national, ethnical, racial or religious group." Genocide Convention, *supra* note 122, art. II.

145 *See, e.g.*, Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6 WASH. U. GLOBAL STUD. L. REV. 621, 627 (2007) ("Because of the peculiarities of [the] definition, some of the worst crimes in history may not be brought as genocides . . . . ").

146 Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura argentina [Order of the Criminal Chamber of the Spanish National Audience Affirming Spain's Jurisdiction To Try Crimes of Genocide and Terrorism Committed During the Argentine Dictatorship], SAN, Nov. 4, 1998 (appeal No. 84/98, Criminal Investigation No. 19/97), *available at* http://www.derechos.org/nizkor/arg/espana/audi.html [hereinafter *Order of Spanish National Audience Regarding Argentine Dictatorship*].

General Augusto Pinochet, a former Chilean leader,[147] both of whom were alleged to have committed genocide. In these cases, which were later consolidated,[148] the main issue was whether Spain had jurisdiction over the crimes.[149] In reaching a decision on that point, the Spanish court defined "national group" as "a national human group, a distinct human group, characterized by something, integrated to a larger community."[150] The Spanish court described this approach as a "social understanding" of genocide;[151] the court adjusted the definition of "national group" to reflect the way society collectively experiences crimes involving widespread human rights violations against targeted groups.[152] Only this definition, the National Audience stated, reflected the global condemnation that predated and resulted in the Genocide Convention.[153] According to the Spanish court, a restricted definition would be illogical because it would not cover the targeted extermination of other groups, such as the elderly,[154] which would fly in the face of the Convention's purpose.[155]

These and other attempts to redefine the meaning of genocide[156] reveal significant dissatisfaction with the current definition; some experts believe that a broader definition would be truer to the purpose of the Convention and allow for the punishment of truly heinous

147 Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena [Order of the Criminal Chamber of the Spanish National Audience Affirming Spain's Jurisdiction To Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship], SAN, Nov. 5, 1998 (appeal No. 173/98, Criminal Investigation No. 1/98), *available at* http://www.derechos.org/nizkor/chile/juicio/audi.html [hereinafter *Order of Spanish National Audience Regarding Chilean Dictatorship*]; *see also* Robert C. Power, *Pinochet and the Uncertain Globalization of Criminal Law*, 39 GEO. WASH. INT'L L. REV. 89, 105–12 (2007) (reviewing criminal proceedings initiated against Pinochet); Madeleine Davis, *Introduction* to THE PINOCHET CASE, *supra* note 131, at 2–6 (describing events leading up to arrest of Chilean leader).

148 Richard J. Wilson, *Prosecuting Pinochet in Spain*, 6 HUM. RTS. BRIEF 3, 3 (1999).

149 María del Carmen Márquez Carrasco & Joaquín Alcaide Fernández, In re *Pinochet*, 93 AM. J. INT'L L. 690, 692 (1999).

150 SCHABAS, *supra* note 123, at 149 (citing *Order of Spanish National Audience Regarding Chilean Dictatorship*).

151 *Order of Spanish National Audience Regarding Argentine Dictatorship*.

152 *Id.*

153 *Id.* The National Audience found support for this interpretation in the first United Nations resolution targeting genocide, G.A. Res. 96 (I), ¶ 2, U.N. Doc. A/RES/96(I) (Dec. 11, 1946), which predated the Convention and was broad enough to protect political groups. *Order of Spanish National Audience Regarding Argentine Dictatorship*; Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927, 959 (1999).

154 *Order of Spanish National Audience Regarding Argentine Dictatorship*.

155 *Id.*

156 See *infra* note 209 for arguments that the current definition of genocide is unsatisfactory.

crimes that currently fall outside of the definition.[157] However, regardless of the commendable intentions that may have animated this broad interpretation, it contradicts the express limitation of genocide in international law.[158]

Because the Argentine court is directed by the Argentine Constitution to comply with the Genocide Convention,[159] one would expect the Argentine court to have limited its analysis to the Convention's drafting history and to generally accepted interpretations of its terms. But by adopting the Spanish court's jurisprudence, it strayed outside these parameters. The Spanish National Audience premised its interpretation in part on the Spanish Penal Code, which has a unique legislative history and departs in significant ways from the Genocide Convention's definition.[160] The Argentine court was not warranted in transposing such a radical standard into its application of international law. Even if the Argentine court decided to look beyond the Convention to *customary* international law,[161] reliance on the Spanish cases would still not be justified for the reasons stated above.

III
Lessons for National Courts Applying International Law

In asserting that the Dirty War constituted genocide, the Argentine court reached a controversial decision as to the nature of genocide. In this Part, I attempt to demonstrate how the court arrived at this conclusion. In Part III.A, I discuss how, in domestic truth-seeking processes, human rights groups are incentivized to use the criminal process to articulate their interests. In Part III.B, I argue that the idiosyncrasies of transitional justice processes make national courts particularly sympathetic to these claims.

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157 See *infra* note 209 for examples.

158 See *supra* notes 122–25 and accompanying text for this critique.

159 *See supra* notes 33–36 and accompanying text.

160 In 1973, the Spanish Penal Code prohibited the destruction of a "national ethnic, social or religious group," leaving out the comma between national and ethnic found in the Convention. Wilson, *supra* note 153, at 959. The court found that, in Spanish law, the word "social" "mediated" the term "national group"; thus "genocide had to be interpreted through a broader notion of 'social conception and understanding.'" *Id.* A 1983 amendment replaced "social" with "racial" in the Penal Code. *Id.* In 1995, the Code was amended again to conform to the Genocide Convention. *Order of Spanish National Audience Regarding Argentine Dictatorship*, SAN, Nov. 4, 1998 (appeal No. 84/98, Criminal Investigation No. 19/97), *available at* http://www.derechos.org/nizkor/arg/espana/audi.html.

161 *See supra* note 123.

A. Indicting the Past: Why Domestic Groups Advocate Through Criminal Processes

High-profile criminal trials provide an exceptional opportunity for domestic groups to pressure national courts to interpret the law in a specific way. The trials function as a space for commemoration and remembrance;[162] as such, their judgments have the power to promote a particular interpretation of an event. This lends additional moral, or social, authority to legal judgments that result from domestic truth-seeking processes. By narrating history, legal processes serve as the locale both for expressing the truth and remembering that truth.[163] Because domestic groups see criminal processes as part of the promotion of a particular vision of the past, shaping legal judgments can be a significant part of their work.

The symbolic meaning attached to criminal trials helps explain why much of the human rights community was determined to obtain an official declaration that the Dirty War was not merely a crime against humanity, but genocide. The struggle to appropriately describe and condemn the Dirty War has been a long one.[164] Although a full examination of this thesis is beyond the scope of this Note, I suggest that human rights groups were focused on this particular goal because genocide has a unique meaning. Scholars have noted the moral, philosophical, and legal differences between crimes against humanity and genocide,[165] describing genocide as "carry[ing]

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[162] *See, e.g.*, OSIEL, *supra* note 5, at 67 ("A criminal trial is a congenial public opportunity for collective mourning of the victims of administrative massacre."); Austin Sarat & Thomas R. Kearns, *Introduction* to HISTORY, MEMORY, AND THE LAW 1, 13 (Austin Sarat & Thomas R. Kearns eds., 1999) ("Law memorializes not just in its archival activities, but in acts that give particular meanings to our past. In every legal act there is an invitation to remember; in the testimony of the witnesses at a trial, in the instructions a judge gives to a jury . . . ."); *see also supra* notes 37–46 and accompanying text (describing role of transitional justice in effectuating reconciliation with past).

[163] Drumbl, *supra* note 23, at 593 ("In addition to expressing the importance of law, legal process also may narrate history and thereby express shared understandings of the provenance, nature, and effects of mass violence.").

[164] The challenges of properly memorializing the Dirty War also haunted earlier judicial efforts. During the first junta trial, lead prosecutor Julio Strassera stated that the "horrifying number of victims resulted from what we may call the greatest act of genocide ever recorded in our country's brief history." RAMA ARGENTINA DE LA ASOCIACIÓN AMERICANA DE JURISTAS, ARGENTINA: JUICIO A LOS MILITARES [ARGENTINA: THE TRIAL OF THE MILITARY] 39 (1988) (translation by author). Strassera further commented that "[t]here exist no provisions in our law, that perfectly and precisely describe the form of criminality that shall be judged here." Osiel, *supra* note 5, at 122.

[165] *See generally* CAROLINE FOURNET, THE CRIME OF DESTRUCTION AND THE LAW OF GENOCIDE: THEIR IMPACT ON COLLECTIVE MEMORY 132 (2007) (arguing that genocide has special meaning and should not be conflated with crimes against humanity); SCHABAS, *supra* note 123, at 9 ("The crime of genocide belongs at the apex of the pyramid [of serious crimes]."); Wald, *supra* note 145 (reviewing unique nature of genocide).

the heaviest stigma in the popular and in the diplomatic world."[166] The human rights community favored this terminology because of its connotation as the most terrible of crimes[167] which stems from its origins in the Holocaust.[168]

Genocide—with its long and sordid history—could more accurately capture the magnitude and terror of the Dirty War. In fact, there has been a documented relationship between the techniques of the Holocaust and those of the Dirty War.[169] This close relationship between the two events, of which the human rights community was well aware, may have informed its desire to attach to the Dirty War the worst label in international law.

The language employed by the human rights organizations involved in the Argentine prosecutions supports the thesis that "genocide" held special meaning for the community. Advocates expressed hope that the court would issue convictions for genocide. One *querellante* lawyer from the human rights organization Justicia Ya! worried that government tactics were "dilut[ing] the magnitude of the crimes" and suggested that defendants feared a finding that "there was an organized criminal plan for genocide."[170] Another well-known

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166 Wald, *supra* note 145, at 629.

167 Genocide has been described as the "crime of crimes." Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment and Sentence, ¶ 451 (Dec. 6, 1999).

168 Lemkin, when he coined the term "genocide," was interested in capturing the atrocities he had witnessed during Hitler's regime. *See* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 40–45 (2002) (describing Lemkin's search for proper term).

169 Anti-Semitism played a significant role in the machinations of torture and kidnapping during the Dirty War. *See* ANDERSEN, *supra* note 61, at 253 ("Posters of Hitler, swastikas, Nazi tape recordings and flags, and ritual debasement of Jewish prisoners were found throughout the state security system."). The detention and torture of prominent Jewish individuals was prevalent. For example, Jacobo Timerman, a famous editor of a left-leaning newspaper, was savagely tortured because he was Jewish. Victoria Ginzberg, *"No llegó al centro clandestino por casualidad, sabía qué pasaba,"* [*"His Arrival at the Detention Center Was Not a Coincidence, He Knew What Happened There"*], PÁGINA 12 (Arg.), Jul. 11, 2007, *available at* http://www.pagina12.com.ar/diario/elpais/1-87914-2007-07-11.html. The Dirty War also mimicked many of the techniques of Hitler's regime. *See, e.g.*, Daniel Feierstein, *Political Violence in Argentina and Its Genocidal Characteristics*, 8 J. GENOCIDE RES. 149, 151 (2006) ("The perpetrators did not refrain from applying any of the mechanisms of destruction . . . from previous genocides or repressive experiences. The concentration camps in Argentina were a compendium of the worst aspects of the concentration camps of Nazism, of the French camps in Algeria . . . ."). One survivor remembers that "one of the military personnel who called himself the 'Great Führer' made the prisoners shout 'Heil Hitler!'" NUNCA MÁS, *supra* note 61, at 68. An interesting argument that unfortunately cannot be fully explored here is whether the Argentine court could have issued convictions for genocide for the detention, kidnapping, torture, and homicide of those individuals who were Jewish, a group long-protected by the Convention.

170 Marcela Valente, *Argentina: Court Hears Case on Dictatorship's Torture Center*, INTER PRESS SERVICE, Oct. 18, 2007, *available at* http://ipsnews.net/news.asp?idnews=39714.

querellante lawyer described the decisions approvingly, declaring that these trials, for the first time, recognized genocide and gave society an opportunity to hear victims' voices.[171]

Human rights actors wanted a particular indictment of the past, one that used the most severe terminology available. In transitional justice contexts, domestic groups have a significant incentive to rely on international law, rather than national law, to meet their goals. Utilizing international law carries particular meaning for domestic groups seeking reconciliation. International standards, particularly those embodied in criminal prohibitions, may come to symbolize objective criteria of what is morally (and legally) acceptable, since international law is largely formed through explicit or implicit global consensus.[172] For human rights organizations, a judgment that international prohibitions have been violated can thus constitute moral condemnation above and beyond any that might emerge from municipal law. This is especially true for societies with a recent history of repressive use of the legal system, where there is substantial mistrust and skepticism about legal and governmental institutions. In these situations, rights groups may be even more determined to invoke what they view as objective, universal, and standardized provisions of international criminal law.

International law thus becomes an arbiter[173] not only of the law but also of history. National courts resolve ongoing tensions between different versions of the past by assigning an objective meaning containing normative criteria to a particular memory. Their legal judgments are thus also pronouncements about history, because the decisions fill in the gaps in the historical record or provide a different record altogether. In this way, courts are actively engaged in the construction of a historical "truth." However, the truth-seeking function and moral authority serves a third role by mediating the identities of individual victims. The same act of filling in the national historical record enables courts to shape individual identities by filling in the gaps in their *personal* narrative. What happened, when, where, and by whom are questions that can be answered through the criminal trial. As a result, survivors and victims' families thus have a clearer understanding of their experiences. Moreover, courts also legitimize

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171 Adriana Meyer, *Un reclamo de justicia que sigue en pie* [*Demands for Justice Continue Apace*], PÁGINA 12 (Arg.), Sept. 19, 2008, *available at* http://www.pagina12.com.ar/diario/elpais/1-111868-2008-09-19.html.

172 See *infra* notes 194–200 for a discussion of how customary international law is created.

173 I thank Professor Eyal Benvenisti for suggesting this term.

the experiences of individuals by identifying which abuses of the law took place and giving form and name to these violations.

The inclusion of victims and human rights organizations in criminal trials shapes the goals and results of the domestic truth-seeking process. There is no question that victims must be involved in the deliberative process through which criminal accountability is imposed.[174] After all, "if a tribunal is to be *for* the victims, it also needs, at least in part, to be *by* them."[175] In this way the state can acknowledge their membership in a society that for years denied their claims.[176] Involving victims in the legal process symbolizes the new regime's commitment to the rule of law. It affects not only the question of an individual's or a regime's guilt or innocence, but also the larger function of the trial in engendering national reconciliation. Human rights organizations are in a strong position to influence legal processes precisely because their participation, as representatives of the victims, is necessary for the legitimacy of the project.

B. Understanding the Responses of National Courts

As we have seen, scholars have advanced the theory that the domestic application of international law must be culturally relevant.[177] In this view, international law is not necessarily preconstituted:[178] It may have nuanced and flexible interpretations that

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[174] As discussed in Part I, to be legitimate, reconciliatory institutions should include the participation of local communities. *See supra* notes 44–46. The notion that victims should be included in criminal trials has also been advanced on the grounds that it is cathartic. *See* Neil J. Kritz, *The Dilemmas of Transitional Justice*, *in* Kritz, 1 TRANSITIONAL JUSTICE, *supra* note 37, at xxvii (suggesting criminal prosecution can achieve sense of justice and catharsis). The public act of testifying may enable victims to "recount the events of their victimization in the context of acknowledgment and support," and individual accountability also promotes reconciliation. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 593, 598 (2002); *see also* Theo Van Boven et al., *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Summary and Conclusions*, *in* Kritz, 1 TRANSITIONAL JUSTICE, *supra* note 37, at 502–03 ("[T]he revelation of the truth is a useful means to remove the stigma from the victims who are burdened by a sense of responsibility for their own victimization both subjectively and objectively.").

[175] Donald L. Hafner & Elizabeth B.L. King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions, and Other Tools for Accountability Can and Should Work Together*, 30 B.C. INT'L & COMP. L. REV. 91, 94 (2007).

[176] *See id.* at 93–94 ("For a tribunal to serve a community scorched by atrocity, that community and its victims must be consulted . . . . The importance of asking victims cannot be stressed enough.").

[177] *See supra* notes 14–23 and accompanying text (describing comparative law approach).

[178] *See supra* notes 14–17 and accompanying text.

depend on local factors.[179] However, this theory is incomplete: It does not consider how domestic groups may shape this process of interpretation. This Note has shown that in the transitional justice context, human rights groups are well positioned to mold local interpretation of international law. However, I suggest that the dynamics of the domestic truth-seeking process also exaggerate how national courts respond to this pressure. Because criminal trials have such reconciliatory power, national courts have a strong motivation to accommodate local interests and claims.

The constitutive power of domestic truth-seeking processes is not lost on the national courts. The *Etchecolatz* and *Von Wernich* judgments illustrate how this pressure can shape the decisions of national courts. In Argentina, the advocacy of domestic groups heightened the court's awareness of the importance of its judicial pronouncements for national reconciliation and individual catharsis. The court in turn actively embraced its part in the construction of collective memory and expressly acknowledged the "debt" it owed to victims. In doing so, it accepted a monumental role that went far beyond merely determining guilt.

The court's engagement with its role in the national reconciliatory process was explicit. In both judgments, the court referred to Michel Foucault's discussion of law as the "producer of truth,"[180] showing that, in their view, legal processes are a major part of the construction of collective memory ("recognizing a 'truth'"). The concept of "law as the producer of truth," the court stated in *Von Wernich*, is "[p]articularly [important] in societies such as ours that have endured the genocide that gave rise to this trial."[181] By describing the Dirty War as genocide, the court knew that it would shape how Argentina remembered that period in history. The court understood that legal processes, by narrating history, serve as a locale for both expressing and remembering a truth. One scholar posits that, by meeting the intersection between history and memory, trials that confront extraordinary crimes serve a broader didactic purpose.[182] This is because, as the Argentine court explained, legal decisions have

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[179] *See supra* notes 14–23 and accompanying text.

[180] Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/2007, "Von Wernich, Christian" (Arg.), 168, *available at* http://www.apdhlaplata.org.ar/Fundamentos%20VW%20chico.pdf (translation by author); Tribunal Oral en lo Criminal Federal Nº 1 de La Plata [Trib. Oral Crim. Fed.], 11/9/2006, "Etchecolatz, Miguel Osvaldo" (Arg.), 253–54, *available at* http://apdhlaplata.wordpress.com/2006/09/18/sentencia-etchecolatz/ (follow "la sentencia" hyperlink) (translation by author).

[181] *Von Wernich*, Trib. Oral Crim. Fed., at 168–69 (translation by author).

[182] LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 260 (2001).

constructive power.[183] While this "truth" is necessarily selective and possibly biased, it serves to define "individual and collective (or cultural) identities in the present."[184] Thus, the court's judicial conclusions about criminal responsibility identify and declare a particular version of the past, which is in turn publicized to the nation. The legitimacy of the court's criminal convictions ultimately enhances the authority of the narrative it uses to describe the Dirty War.

During the *Etchecolatz* and *Von Wernich* trials, the court treated the victims of the Dirty War as if they were its constituency. The court hinted at this when it explained that it was satisfying an "ethical and judicial obligation to recognize that genocide occurred in Argentina."[185] It further stated that the witnesses' requests for the "simple acknowledgement of a truth" was critical "for the construction of collective memory."[186] By accusing the regime of the most heinous crime possible, the Argentine court tried to fulfill the obligation it believed that it "owed" to victims.

These two functions—obligation to victims and production of the truth—inform each other. The Federal Oral Criminal Tribunal No. 1 for La Plata explained that its decision will "allow the continued construction of the memories of the various generations of victims who suffered indirectly and directly from what happened and from the many years of impunity that followed it."[187] Interestingly, the court framed its decision to describe the Dirty War as genocide as a "duty" to "call by their rightful name phenomena, which even considering contextual differences and that they occurred in different spaces and epochs, have similarities that must be recognized."[188] Thus, while the court in fact actively created a particular narrative, it appeared to see itself as merely recognizing and publicizing a narrative that already existed.

The court's vision of its role makes sense only because its victim-oriented focus transcended a public/private division. That is, the trials constituted both a private acknowledgement of wrongs and a public forum for evaluating the Dirty War. For some witnesses, these trials were the first time they had testified or the only opportunity they had

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183 *Von Wernich*, Trib. Oral Crim. Fed., at 169; *Etchecolatz*, Trib. Oral Crim. Fed., at 254.

184 MARK R. AMSTUTZ, THE HEALING OF NATIONS: THE PROMISE AND LIMITS OF POLITICAL FORGIVENESS 44 (2005).

185 *Von Wernich*, Trib. Oral Crim. Fed., at 168 (translation by author); *Etchecolatz*, Trib. Oral Crim. Fed., at 253 (translation by author).

186 *Etchecolatz*, Trib. Oral Crim. Fed., at 254 (translation by author).

187 *Von Wernich*, Trib. Oral Crim. Fed., at 169 (translation by author); *Etchecolatz*, Trib. Oral Crim. Fed., at 254 (translation by author).

188 *Von Wernich*, Trib. Oral Crim. Fed., at 173 (translation by author); *Etchecolatz*, Trib. Oral Crim. Fed., at 269 (translation by author).

to confront their repressors. Their testimony was an intensely private moment—a time to remember and to accuse. At the same time, their testimony was part of a larger national narrative and effort at historical reconstruction. Behind the victims sat a row of women from the Madres de la Plaza de Mayo wearing their traditional white handkerchiefs, lending their support for this search for justice. Austin Sarat and Thomas Kearn capture this private/public dynamic masterfully, explaining that there are "two audiences for every legal act, the audience of the present and the audience of the future."[189]

What this case study shows is that the particular demands of transitional justice—awareness of the interests of the human rights and victims' communities, the need to promote reconciliation, the desire for one particular vision of the past—heavily influence how courts react to domestic groups. National courts may feel an abstract, theoretical imperative to memorialize the past. There is a strong sense that the power and potential of legal pronouncements is unparalleled. This more abstract motivation is personalized by a sense of obligation to individual victims and the groups that represent them. These criminal trials provide a forum for private redressing of a wrong but are also the loci of public acknowledgment of this same wrong.

Given these dynamics, it is no surprise that domestic truth-seeking processes create a space where courts and citizens interact. After all, the administration of justice cannot serve the needs of an affected population if it cannot be understood locally.[190] While it is true that "only institutional mechanisms that are tailored to the specific attributes of the local society at the time of transition can hope to deal with the problems that characterized the society's dysfunction,"[191] this theory fails to consider the impact of these pressures on the court's jurisprudence. National courts must be cautious when they are part of a broader project of national reconciliation; excessive allegiance to the claims of particular interest groups may distort their legal judgments.

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189 Sarat & Kearns, *supra* note 162, at 12.

190 *Cf.* Crocker, *supra* note 52, at 47 ("To fashion and evaluate any particular tool to reckon with past evil . . . requires . . . knowledge of that society's historical legacies and current capabilities . . . ."). *See generally* Daly, *supra* note 45 (arguing that institutions administering transitional justice must resonate with local communities).

191 Daly, *supra* note 45, at 78.

IV
Potential for the Fragmentation of International Law

If discordant interpretations of international law emerge from national truth-seeking moments, there may be significant implications for international law. In this Section, I explain how national court decisions can affect international law and point out a few potential normative implications.

The Argentine cases contain a troubling and discordant definition of genocide that has the potential to undermine the integrity of current genocide jurisprudence.[192] Yet the judgments betray a certain discomfort with their outcomes. Ultimately, neither Etchecolatz nor Von Wernich was actually charged with or convicted of genocide, and the court merely used the label as a description of the Dirty War.[193] Seen from one perspective, this is a brilliant compromise: The court was able to satisfy the victims' desire that the genocide label be used while stopping short of convicting defendants for violating the Convention. This distinction between holding and dictum, however, is artificial; it ignores the complex interplay between national courts and international law. The fact that criminal liability for genocide was not imposed does not eliminate the potential consequences of using the genocide label.

National court decisions inform international law in a number of ways.[194] An important source of international law is international customary law,[195] which involves the combination of two elements: state practice and *opinio juris*. State practice emerges from a pattern of state action that meets certain requirements of duration, uniformity,

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[192] *See supra* Part II.B.3.

[193] While the text of the decision did not explain why the discussion of genocide was only in dicta, it is possible that the court realized it would be unable to satisfy the other elements of genocide, for example, intent, and therefore could not hold Etchecolatz and Von Wernich responsible for the crime. For a brief review of the material and subjective elements of genocide, see Cryer et al., *supra* note 124, at 174–85. *See also supra* notes 122–25, 132–39, 142–44 and accompanying text.

[194] *See generally* Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 N.C. J. Int'l L. & Com. Reg. 259 (2006) (examining "the role of national courts in both 'norm creation' and 'norm interpretation'" vis-à-vis customary international law); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191 (2003) (documenting, in part, "constitutional cross-fertilization"); Waters, *supra* note 8 (focusing on domestic courts as "norm internalizers" and "norm creators").

[195] Malcolm N. Shaw, International Law 73 (6th ed. 2008) (describing different scholarly opinions on role of custom and ultimately noting that custom "[i]n international law . . . is a dynamic source of law in the light of the nature of the international system and its lack of centralised government organs").

consistency, and generality.[196] *Opinio juris* reflects the "state of mind" of the state and is often described as a "psychological element."[197] *Opinio juris* is the belief by the state that it took a certain action because it was motivated by a sense of legal obligation.[198] It is typically "deduced from the State's pronouncements and actions," although the question of proof is a complicated one.[199] With few exceptions, international customary law binds all states, whether or not they participated in its creation.[200]

For the purposes of identifying customary international law, state practice can consist of executive decisions, diplomatic correspondence, state legislation, or manuals of military law.[201] National court decisions are also critical indicators of state practice.[202] These deci-

196 *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7–8 (6th ed. 2003) (explaining these requirements).

197 *See, e.g.*, BROWNLIE, *supra* note 196, at 8 ("Some writers do not consider this psychological element to be a requirement for the formation of custom, but it is in fact a necessary ingredient."); SHAW, *supra* note 195, at 75 ("This is the psychological factor, the belief by a state that behaved in a certain way that it was under a legal obligation to act that way."); Hugh Thirlway, *The Sources of International Law*, *in* INTERNATIONAL LAW 117, 125–26 (Malcolm D. Evans ed., 2003) ("It also follows from the psychological requirement of *opinio juris*, the consciousness of conforming to a rule, that if the acts of practice are to be attributed to a motive other than such consciousness, they can not show *opinio juris*.").

198 *See, e.g.*, BROWNLIE, *supra* note 196, at 8 ("The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage."); SHAW, *supra* note 195, at 75 ("The issue therefore is how to distinguish behavior undertaken because of a law from behavior undertaken because of a whole series of other reasons ranging from goodwill to pique, and from ideological support to political bribery.").

199 Thirlway, *supra* note 197, at 126. The difficulty, as Brownlie points out, lies in identifying the evidence that states are motivated by their legal obligations, rather than by a different motive. BROWNLIE, *supra* note 196, at 8. The International Court of Justice, Brownlie notes, has adopted two approaches to the question of proof. *Id.* at 8–9. The first approach is rather lax—the court will "assume the existence of an *opinio juris* on the bases of evidence of a general practice, or a consensus in the literature, or the previous determinations of the [c]ourt or other international tribunals." *Id.* at 8. In other instances, the court has been far stricter and demanded "positive evidence of the recognition of the validity of the rules in question." *Id.* at 8–9.

200 Thirlway, *supra* note 197, at 124.

201 BROWNLIE, *supra* note 196, at 6.

202 *See, e.g.*, *id.* at 52 ("Judicial decisions in the municipal sphere and acts of legislation provide prima facie evidence of the attitudes of states on points of international law and very often constitute the only available evidence of the practice of states."); Moremen, *supra* note 194, at 261 ("National court decisions almost certainly count as state practice. The creation of state practice through national court decisions can be seen as a way for national courts to play a role in what has been called a transnational judicial dialogue between courts."); *cf.* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 248 (2008) ("[T]he more the national courts engage in applying international law, the more their jurisprudence constrains the choices available to the international courts when the latter deal with similar issues.").

sions constitute the actions of the state in an official legal forum in which particular legal obligations exist. As a result, the "decisions of domestic courts involving international questions directly contribute to the form[ation] of international rules by the process of custom."[203]

National court decisions affect international law in two other ways as well. Article 38 of the Statute of the International Court of Justice, widely seen as summarizing the main sources of international law,[204] provides that the court shall apply, among other sources, "the general principles of law recognized by civilized nations," and, as a "subsidiary means for the determination of the rules of law," the "judicial decisions and the teachings of the most highly qualified publicists of the various nations."[205] National court decisions can fall into both these categories. They clearly constitute "judicial decisions"[206] but they can also be evidence of "general principles of law"[207] within the meaning of Article 38.

Because national court decisions will shape international law, the normative implications of the Argentine decisions are significant. Even though the court did not impose criminal liability for genocide, the judgments interpret a critical term in international criminal law. If

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[203] Moremen, *supra* note 194, at 289 (quoting Anthony D'Amato, *What 'Counts' as Law?*, *in* LAW-MAKING IN THE GLOBAL COMMUNITY 83, 102 (Nicholas Greenwood Onuf ed., 1982).

[204] *See, e.g.*, MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 27 (3d ed. 2006) (describing Article 38 as "[a]n ordinary starting point for international lawyers from most any part of the globe when thinking about the formal sources of international law"); WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 195 (3d ed. 2007) (noting that Article 38 defines "three primary sources of international law: international treaties; international custom; and general principles of law recognized by civilised nations"); Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 74 (2007) ("Discussion of the sources of international law often starts with Article 38(1) of the Statute of the International Court of Justice . . . ."); Beth Van Schaack, Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 158 (2008) (noting that in identifying possible criminal defenses, "jurists often make use of the multiplicity of sources of international law set forth in Article 38 of the Statute of the International Court of Justice").

[205] Statute of the International Court of Justice art. 38(1)(c)–(d), June 26, 1945, 59 Stat. 1055.

[206] Thirlway, *supra* note 197, at 133 ("The scope of Article 38(1)(d) . . . include[s] the decisions of municipal courts also."). Thirlway explains that municipal court decisions can "contain a useful statement of international law on a particular point (thus constituting a material source)" and can also constitute state practice. *Id.* He also describes how the ICJ relied on decisions by British and French courts in the *Arrest Warrant* case to determine a question of international criminal law, and suggests that "[t]he statements of international law in those decisions could have been regarded as 'subsidiary means' for the determination of the customary law" but were instead used as evidence of state practice. *Id.* (citing Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 23–24 (Feb. 14)).

[207] Moremen, *supra* note 194, at 267.

these cases constitute state practice or *opinio juris* then the expanded definition of genocide proposed by the court could start to shift the narrow definition of the crime that has dominated international law. Such a shift conflicts with the clear intent of the drafters of the Convention[208] and makes the contours of the crime of genocide unknowable and unpredictable.

The debate over whether the definition of genocide should be expanded is an important one.[209] The fact that the prohibition against genocide does not cover some forms of systematic state repression and killing is problematic and the desire of national courts to respond to these limitations is understandable. However, the purpose of this Note is not to take sides in that debate, but rather to illustrate how inconsistent interpretations by courts can contribute to the further fragmentation of international law.[210] The integrity of the international legal system is uncertain when national courts adopt differing

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[208] *See supra* notes 123–26 (discussing drafting history of Convention).

[209] A significant number of scholars have criticized the limited definition of genocide. *See, e.g.*, PIETER N. DROST, 2 THE CRIME OF STATE: GENOCIDE 123 (1959) ("By leaving political and other groups beyond the purported protection the authors of the Convention also left a wide and dangerous loophole for any Government to escape the human duties under the Convention . . . ."); M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 199, 212 (1998) (attributing omission of social and political groups from Genocide Convention to desires of Joseph Stalin and lamenting that, consequently, killings by Khmer Rouge are not covered); Frank Chalk & Kurt Jonassohn, THE HISTORY AND SOCIOLOGY OF GENOCIDE 11 ("[T]he wording of the convention is so restrictive that not one of the genocidal killings committed since its adoption is covered by it."); Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millenium*, 23 HOUS. J. INT'L L. 467, 524 (2001) ("The Convention also remains inadequate in coverage. For instance, political and economic groups were omitted based on their fragility and fluidity. The omission of cultural genocide is significant to the extent that the eradication of groups deprives the human family of an element of aesthetic expression."); Lori Lyman Bruun, Note, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 MD. J. INT'L L. & TRADE 193, 206–07 (1993) (describing failure of Genocide Convention to include political group as "weakness" and "compromise").

At least a few have suggested than an expanded understanding of genocide would be preferable. *See, e.g.*, THOMAS W. SIMON, THE LAWS OF GENOCIDE 95–102 (2007) (rejecting current reliance on exhaustive list of protected groups and proposing flexible definition of genocide that depends on how perpetrator defines group, harm experience by group, and vulnerability of group); Chalk & Jonassohn, *supra*, at 23 (proposing that genocide is "a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator"); David Lisson, Note, *Defining "National Group" in the Genocide Convention: A Case Study of Timore-Leste*, 60 STAN. L. REV. 1459, 1471–75 (2008) (proposing alternative conception of "national group" that would focus on whether group possesses right of self-determination); Van Schaack, *supra* note 123, at 2280–90 (arguing that "political groups" are protected by *jus cogens* definition of genocide).

[210] Regardless of the outcome of the debate, the Argentine and Spanish definition of genocide is still problematic because it expands beyond the inclusion of new protected

interpretations of the law. Allowing national actors to define international law can be risky.[211] If national courts were to begin issuing differing interpretations of substantive rules of international law, this could lead to inconsistent application of that law across different states. As a result, the international criminal law regime would not be a uniform one;[212] actions that would lead to criminal liability under a treaty in one state would not lead to the same result in another state. These variations could eventually be reflected in the international legal system through the mechanisms of state practice and o*pinio juris*, which could allow international tribunals and national courts to pick among different interpretations of substantive law. This problem has already been noted elsewhere in reference to international and regional tribunals that issue contradictory interpretations of the law;[213] in those cases, "[e]ven a slight variation in the substantive rules of international criminal law could prove extremely damaging" because it would lead to international crimes having "distinct regional definitions."[214]

Fragmentation is particularly problematic in the criminal context. Legal judgments warn potential perpetrators about the criminal pen-

groups (such as political groups) to cover victims defined by any shared characteristic. See *supra* note 131 for similar critiques by other scholars.

211 On the other hand, an increased role for national actors in the international sphere may be valuable in some areas of international law. *See generally* Benvenisti, *supra* note 202, at 241 (arguing that national courts "bolster[ ] domestic democratic processes and reclaim[ ] national sovereignty from the diverse forces of globalization" by invoking international law).

212 The British House of Lords recently noted this problem, stating that "international treaties should, so far as possible, be construed uniformly by the national courts of all states." Benvenisti, *supra* note 202, at 250 (citing Regina v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 244 (H.L. 1999)). This is because "[i]t is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states." *Id.* (quoting Jones v. Ministry of Interior (Saudi Arabia) [2006] UKHL 26, [2007] 1 A.C. 270, 298 (appeal taken from Eng.)).

213 *See, e.g.*, Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 272 (2001) ("A major risk, and one that is frequently noted by commentators, is that the jurisprudence of the different international tribunals can erode the unity of international law, lead to the development of conflicting or mutually exclusive legal doctrines, and thus eventually threaten the universality of international law."); William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 756–57 (2003) (describing dangers that would result from regional variations in how international crimes are defined); J.I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 101, 134 (1998) ("To the extent that international tribunals announce different views on the rules of general international law, the legitimacy of those rules in this fragile community may be placed at risk.").

214 Burke-White, *supra* note 213, at 756.

alties that might attach to their wrongful acts.[215] Enforcement of the law will become arbitrary if there is no uniform definition of a crime. Defendants have insufficient notice of which actions will trigger criminal responsibility if their actions have different legal consequences in different jurisdictions. Ensuring that individuals have notice of what behavior is illegal is a fundamental principle of criminal law because ex ante notice of the law is a critical element of due process.[216]

Thus, the danger is that courts will be selective about the areas of international criminal law they choose to follow and those they choose to modify. This would give national courts more leeway in domestic truth-seeking processes, where they already interpret international law with an eye to their other objectives. As observed above, in the transitional justice context, there is a heightened sensibility to the demands of nonstate actors. Courts may feel so pressured by victims and human rights organizations that they may surrender rigorous obedience to international law in favor of satisfying the demands for national reconciliation. A fair reading of the law is taxed if the court prioritizes extrajudicial obligations to domestic groups over fidelity to international precedent. When the narrative of a court conflicts with the parameters of the law, the authority of that court suffers.

Moreover, the characteristics that draw domestic groups to international criminal law—namely its universality and moral condemnation—are undermined by conflicting interpretation and enforcement.[217] When the same crime gives rise to differing levels of condemnation—for example, when a national court in one state interprets international law as prohibiting behavior that in another state has different criminal repercussions—the significance attached to that crime is eviscerated. The symbolic value of a crime like genocide is diluted if it does not have the same meaning across all cultures and

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215 Van Schaack, *supra* note 204, at 169.

216 The principle of *nullum crimen sine lege*, *nulla poena sine lege* (no crime without law, no punishment without law), which protects defendants from retroactive punishment and requires notice of the law, is an essential part of the criminal law system. CRYER ET AL., *supra* note 124, at 13; RATNER & ABRAMS, *supra* note 25, at 21–24; Van Schaack, *supra* note 204, at 121. The principle is part of our notion of due process and human rights. The Statute of the International Criminal Court, for example, provides that no person shall be punished ex post for an act that did not constitute a crime at the time of its commission. Rome Statute of the International Criminal Court art. 22, July 17, 1998, 2187 U.N.T.S. 90. Article 15 of the International Covenant on Civil and Political Rights similarly ensures that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." International Covenant on Civil and Political Rights art. 15, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

217 This problem was identified by William W. Burke-White with regard to regional variation among criminal tribunals. Burke-White, *supra* note 213, at 756.

states. The paradox is that, when domestic courts rely on international law to produce a memory that victims clamor for, they risk undermining the meaning of that judgment.

The international legal system is inherently state-centric and nonstate actors have traditionally played a very limited role in international law.[218] If courts become vehicles for the interests of domestic groups, rather than arbiters of the law, fragmentation of international law is increasingly likely. If national courts and domestic actors continue to invoke international law to lend authority to domestic truth-seeking processes, we may be witnessing the beginning of a fundamental shift in the role of international law in domestic legal systems. The challenge will be to ensure that the national application of international law considers the possible impact of creating normative shifts in the meaning of established international doctrine.

CONCLUSION

To the extent that the new trials in Argentina have mitigated the effects of decades of immunity and denial, they have been immeasurably successful. The convictions of Miguel Etchecolatz and Christian Von Wernich have engendered a new era of criminal responsibility and have opened the floodgates for future prosecutions: As of June 2008, approximately 243 criminal proceedings for state terrorism had been initiated throughout the country.[219] Decades of advocacy by the human rights movement have been instrumental in securing these successes. Survivors and families of victims are now able to assert their claims and tell their stories before domestic tribunals. Viewed in this light, the Argentine court's decision to invoke the terminology of genocide to capture the horrors of the Dirty War is laudable. Courts

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[218] *See* SHAW, *supra* note 195, at 45 ("International law reflects first and foremost the basic state-oriented character of world politics and this essentially because the state became over time the primary repository of the organised hopes of peoples, whether for protection or for more expansive aims."); ANNA-KARIN LINDBLOM, NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW 54 (2005) ("The general model of international law as a system of rules between sovereign states has basically kept its grip since [the Peace Treaty of Westphalia], even if alternative views have become more common as international law and politics in fact involved more and more actors."). The focus on states has started to change, though, as nonstate actors have begun creating a greater role for themselves in the international legal system. *See generally* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (outlining development of transnational activist networks and their efforts to change behavior of states and international organizations).

[219] Centro de Estudios Legales y Sociales, CELSJuicios, *Crímenes del Terrorismo de Estado: Weblogs de las Causas* [*Crimes of State Terrorism: Blogs of the Judicial Proceedings*], http://www.cels.org.ar/wpblogs/ingles (last visited Jan. 17, 2009) (blog reporting on judicial investigations and trials underway for crimes against humanity in Argentina).

need, after all, to be sensitive to the local community in order to advance the goals of transitional justice.

However, the transitional justice context may encourage courts to go too far toward accommodating community interests. Given the reconciliatory potential of postconflict adjudication, courts will naturally feel pressured to accommodate the interests and goals of local communities. As a result, nonstate actors may be able to exercise undue influence over the legal process and inadvertently water down established norms. Because national courts have a duty to interpret and apply international law consistently, they must resist this pressure to mete out punishment and be cautious when using important legal terms. Ultimately, the challenge is for national courts to strike a proper balance between their duty to protect the integrity of international law on the one hand and the needs of victims of large-scale human rights violations on the other.