EXILE AND ELECTION: THE CASE FOR BARRING EXILED LEADERS FROM CONTESTING IN NATIONAL ELECTIONS

INTRODUCTION

During the twentieth century, the world witnessed a series of regime changes. Dictatorships, military coups, and fascist governments were rejected in favor of democratic values and principles.[1] This change in governance seems to have continued into the twenty-first century, albeit with some major challenges in the implementation of a democratic system in States.[2] One of the more alarming trends has been exiled leaders returning to their State to contest national elections despite facing serious criminal charges. This causes the developing democratic State's legitimacy of governance, free and fair elections, accountability, and transparency to be threatened. Fragile States struggling to implement democracy cannot do so without a stable elections system. The ability of exiled leaders to participate in elections when they have not been held accountable for serious offenses would greatly undermine the establishment of this system. To prevent this harm, international and domestic laws must begin to play a stronger role in addressing this problem.

Pakistan is a State which highlights this troubling trend. In 2013, a Pakistani court indicted former President Pervez Musharraf (hereinafter Musharraf) for his alleged involvement in the 2007 assassination of former Prime Minister Benazir Bhutto (hereinafter Bhutto).[3] The charges against Musharraf included murder and conspiracy to murder.[4] Both political leaders shared a commonality: exile.[5] Bhutto went into self-imposed[6] exile

1. DEMOCRACY ASSISTANCE: INTERNATIONAL CO-OPERATION FOR DEMOCRATIZATION 3 (Peter Burnell ed.) (2000) ("The 1990s witnessed a dramatic increase in interest among western liberal democracies and international organizations in promoting democracy, human rights and good governance as the global gold standards for states.").

2. For purposes of this Note, "State" means country. Matt Rosenberg, *Country, State, and Nation*, ABOUT.COM (June 10, 2015), http://geography.about.com/cs/politicalgeog/a/statenation.htm. (last visited Feb. 2, 2016). ("A country is a self-governing political entity. The term country can be used interchangeably with State.").

3. Salman Masood and Declan Walsh, *Pakistani Court Indicts Musharraf in 2007 Assassination of Bhutto*, N.Y. TIMES (Aug. 20, 2013), http://nyti.ms/19uSzoy.

4. *Id.*

5. *Exile*, NEW WORLD ENCYCLOPEDIA (Oct. 11, 2013), http://www.newworldencyclopedia.org/p/index.php?title=Exile. ("Exile is a form of punishment in which one has to leave one's home (whether that be on the level of city, region, or nation-state) while either being explicitly refused permission and/or being threatened by prison or death upon return. It is common to distinguish

in Britain and Dubai in 1999 following a number of corruption charges.[7] Musharraf left for London and Dubai in self-imposed exile in 2008[8] after unlawfully suspending the country's constitution and instituting emergency rule in 2007.[9] Though Bhutto and Musharraf are not the first political leaders to exercise exile,[10] their cases are distinct from most exiled leaders because despite pending criminal charges against them, both returned to Pakistan in order to contest the national election.

Exiled leaders who have been charged with criminal offenses should be barred from standing in national elections until such charges are resolved through an adjudicative process relying on a combination of international and domestic laws. The policy rationale behind this proposition is two-fold. First, it encourages the development of a stable democracy. Second, it serves as an incentive for current political leaders in developing countries to comply with domestic laws and international norms.

This Note will explore the policies supporting a restriction on leaders, such as Musharraf and Bhutto, from participating in national elections until their criminal charges have been resolved. It will first present a brief historical gloss on exile and its formal use by world leaders. Next, in order to demonstrate the significance of utilizing both international and domestic laws, international electoral standards and Pakistan's electoral standards will be assessed. In addition, the implications of this trend will be discussed by contrasting the exile of three highly controversial political leaders with cases in present-day Pakistan. Finally, the role of domestic and international laws, courts, and host States will be examined in relation to this proposition.

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between internal exile, forced resettlement within the country of residence, and external exile, deportation outside the country of residence.")

6. *Id.* Self-imposed exile is usually viewed as a form of protest, or the individual's avoidance of persecution or prosecution for criminal activity.

7. *Benazir Bhutto*: *Women's History*, HISTORY.COM, http://www.history.com/topics/womens-history/benazir-bhutto (last visited Oct. 2, 2015).

8. *Pakistan's Musharraf Charged in Treason Case*, BBC NEWS (Mar. 31, 2014), http://www.bbc.com/news/world-asia-26815518.

9. *Id.*

10. *See infra* note 85.

I. BACKGROUND

A. The Practice of Exile

The concept of deposed leaders finding a safe haven dates back to ancient times.[11] Peisistratus, a Greek tyrant, was overthrown "from office in Athens and exiled to northern Greece,"[12] and "Scottish monarchs in the Middle Ages were often exiled to France . . . ."[13] This exile may be voluntary or involuntary and may even be to a place within the country.[14]

In the past, it was common practice for deposed leaders to flee to a country willing to take them, usually following a prior arrangement to end civil unrest.[15] Professor David Anderson of the African Studies Centre at the University of Oxford claims that where a leader chooses to be exiled is often governed by personal relationships or past favors.[16] For the host country it is a "benign gesture because these deposed leaders must no longer lead an active political life."[17] Promising a deposed leader a safe haven can bring peace after a civil war; this promise, however can later be rescinded.[18] Professor Anderson believes that for deposed leaders "[t]here's a sword of Damocles hanging over [them] . . . . If they break the terms of their guaranteed impunity, then they are in rough waters in terms of the politics around them and not allowed to stay."[19] There are of course risks for the host country as well. The host country could be seen as complicit in any crime(s) the deposed leader is accused of committing,[20] and the long arm of the law may permit allegations of corruption and abuse to end up in the host country.[21]

The number of countries that may accept a deposed leader has been narrowed by the International Criminal Court (hereinafter ICC).[22]

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11. Tom Geoghegan, *What Happens to Deposed Leaders?*, BBC NEWS MAGAZINE (Apr. 14, 2011), http://www.bbc.com/news/magazine-13052996.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* The Arab Spring caused speculations as to the future of Colonel Muammar Gaddafi and Hosni Mubarak as fighting spread to Libya and Egypt.
16. *Id.*
17. *Id.*
18. *Id.* For example, former Liberian president Charles Taylor was taken in by Nigeria as they felt a regional responsibility, but he was later released when Sierra Leone requested his extradition. *Id.* He now faces 11 counts of war crimes and crimes against humanity. *Id*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*

According to Patrick Smith, editor of the London-based newsletter Africa Confidential, "[t]he country shouldn't be signatories to the International Criminal Court which leaves a lot of scope—China, America, Russia, and Israel—but also not be part of the international consensus . . . ."[23] While the ICC has its share of critics,[24] "there is general support for more mechanisms to bring tyrants to justice."[25] Given the increasing role of international law and its enforcement mechanics,[26] it has become evident that a deposed leader has "no guarantee of impunity."[27]

Exile has been used especially by governments in power[28] to prevent their political opponents from organizing in the country or becoming a martyr.[29] Though exile typically represented a severe punishment,[30] the rules of exile softened to some extent during the nineteenth and twentieth centuries.[31] Exiled individuals have been welcomed in other countries.[32] Exile has become more pleasant because modern-day exiled leaders often have accumulated wealth stored in other countries. As a result, they tend to live luxurious lives in exile.[33]

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23. *Id.*

24. *See* Phil Clark, *The Limits and Pitfalls of the International Criminal Court in Africa*, E-INTERNATIONAL RELATIONS (Apr. 28, 2011), http://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/. A significant criticism of the ICC is that it represents a neo-colonialist intervention in the affairs of African states by focusing solely on African conflicts to date. *Id.* In addition, because the ICC operates on a minimum budget, it has no police force of its own. *Id.* Instead it must rely on domestic states to investigate and prosecute their own cases. *Id.* This present challenges as well because it means the ICC may have to cooperate with state officials who themselves are suspected of committing atrocities. *Id.* In cases involving African states, some African governments have been willing to assist the ICC in exchange for protection of their officials from prosecution. *Id.* The ICC with its limited recourses of staff and finances cannot cover a global jurisdiction. *Id.*

25. Geoghegan, *supra* note 11.

26. *Id.*

27. *Id.*

28. *Personal Exile*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Exile. (last visited Nov. 2, 2015).

29. *Id.*

30. *Id.* Poets Ovid and Du Fu were exiled to "strange or backward regions," cut off from families and associates, as well as accustomed lifestyles. *Id.*

31. *Id.*

32. *Id.*

33. Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 958 (2006) ("Modern exile, however, is considerably more pleasant. Although banished from kin and country, today's exiles often bring with them generous bank accounts and retire to live with a small retinue somewhere peaceful, and often quite attractive.") Noting that Ferdinand Marcos found safe haven in Hawaii, Haiti's "Baby Doc" Duvalier fled to south of France, Ethiopia's Mengistu Haile Miriam went to Zimbabwe, and Uganda's Idi Amin died peacefully in Saudi Arabia. *Id.* at 958-59.

Deposed leaders, usually corrupt during their rule, operate on the formula of diverting public funds for private gain.[34] Transparency International has been pressuring both leaders of G20 countries and global financial institutions to freeze and investigate suspect assets.[35] These investigations must be conducted quickly because the longer they take, the greater the chance the assets will be moved beyond investigators' reach and the smaller the chance that public funds will be recovered. It is especially important for countries that accept assets from politically exposed individuals to identify illicit flow quickly and assist in the recovery of stolen assets, as required by the United Nations Convention Against Corruption (UNCAC), ratified by 148 countries.[36]

B. International Electoral Standards

International law contains a number of obligations[37] relevant to democratic governance and elections. Included in these obligations are key principles of democratic elections, such as the right to be elected and the

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34. Angela McClellan, *Stolen Assets: Time to Act Now*, TRANSPARENCY.ORG, http://archive.transparency.org/global_priorities/other_thematic_issues/global_crisis/stolen_assets_act (last visited Nov. 4, 2015).

35. *Id.* TI requested the G20 heads of states and the Emir of Dubai "to investigate any assets believed to be owned by former Egyptian president Hosni Mubarak." *Id.* It is estimated that "Egypt lost more than $6 billion per year to illicit financial activities and official government corruption." *Id.* It is essential to recover assets illicitly transferred from the country because they could "provide much needed funds for development in the country where 40 per cent of the population lives on less than $2 a day." *Id.* Switzerland was the first to respond to this request by "freezing funds based on new legislation that allows them to confiscate assets for up to 10 years." *Id.* This period "gives the country from where the assets are allegedly stolen time to initiate restitution requests." *Id.*

36. *Id.* This is a big reason why TI lobbies for stronger and better international cooperation to prevent illicit flows and recover stolen assets.

37. Democracy Reporting International, *Strengthening International Law to Support Democratic Governance and Genuine Elections, Report*, CARTER CENTER 11 (2012), http://www.democracyreporting.org/files/dri_report_strengthening_democratic_governance_.pdf. "Obligations are defined as legally binding rules derived from international treaties, international customary law, general principles of law, or binding resolutions of international organizations." *Id.* States are obliged to implement these obligations and in the case of a breach, they incur state responsibility. *Id.* The interpretation of obligations in a treaty is "guided by articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT 1969), which are generally considered to be international customary law." *Id.* Article 31 (1) states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* Additionally, "Article 31 (3) stipulates that subsequent state practice in the application of a treaty shall be taken into account when interpreting a treaty provision." *Id.* at 11. *See* Guy S. Goodwin-Gill, *Free and Fair Elections*, IPU.ORG 159, http://www.ipu.org/PDF/publications/Free&Fair06-e.pdf ("Putting the varied experience of international observer delegations, United Nations electoral assistance activities, and national laws and practices together with the existing rules and standards of international law allows for a reasonably coherent statement of the requirements for free and fair elections within today's system of inter-dependent States.").

right to an election that is "genuine."[38] Article 25 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) is "the cornerstone of democratic governance and genuine elections in international law."[39] Pakistan ratified and acceded to the ICCPR in June 2010 thus becoming a State party to the convention.[40] While international law sets minimum standards on key aspects of democratic governance, it does not establish a stand-alone "right to democracy" *per se*.[41] These international standards are also sometimes vague and ambiguous.[42] Specifically, there remain ambiguities and gaps regarding implementation of electoral rights and obligations in the State because[43] a fairly wide margin of discretion is left to the State in the implementation of electoral processes.[44] More importantly:

> [o]bligations in international law are not generally self-executing—they need *implementation* at the domestic level. The complexities and interrelationships between electoral rights and objectives seem clearly to require a statutory framework and appropriate machinery, but neither universal nor regional human rights instruments contain any formal obligation to enact electoral legislation.[45]

The ICCPR, as well as regional treaties, include the right to vote and to be elected.[46]

International law indicates what constitutes reasonable and unreasonable restrictions on the right to be elected; however, this right is only partially governed by international obligations.[47] The United Nations Human Rights Commission (HRC)[48] "argues that [a]ny restrictions on the

38. Democracy Reporting International, *supra* note 37, at 6.

39. *Id.*

40. *Status of Ratification-International Covenant on Civil and Political Rights*, OHCHR.ORG (Feb. 10, 2016), http://indicators.ohchr.org/.

41. Democracy Reporting International, *supra* note 37, at 7.

42. *Id.*

43. *Id.* at 8.

44. *Id. See also* Goodwin-Gill, *supra* note 37, at 160 ("[t]he choices made by the State are thus to be applied so that they are *effective*, that is, oriented to the objective of a free and fair election; and in such a way as to take account of other obligations in the field of human rights.").

45. Democracy Reporting International, *supra* note 37, at 174.

46. *Id.* at 52.

47. *Id.* at 47, 52.

48. *Id.* at 12 ("The HRC is the main body tasked with interpreting and monitoring compliance with the ICCPR. . . . [It] is composed of independent and renowned experts from all over the world."). When issuing views on individual cases, "the HRC also issues General Comments that provide interpretation of articles of the ICCPR." *Id.* However, "[n]either General Comments nor the views on individual cases are legally binding *per se*." *Id.* HRC decisions nonetheless "carry the highest authority in interpreting ICCPR provisions." *Id.*

right to stand for election . . . must be justifiable on objective and reasonable criteria."[49] Reasonable restrictions "include citizenship, reaching a minimum age for the office, mental incapacity established by a court, criminal conviction, conflicts of interest (for example, based on employment in the civil service), minimum amount of support from potential voters, or a reasonable monetary fee."[50] Article 25(b) of the ICCPR conditions that the rights contained therein should not be subject to unreasonable restrictions.[51] The burden lies with the State to prove that any restriction imposed on an Article 25 right is objective and reasonable.[52] In addition to electoral process rights, General Assembly resolution 59/201[53] contains two other key elements of democratic governance, which are transparency and accountability.[54]

Article 21(3) of the 1948 Universal Declaration of Human Rights (UDHR)[55] states that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and

49. *Id.* at 31.
50. *Id.*
51. *Id.* at 30.
52. *Id.*
53. *Id.* at 14. This resolution demonstrated "nearly global consensus on key elements of a democracy," with 172 States in favor, 15 abstentions, and no rejections. *Id*. *See also* Goodwin-Gill, *supra* note 37, at 24 ("Over many years, the General Assembly's resolutions on respect for the principles of national sovereignty and non-interference in the electoral processes operated as counterweight to what many States perceived as an unjustifiable extension of UN activity into the reserved domain of domestic jurisdiction. . . . Many States nevertheless considered that a stronger defence of sovereignty and the reserved domain was required, together with the endorsement of a number of related principles of particular and lasting interest to the developing world.").
54. Democracy Reporting International, *supra* note 37, at 12. General Assembly resolution 59/201 states, "transparency in public administration is an essential element of democracy . . . . [T]here is generally consensus that it refers to unfettered access by the public to timely and reliable information on decisions and performance in the public sector." *Id.* According to General Assembly resolution 59/201 (2005), accountability (the other essential element of democracy) "requires that the public, through the media, elections, parliaments, courts, or other independent institutions, is able to hold those in power responsible for their actions." Accountability also "entails a high degree of transparency." *Id.* at 13.
55. *See Digital Record of the UDHR,* OHCHR.ORG (Feb. 2009), http://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx ("The UDHR was proclaimed by the General Assembly on 10 December 1948, and since then is widely regarded as forming part of customary international law."). *See also* Peter Bailey, *The Creation of the Universal Declaration of Human Rights*, UNIVERSALRIGHTS.NET, http://www.universalrights.net/main/creation.htm ("[M]ost if not all the provisions of the UDHR have almost certainly become a part of international customary law. The view is steadily growing among international lawyers that practice (always an important source of international law) includes not only acts such as observing rules about navigation at sea but also acts such as voting for resolutions at United Nations and other international gatherings."). *See generally The Universal Declaration of Human Rights is the Most Universal Document in the World*, OHCHR.ORG, http://www.ohchr.org/EN/UDHR/Pages/WorldRecord.aspx (noting that the UDHR is the most translated documented with more than 300 languages and dialects to its credit).

shall be held by secret ballot or by equivalent free voting procedures."[56] To comply with this edict, a State may consult with the International Institute for Democracy and Electoral Assistance (hereinafter International IDEA), an intergovernmental organization that supports sustainable democracy worldwide;[57] it is the only global organization with this mandate.[58] Its expertise includes "electoral processes, constitution building, political participation and representation, and democracy and development."[59] The organization has three aims: "increased capacity, legitimacy, and credibility of democracy; more inclusive participation and accountable representation; [and] more effective and legitimate democracy cooperation."[60] International IDEA has offices in Africa, Asia and the Pacific, Latin America and the Caribbean, West Asia, and North Africa regions; it is also a permanent observer to the United Nations.[61]

C. Pakistan's Electoral Standards

Pakistan's Constitution contains eligibility requirements for many States leadership positions. The Prime Minister (Chief Executive of the Republic) must be a citizen of Pakistan, a Muslim, a member of the National Assembly, be above 25 years of age if he or she is a member of the National Assembly or above 30 years of age if he or she is a member of the Senate.[62] He or she must be able to provide a good conduct of character and is not commonly known as one who violates Islamic Injunctions, possess adequate knowledge of Islamic teachings and practice obligatory duties prescribed by Islam, as well as abstain from major sins, and has not, after the establishment of Pakistan, worked against the integrity of the country or opposed the ideology of Pakistan.[63] The President (Head of State) must be a citizen of Pakistan, a Muslim, 45 years

56. International Institute for Democracy and Electoral Assistance (hereinafter International IDEA), *International Electoral Standards: Guidelines for reviewing the legal framework of elections*, IDEA.INT 101, http://www.idea.int/publications/ies/upload/electoral_guidelines.pdf (last visited Nov. 2, 2015) [hereinafter *International Electoral Standards*].

57. International IDEA, *About Us*, IDEA.INT, http://www.idea.int/about/index.cfm (last visited Nov. 2, 2015).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. PAK. CONST. June 8, 1962, art. 62(1)(a)-(g), http://www.pakistani.org/pakistan/constitution/part3.ch2.html.

63. *Id.*

of age or above, and qualified to be elected as member of the National Assembly.[64]

General elections are administered by the constitutionally established Election Commission of Pakistan (hereinafter ECP).[65] A permanent ECP duty is "to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly, and in accordance with law, and that corrupt practices are guarded against."[66] Courts are barred from questioning the legality of any action taken in good faith by the ECP and no suit, prosecution, or other legal proceeding can be instituted against it for anything done in good faith.[67]

II. RETURN OF THE EXILED

During the twentieth century, three controversial and highly politicized leaders were exiled. These deposed leaders did not return to their native country post-exile and represent a stark contrast to current trends of exiled leaders returning to their national States.

A. Mohammad Reza Shah Pahlavi

Over the course of his 26-year reign, the Shah of Iran alienated most of his subjects including wealthy landowners, peasants, middle-class merchants, and the Shiite clergy. He and his supporters garnered much resentment because of their pro-Western policies. Iran's subsequent political reforms allowed dissenters to overthrow the government and erect a new regime led by Ayatollah Ruhollah Khomeini.[68]

The Shah spent the rest of his life in exile. Most countries were reluctant to provide him with a safe haven, as they feared they might alienate the new Iranian regime by doing so.[69] After a few months in Egypt, the Shah moved to Morocco where he stayed until King Hassan II decided he was a political liability. Next, he requested asylum in the United States but was denied citing concerns for the safety of Americans

64. *Id.* art. 41.
65. *Id.* art. 218–219.
66. The Election Commission Order, 2002, C.E.'s Order No. 1 of 2002 (PAK), ECP.GOV.PK 5,32, http://ecp.gov.pk/frmGenericPage.aspx?PageID=3025.
67. *Id.* at 9(D).
68. Erik Sass, *Get Out! How 8 Dictators Spent Their Exile Years*, MENTAL FLOSS (Apr. 22, 2011), http://mentalfloss.com/article/27570/get-out-how-8-dictators-spent-their-exile-years.
69. *Id.*

still in Iran. The Shah then moved to the Bahamas until the U.K. forced him to relocate to Mexico.[70]

In October 1979, he was allowed into the U.S. for a cancer treatment, which was unsuccessful. The Shah's admission to the United States sparked an outrage in Iran. Radical students retaliated by taking over the U.S. Embassy in Tehran and holding embassy workers hostage for 444 days.[71] In order to take political pressure off the U.S., the Shah traveled to Panama. The Panamanian government, however, was hesitant and even considered extraditing him to face charges of murder and torture. To avoid extradition to Iran, the Shah returned to Egypt where he died in Cairo on July 28, 1980.[72]

B. Ferdinand Marcos

During Ferdinand Marcos's tenure as President and Prime Minister of the Philippines from 1965 to 1986, he stole an estimated $5 billion-$10 billion from the country. Other notable offenses under his rule include an estimated 3,257 murders, 35,000 torture victims, and 70,000 political prisoners.[73] Marcos was fully supported by the United States until 1983 when the opposition leader, Benigno Aquino Jr., was assassinated and Marcos was exiled.[74] He first headed to Guam and then Hawaii with the help of the U.S. military.[75] Marcos spent the next couple of years in comfortable exile while receiving medical care for multiple ailments. He died on September 28, 1989 at the age of 72.[76]

While Marcos was exiled, investigators in the Philippines uncovered evidence of excessive corruption. In *Republic of Philippines v. Marcos*,[77] he was charged under RICO in U.S. federal courts. The Ninth Circuit held that the suit was not barred under the act of state or political question doctrines.[78] The Second Circuit held that proceeds of theft located within a court's jurisdiction could be frozen until the Philippines court had a chance to adjudicate the charges.[79] In 2009, the government of the

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986); Republic of the Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988).
78. Marcos, 862 F.2d 1355, 1361.
79. *Id.* at 354–55.

Philippines reported it had recovered about $2 billion looted by the Marcos.[80]

C. Idi Amin

Idi Amin, dictator of Uganda, launched his military career when Uganda was still a British colony.[81] During the mid-1970s, his supporters began expropriating businesses owned by Uganda's South Asian minority. Amin carried out massacres against rival African ethnic groups, resulting in the murder of approximately 300,000 people.[82] His rule ended when he invaded Tanzania in 1978, provoking a counter-invasion and popular uprising. He was forced to flee in 1979. Amin first went to Libya which was under Colonel Qaddafi's reign.[83] Then in 1980, Amin settled in Saudi Arabia where the Saudi royal family supported his comfortable exile on the condition that he stay out of trouble. He died and was buried in Jeddah, Saudi Arabia in 2003.[84]

D. Present-Day

Many present-day exiled leaders, such as Musharraf and Bhutto, no longer choose to remain in their host country.[85] Instead, they return to their national State with the intention of contesting in elections despite pending criminal charges; these serious charges are usually settled through closed door agreements.[86] Due to the lack of electoral restrictions, these formerly exiled leaders have been allowed to threaten Pakistan's developing

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80. *Id.*
81. Sass, *supra* note 68.
82. *Id.*
83. *Id.*
84. *Id.*
85. *See* Hannah Dreier, *Exiled Opposition Leader Arrested upon Return to Venezuela*, AP.ORG (Oct. 15, 2015), http://bigstory.ap.org/article/63bdf53aab6243a08b1a736a1bdca03c/exiled-opposition-leader-returns-venezuela-arrested. Venezuelan opposition leader, Manuel Rosales, lived in self-imposed exile and returned to his country "after six years as a fugitive from corruption charges." *Id.* He was accused of stealing public money. *Id.* Intelligence police met him at the airport where they arrested him. *Id. See also* Steve Wilson, *Exiled Cambodian Opposition Leader Returns Home to Spearhead Election Campaign Against Hun Sen*, TELEGRAPH (July 19, 2013), http://www.telegraph.co.uk/news/worldnews/asia/cambodia/10189661/Exiled-Cambodian-opposition-leader-returns-home-to-spearhead-election-campaign-against-Hun-Sen.html (discussing opposition leader Sam Rainsy's returned to Cambodia to campaign after being in exile since 2009 to avoid serving 11 years in prison on charges considered to be politically motivated.)
86. Isambard Wilkinson, *Benazir Bhutto's Triumphal Return to Pakistan*, TELEGRAPH (Oct. 18, 2007), http://www.telegraph.co.uk/news/worldnews/1566625/BenazirBhuttostriumphalreturntoPakistan.html ("Negotiations have led to an 'understanding' that allowed Ms Bhutto to return to Pakistan without having to face corruption charges.").

democracy by contesting in national elections despite pending criminal charges. There needs to be a restriction on the candidacy of exiled leaders who are facing criminal charges that have yet to be adjudicated.

Domestically, there has been some support for the restriction on political leaders running for office when they are facing criminal charges. In 2013, the Pakistani High Court disqualified Musharraf from contesting in the general elections when he returned from exile.[87] Additionally, the ECP rejected his nomination papers in three districts citing his subversion of the Constitution when he took power in a coup in 1999.[88]

In similar cases that year, two other high-ranking officials were disqualified from contesting in the elections. Raja Pervez Ashraf (departing Prime Minister for People's Party of Pakistan) was disqualified facing substantial allegations of corruption and mismanagement.[89] The ECP rejected his nomination papers and an appellate tribunal upheld the decision.[90] Next, Yusuf Raza Giliani (former Prime Minister of Pakistan) was also disqualified from running for Parliament after his dismissal as Prime Minister by the Supreme Court.[91]

In each of these scenarios domestic law—through the combination of rulings by the ECP and the judiciary—served to adequately protect the

87. Salman Masood, *Musharraf Is Disqualified From Pakistani Elections*, N.Y. TIMES (Apr. 16, 2013), http://nyti.ms/170y15Z.

88. *Id*. *See Pakistan's Musharraf Charged in Treason Case*, BBC NEWS (Mar. 31, 2014), http://www.bbc.com/news/world-asia-26815518. "A court in Pakistan has charged former military ruler Pervez Musharraf with treason, the first army chief to face such a prosecution." *Id*. He was "accused of unlawfully suspending the constitution and instituting a state of emergency rule in 2007." *Id.* He was disqualified from standing in the country's elections after returning from self-imposed exile in 2008 due to an array of charges related to his time in power (President from 2001–2008). *Id.*

89. Salman Masood, *supra* note 87.

90. *Id.*

91. *Id.* For a discussion on another exiled Pakistani official, *see also* Barry Bearak, *Pakistan's Deposed Leader is Given Pardon and Exiled*, N.Y. TIMES (Dec. 10, 2000), http://www.nytimes.com/2000/12/10/world/pakistan-s-deposed-leader-is-given-pardon-and-exiled.html. "Nawaz Sharif, the deposed prime minister of Pakistan, has been pardoned from his life sentence in prison and exiled with his family to Saudi Arabia . . . . [H]e will still have to forfeit more than $10 million in property and he remains disqualified from public office for 21 years." *Id.* Sharif was elected twice as Pakistan's prime minister before being ousted on October 12, 1999 in a military coup. *Id.* Saudi Arabia agreed to accept the Sharif family "on humanitarian grounds" as he suffers from a heart ailment and high blood pressure. *Id.* He was convicted on corruption charges, hijacking, and terrorism. *Id.* The Sharif family had supposedly been "making appeals for clemency to . . . Musharraf, the nation's military ruler" at the time, who eventually pardoned the remaining jail sentence. *Id.* The deal was unexpected. But the "military government in Pakistan had been under international pressure to restore democracy." *Id.* While local elections were scheduled to be held later that month, "Pakistan's political structure [was] in chaos." *Id.* After Sharif's exile, it was noted that "longstanding leaders of three major political parties [would] be living outside the country including" Nawaz Sharif of the Pakistan Muslim League, "Benazir Bhutto of the Pakistan's People's Party and Altaf Hussain of the Muttahida Qaumi Movement." *Id.*

people of Pakistan's interest in holding their leaders accountable. This has not always been the case as, just a few years prior to these decisions, Bhutto was allowed to return to contest in the 2008 general elections despite charges of corruption; these charges were subsequently struck down by Musharraf.[92] This inconsistency needs to be addressed on a national and international level to ensure elections are administered fairly and political leaders are held accountable for wrongful actions. Without former executive officials being held answerable to the public, developing States will not be able to move closer to becoming stable democracies.

III. APPLICATION OF INTERNATIONAL AND DOMESTIC LAW

The problem of exiled leaders returning to contest national elections can be resolved by combining domestic and international law systems. To do this, it is important to evaluate the justifications for each; for neither system can exist without the other in today's increasing globalized and inter-connected world.

International law plays a role in resolving the problem, as it is an issue that crosses national borders. States—some of which are very powerful on the economic and political front—permit exiled leaders to reside in their territories. There are, of course, multiple complications with allowing only international law to dictate the terms and conditions of exile. For example, if exiled leaders decide to campaign from their host countries, is the host country obligated to prohibit them from doing so? Is a host country obligated to prevent exiled leaders from returning to their national State to contest in elections knowing they face serious criminal charges? It can be argued that placing this burden on a host country would actually hinder democratic processes from unfolding as it deprives the exiled leader's national State of the opportunity to decide to prohibit the former leader from contesting. In other words, domestic safeguards may be in place to resolve this problem, such as what occurred through the denial of Musharraf's nomination papers.[93]

Domestic law plays a role in resolving the problem because, as discussed previously, international law leaves much of the implementation of election laws up to States.[94] The determination of reasonable or

92. Wilkinson, *supra* note 86 ("Gen. Musharraf issued a presidential ordinance earlier this month striking down corruption charges against Ms Bhutto. However the supreme court has yet to rule on the legality of the ordinance.").

93. Masood, *supra* note 87.

94. *See supra* Part I.B.

unreasonable restrictions on the right to be elected is a matter of domestic concern, albeit the restrictions are subject to objective review.[95] Therefore, it can be argued that domestic law should provide the detailed, unambiguous laws governing rules of exile, right of return, and the right to stand in elections post-exile. On the other hand, many exiled leaders are dictators in name or in practice whose national State is either a weak democratic State or struggling to become a democratic State (i.e. transition in form of government). In these situations, domestic law would prove useless when the State is not equipped to challenge the exiled leader or prevent him/her from entering the election race. Additionally, judicial review may also be foreclosed in such situations.

Simply relying on domestic law proves more difficult if the exiled leader is still very wealthy and resourceful with offshore assets or enters into some "off the record" agreement with the current government to re-enter the political arena. Bhutto, for example, went into self-imposed exile during the 1990s amid large corruption charges.[96] She returned in 2007 against the backdrop of a possible power-sharing agreement with Musharraf to establish a moderate, pro-Western government.[97] Musharraf issued a presidential ordinance striking down corruption charges against Bhutto. The Supreme Court of Pakistan has yet to rule on the legality of such an ordinance.[98]

To account for these difficulties and prevent inconsistent rulings in developing democratic States, international law—in the form of an international declaration or General Assembly resolution—should create a general consensus prohibiting exiled leaders from contesting in national elections when criminal charges are pending against them. The exiled leader may only stand as a candidate in elections once the charges have been resolved through the State's adjudicative process with a verdict in favor of the leader. If the exiled leader returns to contest in elections despite pending charges, remedial measures—including injunctions, house arrest, or judicial judgment—must be made available through the application of a State's domestic election laws. The practical implications of this are enormous. First, it will advance democratic principles—notably accountability and transparency—in developing States. Second, it will

95. *See supra* Part I.B.

96. Wilkinson, *supra* note 86.

97. *Id.* (noting that "America and Britain have lobbied hard for Gen Musharraf to enter into a power-sharing arrangement with Ms Bhutto with the aim of establishing a moderate, pro-Western government.").

98. *Id.*

incentivize current political leaders to comply with domestic and international laws instead of facing the possibility of exile and prohibition on a political life altogether.

IV. ANALYSIS

Exile is usually offered as a practical, though unsatisfactory, solution to end mass atrocities or reach a temporary truce.[99] On a domestic level, two principal justifications are given for allowing a deposed leader to seek a safe haven. First, dictators and military leaders usually demand impunity as a condition of relinquishing power. As a result, those eager to end conflict or fearful of repercussions from attempts to hold the deposed leader accountable may not pursue criminal trials or other proceedings. Second, a country's new regime, even if it is committed to prosecuting the deposed leader, is often faced with considerable number of logistical obstacles in implementing this prosecution.[100] Additionally international negotiators, eager to reach a settlement to end a bloody conflict or protect their own States' interests, often discourage prosecution.[101]

Exile goes hand in hand with amnesty.[102] The difference between amnesty and exile is that the former immunizes the perpetrator from domestic prosecution, while the latter puts the perpetrator out of the

99. Sadat, *supra* note 33, at 987.

100. *Id.* at 988. For example, during the Rwandan genocide of 1994, Rwanda's justice system was completely eviscerated. *Id.*

101. *Id.* at 990. *See also* Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 342–43 (2006) ("[D]uring the past thirty years, Angola, Argentina, Brazil, Cambodia, Chile, El Salvador, Guatemala, Haiti, Honduras, Ivory Coast, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay have each, as part of a peace arrangement, granted amnesty to members of the former regime that committed international crimes within their respective borders."). The United Nations actually "pushed for, helped negotiate, or endorsed the granting of amnesty as a means of restoring peace and democratic government" in five countries: Cambodia, El Salvador, Haiti, Sierra Leone, and South Africa. *Id.* at 343 (quoting Michael P. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 41 (1996)).

102. *See* Gwen K. Young, Comment, *Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427, 430 (2002). Amnesty is when a state forgets crimes committed by perpetrators, such as torture, extra-judicial killings, and other crimes against humanity. *Id.* International convention obligations have significantly narrowed the scope of acceptable forms of amnesty. *Id.* at 456. For example, amnesty is not valid if it prevents "investigation, prosecution, or redress for certain serious international crimes such as torture and disappearances. *Id.* at 456–57. The UNCHR considers self-and-blanket amnesties invalid. Therefore, the trend has been to allow discrete amnesties which allow individual accountability. *Id.* at 457. *See also* Sadat, *supra* note 33, at 959 ("While exile might still be an option for individuals accused of general venality—tax fraud, corruption, or embezzlement—the notion of allowing the perpetrators of human rights atrocities to go unpunished appears to have become normatively unacceptable.").

jurisdictional reach of domestic prosecution.[103] "[R]ecent travails suggest that political amnesties, particularly when imposed from above, rather than democratically adopted from within, may cause a country already struggling with democracy and human rights to slip further into chaos, rather than enter a period of stability and tranquility."[104] Furthermore, history has shown that exiled leaders are prone to recidivism, often resorting to corruption and violence, and disrupting the peace process in its entirety.[105] In developing countries where democratic institutions are weak, exiled leaders charged with serious offenses standing for election hinder the implementation of international principles of accountability and transparency. This can be especially harmful in these countries as "[w]hat a new or reinstated democracy needs most is legitimacy, which requires a fair, credible, and transparent account of what took place and who was responsible."[106] A common criticism to prohibiting the return of exiled leaders is that it may hinder political processes that strengthen democracy.[107] This criticism is well-founded only if the returning exiled leaders are not charged with criminal offenses that need to be resolved through an adjudicative process.

There are a myriad of reasons why exiled leaders with criminal charges should be barred from contesting in elections. There are of course practical implications, as in one cannot represent a nation or vote in parliament if one is declared guilty and locked in prison.[108] On a more philosophical level, such restrictions relate to society's understanding of citizenship,

103. Scharf, *supra* note 101, at 343 (noting that both amnesty and exile are often used to induce regime change).

104. Sadat, *supra* note 33, at 991. Amnesty granted in the case of Haiti was not of any real assistance to bring about an end to human rights atrocities committed during the conflict in the 1990s. *Id.* Jean-Bertrand Aristide who was elected President with majority vote was overthrown by a military coup in 1991. *Id.* The Governors Island Agreement of 1993 promised the return of constitutional rule in exchange for amnesty for coup leaders. But this amnesty appears to have destabilized the country according to some experts. *Id.* at 992–93. Principle 7(1) of the *Princeton Principles on Universal Jurisdiction* provides that "[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law," which suggests that domestic amnesties for *jus cogens* crimes is undesirable, though not prohibited *per se*. *Id.* at 1018.

105. Scharf, *supra* note 101, at 348.

106. *Id.*

107. *Karachi: Return of Exiled Leaders Urged*, DAWN.COM (Jan. 15, 2007), http://www.dawn.com/news/227960/karachi-return-of-exiled-leaders-urged ("Speakers at a function [in Pakistan] . . . demanded that all political leaders [living abroad] in exile be allowed to return" to Pakistan in order to contest in elections arguing that if said popular leaders were denied an "active part in politics . . . the credibility of the system would always remain doubtful.").

108. Ian Holland, *Crime and Candidacy*, APH.GOV.AU (Mar. 24, 2003), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03CIB22.

specifically what it means to be a "good" citizen.[109] The relationship between citizenship and elected leadership dates back to the time of Aristotle.[110] Criminal acts are incompatible with citizenry because if one is incapable of being a citizen, one should not hold political office.[111] For example, treason is a common disqualification from holding political office because the act itself is viewed as being inconsistent with the safety or stability of the State.[112] Therefore, legal restrictions barring exiled leaders with criminal charges from contesting in elections are preferable to relying on the electorate to assess the worthiness of the individual.

When evaluating adequate legal protections, the trickier question is how to distinguish between those who are charged with breaking a law and those who advocate contempt for the law[113] as contempt for the law may signify that a person is not concerned with the stability of the legal system of its society. In judicial terms, the distinction is one of due process and separation between opinion and action. In political philosophy the distinction becomes blurred.[114] It is possible, however, to differentiate types of law breaking as there are actions undertaken with respect for constitutional order and those which hold the State's constitution in contempt. There can also be a distinction drawn between lawbreakers seeking their own self-interest and those who advocate for the interests of others. Additionally, there are lawbreakers who seek to evade punishment (i.e., denying constitutional order) and those who are not (i.e., belief in a broader rule of law in a sense).[115]

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109. *Id.*

110. *Id.* Aristotle "defined citizenship in terms of participation, including the holding of public office." *Id.* The premise that criminal conducts is inconsistent with citizenship was articulated by Aristotle in *The Politics* in which he argued that "[t]he task of all the citizens, however different they may be, is the stability of the association, that is, the constitution. Therefore the virtue of the citizen must be in relation to the constitution." *Id.*

111. *Id. See also* Dr. Reynaldo T. Casas, *Disqualify Political Candidates with Criminal Records*, BUSINESS.INQUIRER.NET (Dec. 7, 2015), http://business.inquirer.net/203672/disqualify-political-candidates-with-criminal-records. Dr. Casas argues placing a ban on politicians with criminal records from contesting in elections as they have forfeited their right to lead the Philippines. He notes that national governments ultimately will have to "pass a law to disqualify candidates with proven criminal records . . . ." *Id.*

112. Ian Holland, *Crime and Candidacy*, APH.GOV.AU (Mar. 24, 2003), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03CIB22.

113. *Id.*

114. *Id.*

115. *Id.*

In addition, a key question in asking who can be a political representative is who the community is willing to accept.[116] People seem to make distinctions between types of law breaking,[117] and in today's world, it is highly unlikely that the electorate would not know of an exiled leader's criminal record. In order for the public to properly evaluate the actions of the law breaker, they must have access to different means of relaying information (technological or otherwise). Further, given likely community consensus, more serious criminal acts including murder, torture, rape, corruption, treason, and international offenses including crimes against humanity and genocide should automatically prohibit an exiled leader facing these charges from contesting in national elections given the gravity and nature of the crimes.

A. The Role of Domestic and International Law

Strengthening domestic laws is vital to prohibiting exiled leaders with pending criminal charges from contesting in national elections. Without legislation on the domestic level, exiled leaders will continue to take advantage of systems that do not bar their candidacy. Laws governing election of exiled leaders allow domestic courts to step in and institute judicial proceedings to uphold such legislation.

Pakistan's electoral standards represent a move in the right direction. The constitutional provisions concerning eligibility of the Prime Minister and President include requirements such as good conduct of character and must not work against the integrity or oppose the ideology of Pakistan.[118] Though neither of these provisions explicitly relate to the possibility of a candidate facing criminal charges, it can be read implicitly.

Another domestic safeguard in Pakistan is the duty discharged to the ECP. The Election Commission must "ensure that the election is conducted honestly, justly, fairly, and in accordance with law, and that corrupt practices are guarded against."[119] A former leader in exile charged

116. *Id.* (citing the example of Recep Tayyip Erdogan, the current President of Turkey, who was legally prevented from taking office even though he had support from the community.).

117. *Id.* This proved true in the re-election attempt in 1993 of Keith Wright (sitting federal MP) who was charged with indecent dealing. *Id.* Although he continued to "proclaim his innocence, he received only 5.9 percent of the vote. . . ." *Id.* In Australia, some restrictions on political candidacy are written in constitutions while others are written in legislation such as electoral laws. *Id.* Nevertheless, "[l]aws restricting the ability of criminals to engage in politics exist in every Australian jurisdiction." *Id.* These laws vary. For example, most jurisdictions ban a candidate for life if convicted of treason. *Id.* There are differences in the length of ban concerning felonies, however. *Id.*

118. *See* discussion *supra* Part I.C.

119. *See* The Election Commission Order, *supra* note 66.

with criminal offenses being prevented from standing in elections falls within this provision. Allowing such a person to participate in the election would be a corrupt action since there has not been a formal judicial proceeding on the innocence or guilt of the leader. This corrupt action would run afoul of the ECP's duty to conduct elections in an honest and just fashion. The ECP's fulfillment of its duty was seen in Musharraf's case when it rejected his nomination papers for violating the laws of the State by subverting the Constitution and taking power in a coup.[120] The more difficult situation for the ECP and Pakistan occurs when charges are dropped, as in Bhutto's case,[121] because government officials within the State reach an agreement favorable to both parties' political ambitions. This is where countries, like Pakistan, can look to international laws.

Key principles of democratic elections are contained in a variety of international law sources, such as the ICCPR.[122] Underlying these principles is the notion of "genuine" elections.[123] As previously discussed, though States are given much discretion in implementing an electoral process, international law does indicate reasonable and unreasonable restrictions on the right to be elected;[124] restrictions have to be justifiable on objective and reasonable criteria.[125] One such reasonable restriction, according to international law, is criminal conviction.[126] The issue for States is that criminal charges are not included under reasonable restrictions *per se*.

In order to resolve this issue, one of two options may be considered. A State, such as Pakistan, may stipulate its own provision within its electoral standards establishing that exiled leaders with pending criminal charges are barred from contesting in national elections until such charges are adjudicated. If it did so, Pakistan would have the burden of proving the restriction imposed on these ICCPR Article 25 rights is reasonable.[127] The second option would be an international declaration (akin to the UDHR) or a United Nations General Assembly resolution recognizing this provision as a reasonable restriction on the right to be elected. While international declarations and General Assembly resolutions are not given as much weight as an international convention, they remain an important

120. Masood, *supra* note 3.
121. Wilkinson, *supra* note 86.
122. Democracy Reporting International, *supra* note 37, at 6.
123. *Id.*
124. *See* discussion *supra* Part I.B.
125. *See* discussion *supra* Part I.B.
126. *See* discussion *supra* Part I.B.
127. Democracy Reporting International, *supra* note 37, at 30.

persuasive source in international law.[128] The reason for a declaration or resolution as opposed to an international convention is one of practicality. It would be an incredibly arduous task to obtain ratifications and accessions to such a convention because, as discussed before, international obligations on electoral standards are generally not self-executing.[129] They need to be implemented through a State's domestic law[130] because each State ultimately is a sovereign. The declaration or resolution will permit States to point to a source of general international consensus should it need to justify the reasonableness of a domestically implemented restriction. This combination of domestic and international law provides a starting point for States to address the trend of exiled leaders with criminal charges contesting in elections before the charges are properly adjudicated.

B. The Role of Courts

When an exiled leader facing criminal charges returns to the State, the judiciary then must play an important role in adjudicating the case. An initial question in this matter is what court has jurisdiction to hear the case. Though the default answer is usually the State's domestic courts, the nature of the criminal offense is important to discern prior to choosing a legal forum. International crimes are prosecuted differently from domestic crimes stemming from municipal laws. At the international level there are only a few courts with jurisdiction to hear cases involving individual accountability. The ICC establishes individual criminal liability for serious international crimes.[131] However, the ICC takes cases only when a State is unwilling or unable to investigate or prosecute.[132] A case is inadmissible if

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128. Statute of the International Court of Justice art. 38, ¶ 1 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.")

129. *See* discussion *supra* Part I.B.

130. Goodwin-Gill, *supra* note 37, at 161.

131. Young, *supra* note 102, at 458. The ultimate objective of the ICC is to end impunity for perpetrators. *Id.* at 459.

132. *Id.* at 458–59 (noting that articles 17, 20, and 53 of the Rome Statute of the ICC allow the court to take cases when a state is unwilling or unable to investigate or prosecute.) Factors to determine unwillingness include: (1) a state's decision to shield the perpetrator from criminal responsibility, (2) unjustified delay in prosecution or investigation, or (3) national proceedings which do not manifest an intent to bring the perpetrator to justice. The inability to prosecute also includes the

the State with jurisdiction over the individual is investigating or prosecuting the case or if the State has investigated or tried the individual with the intent to bring the person to justice.[133] Furthermore, the ICC does not replace or add to national jurisdiction, rather it complements national jurisdiction.[134] For the ICC to hear a case involving an exiled leader standing for election, the international community would have to recognize the very act of contesting as a serious offense. This seems unlikely considering there are virtually no international conventions specifically prohibiting exiled leaders with criminal charges from contesting nor enough ratifications for the conventions that are in place.[135]

The International Court of Justice is another legal forum for States that are members of the United Nations.[136] Each member of the United Nations "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."[137] The jurisdiction of the Court includes legal disputes concerning the interpretation of a treaty or any question of international law as the parties (i.e., States) refer to the Court.[138] The ICCPR is the only convention close enough to outlining electoral rights with a large number of State ratifications.[139] The International Court of Justice may potentially hear a case concerning the interpretation of the convention as it relates to Article 25 rights and determining reasonable restrictions on candidacy only if States agree to the Court's jurisdiction.[140] This scenario is unlikely, as it would essentially

collapse of a state's judicial system, its inability to apprehend the accused, and the inability to obtain the necessary evidence or testimony. *Id.* at 460.

133. *Id.*

134. *Id.* at 461.

135. *But see id.* at 471 (articulating that recognizing amnesty may be inconsistent with ICC aims because while the Preamble of the ICC states that the ultimate aim of the ICC is to ensure individual accountability for human rights violators, and by not addressing amnesty the Rome Statute does not provide the ICC with any guidelines to ensure that recognition of amnesty is in compliance with individual accountability). The same can be argued to an extent with respect to exile. Like amnesty, exile is also a reality in the international community.

136. U.N. Charter art. 93, ¶ 1 ("All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice . . . .").

137. *Id.* art. 94, ¶ 1.

138. Statute of the International Court of Justice, *supra* note, 128, art. 36, ¶ 1-2 ("1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. 2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law . . . .").

139. *See supra* note 37, at 6. There are 168 States party to the ICCPR. *Id.*

140. *See* discussion *supra* Part I.B.

require States to be in dispute about each other's domestic electoral standards and candidate eligibility.

Given these restrictions, the only realistic forum to bring judicial proceedings against an exiled leader with criminal charges would be a State's domestic courts. From a policy perspective, the exiled leader is being held accountable by the courts of its State which exemplifies transparency and fairness within the legal system. It also symbolizes an innately democratic judicial action.

C. The Role of Host States

Lastly, the role of States granting a safe haven to exiled leaders can be analyzed by comparing exile to amnesty. Because there is such little discussion at the international level about exile, amnesty serves as an appropriate analogy. Domestic amnesty is lawful in the State where it is granted.[141] With exile the question remains of what actions, if any, is a host State to prohibit exiled leaders with criminal charges from returning to their State for national elections. The concept of sovereignty[142] dictates that the national State of the exiled leader has the authority to take action as it sees fit. Therefore, if an exiled leader has criminal allegations, it is for the national State to enforce its election laws and bar the individual from

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141. *See* Sadat, *supra* note 33, at 1023. "However, the situation before a court in a third state is quite different." *Id.* The concept of universal jurisdiction comes into the picture, which is exercised by States or the international community. In addition, States exercising universal jurisdiction over perpetrators do so pursuant to their own "internal legislation" created to that effect. *Id.* If a forum State is to exercise universal jurisdiction in a case where domestic amnesty is granted to a defendant, the first question to answer is what law applies. Because:

> [p]ublic international law has not yet developed a system of conflicts of laws to address this question, it is largely operating under the *Lotus* paradigm: every state being an independent sovereign, every state may apply its law to a problem unless there is some rule prohibiting it from doing so.

Id.

> [A] national court exercising universal jurisdiction has a dual role: to apply and interpret national law, and to effectively sit as a court of the international community, applying international legal norms. Thus in considering what effect a national amnesty should have before a foreign court, it is appropriate to consider whether the applicable law should be the law of the forum state, the law of the state granting the defendant immunity, the law of the state of the defendant's nationality, the law of the state upon whose territory the crimes were committing (the territorial state), or international law to resolve this question.

Id. at 1024.

142. *See* WEST'S ENCYCLOPEDIA OF AMERICAN LAW (ed. 2) (2008) (defining sovereignty as the "supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific powers are derived . . . ."). It is the independence of a state, and its right and power to regulate its internal affairs without foreign interference. It includes powers such as making, executing, and applying laws, imposing and collecting taxes, making war and peace, forming treaties, and engaging in trade with foreign nations. *Id.*

contesting (assuming it has such domestic laws in place). Additionally, if an exiled leader is facing criminal charges, it is for the national State to institute judicial proceedings in its domestic courts. There may, however, be legitimate concerns regarding a national State's judiciary process. The primary concern is whether or not the judicial system is competent and transparent enough to carry forth such proceedings. If the legal system of a State is fragile to begin with, it is difficult to implement fair proceedings which do not fall victim to bribery, threats, or other forms of coercion at the hands of the exiled leader.

The State providing a safe haven may condition the exile on the leader's promise to refrain from contesting in elections from either the host country or by returning to his or her country of origin. As in previous cases, some States have placed varying conditions on exiled leaders residing within their territory (as Saudi Arabia did with Idi Amin).[143] Further, the State could apply its own domestic election laws and bar the exiled leader, or deny exile entirely.[144] In exercising universal jurisdiction, the domestic court of the State granting exile would have a dual role. First, it would apply and interpret national law. Second, it would act as an international court and apply international legal norms. In order to evaluate the effects of allowing such exercise of jurisdiction, it is important to consider whether the applicable law should be the law of the national State, the law of the State granting the leader exile, the law of the State where the crimes were committed, or international law.[145] These options remain to be assessed with respect to exile.

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143. Sass, *supra* note 68.

144. REP. AND ANALYSIS OF IMMIGRATION AND NATIONALITY LAW, 82 No. 26 INTERPRETER RELEASES 1061 (July 1, 2005) (Westlaw). In 2005 the Attorney General denied asylum to a leader in exile of the Islamic Salvation Front of Algeria who was associated with armed groups who committed acts of persecution and terrorism in Algeria. *Id.* The reasoning given by the Department of Justice was that the U.S. has significant interests in combating violent acts of persecution and terrorism and it is therefore inconsistent to provide a safe haven to individuals connected to such acts of violence. *Id.*

145. *See* Sadat, *supra* note 33, at 1024. In deciphering:

> the legal status of an individual accused of a jus cogens crime, who has sought and been given refuge in a third state . . . the short answer appears to be that the individual may benefit from the grant of asylum within the state of refuge under the constitutional system in place there, but presumably could not travel with his immune status, for it would cease to have any effect outside the territory of the state of refuge (Returning to the Idi Amin example . . . it will be recalled that the Ugandan government stated that he would be arrested if he returned from his exile in Saudi Arabia.). Given that criminal laws are generally laws of territorial application, surely it cannot be that granting immunity to Charles Taylor in Nigeria, for example, or to Idi Amin in Saudi Arabia, affects the prescriptive jurisdiction of the territorial state. Thus, the effect of a transnational amnesty (exile) in the territorial state (or presumably any third state as well), would appear to be null. Similarly, as is the case with domestic

CONCLUSION

This trend of exiled leaders returning to their State to contest in national elections despite pending criminal charges is troubling. It is undermining the progress of States trying to implement democratic institutions and reforms. It is hindering the development of an electoral system that is fair, free, and transparent. Additionally, this is preventing leaders from being held accountable for serious offenses by allowing them to continue to participate in the electoral process without a formal adjudication of their past crimes. While it is not clear how long this trend will persist, it is clear that some steps need to be taken to address the problem before it becomes all too common for exiled leaders to escape accountability. Musharraf and Bhutto's cases serve as examples of a State struggling to advance democratic principles, of which free and fair elections are crucial.

A combination of domestic and international law must govern the issue. First, a general consensus should exist in the form of an international declaration or General Assembly resolution to prohibit exiled leaders from contesting in national elections amid pending criminal charges. This would allow a State to implement this restriction domestically and use the consensus reached by the international community to bolster the reasonableness of the restriction.

An exiled leader must only be allowed to stand as a candidate in elections once all charges have been resolved through the national State's adjudicative process. This proposition will advance democratic principles, such as accountability and transparency in developing States. It will also incentivize current political leaders in developing States to comply with domestic and international laws.

Fizza Batool[*]

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amnesties before international courts, presumably any grant of exile has no legal effect before an international court (as the SCSL held by implication in the Charles Taylor case).

Id. at 1031.

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