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The Clash of Obligations: Exercising Extraterritorial Jurisdiction in Conformance with Transitional Justice

CHRISTEN BROECKER*

I. INTRODUCTION

In April 2009, Judge Shira Scheindlin of the Southern District of New York issued a much-anticipated opinion in the context of a set of lawsuits that have generated an extraordinary amount of attention over the course of the past seven years. The suits, consolidated and refashioned from a dozen disparate claims into a pair of federal class actions between 2002 and 2009, were brought by representatives of a group consisting of potentially tens of thousands of South African citizens who claim to be victims of crimes recognized under international law committed by multinational corporations – as principles or as accomplices to the South African government – during the Apartheid era.[1]

While Judge Schiendlin's opinion on the defendants' motion to dismiss the case was notable in several respects, one of its most

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1. The claims, brought pursuant to the Alien Tort Statute, 28 U.S.C. 1350, alleged that seven multinational corporations – Daimler A.G.; Ford Motor Company; General Motors Corporation; International Business Machines Corporation (IBM); Fujitsu, Ltd.; Barclays Bank, PLC; Union Bank of Switzerland, A.G. (UBS); and Rheinmetall Group A.G. – aided and abetted a host of internationally-prohibited crimes by providing the South African government with military, logistical, and technological support during the course of the Apartheid regime. *See* In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 240-44 (S.D.N.Y. 2009).

powerful aspects was the confidence and brevity with which it dispensed with the vociferous objections to continued adjudication made by former president Thabo Mbeki of South Africa and his colleagues.[2] A year and a half earlier, in October 2007, a three-judge panel of the Second Circuit Court of Appeals had similarly declined to dismiss the plaintiffs' claims, but it had done so in an extremely lengthy, fractured opinion, ultimately sending the case back to the District Court for reconsideration.[3] Two of the judges had urged the District Court to consider, in reaching its decision, both the views of the South African government, which vigorously opposed the litigation on the grounds that it undermined the reconciliatory policy pursued by the country during its political transition, and those of former members of the Truth and Reconciliation Commission and opposing political groups, trade unions, and others, who believed that the U.S.-based litigation in no way imperiled the political or financial stability of the country.[4] However, the lone dissenting judge on the panel had reacted in horror to the majority's suggestion that a foreign court should have the power to make judgments regarding the legality of acts committed abroad in the face of a decision by the state where those acts occurred to decline to punish their perpetrators.[5] Judge Korman, a District Court judge sitting by designation, decried the majority's decision to subject a foreign democratic nation to "the indignity of having to defend policy judgments that have been entrusted to it by a free people against an attack by private citizens and organizations who have lost the political battle at home," and declared that the dispute was "not the business of the Judicial Branch of the United States."[6]

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2. Note, however, that in September 2009, South African Minister of Justice and Constitutional Development Jeffrey Thamsanqa Radebe informed Judge Scheindlin that in the wake of her ruling, the Government of South Africa was "now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law." Letter from Jeffrey Thamsanqa Radebe, MP, to Judge Shira Scheindlin, September 2009, *available at* http://www.khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindlin_09.01.09.PDF.

3. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258, 264 (2d Cir. 2007).

4. *Id.* at 295-96.

5. *Id.* at 152. (denying defendants' motion to stay the proceedings pending the Supreme Court's consideration of their petition for certiorari).

6. *Id.* at 156 (Korman, J., dissenting). In May 2008, the Supreme Court denied the *Khulumani* plaintiffs' petition for certiorari on the grounds that it was unable to muster a quorum of justices to consider the claim. As a result, the plaintiffs have amended their

Upon reconsideration of the case, Judge Scheindlin's conclusion regarding the propriety of U.S. adjudication of the plaintiffs' claims differed starkly from that expressed by Judge Korman. Her opinion held, first, that her court's adjudication of the claims against the corporate defendants did not conflict with the TRC process pursued in South Africa;[7] second, that there was no adequate forum in South Africa capable of adjudicating the plaintiffs' claims; and third, that litigation in U.S. courts did not conflict with the broader goals of the TRC process.[8] Thus, with little fanfare, she rejected the corporate defendants' argument that U.S. court adjudication of the case would "interfere with South Africa's stated preference that its democratically elected government provide the exclusive mechanisms to address harms inflicted by the apartheid-era South African government on South African citizens in South Africa."[9]

The 2007 and 2009 *Apartheid Litigation* decisions are particularly appropriate illuminations of a series of difficult questions that have plagued the courts of not only the United States, but those of several European nations as well, for over two decades. Is there an internationally-imposed obligation for third-party states to exercise their jurisdiction over certain egregious offenses recognized under international law? Even if there is no obligation, do such states have a *right* to assert their jurisdiction over such offenses in the name of pursuing justice and accountability? Finally, when is it appropriate for third-party states to decline to do so because the state where those offenses occurred has decided not to punish their perpetrators? The answers to these questions could have significant ramifications for the victims of grave human rights abuses in countries as wide-ranging as Afghanistan, Algeria, Indonesia, and Haiti, who seek to hold the perpetrators of universally condemned crimes accountable, but

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complaints and are awaiting rehearing by the District Court. *See* Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S.Ct. 2424 (2008).

7. In re S. African Apartheid Litig., 617 F. Supp. 2d at 285 (finding that "[t]he TRC process was not exclusive," as victims were permitted "to sue those who declined to offer testimony to the TRC," and that the defendants before the court had in fact declined to offer testimony to the TRC).

8. *Id.* at 285-86.

9. *Id.* at 286, n.358 (concluding, "[i]t is not clear to what 'exclusive mechanisms' defendants are referring. The TRC process was explicitly not exclusive and defendants have pointed to no other South African forum that has, can, or will adjudicate these claims").

who have been denied access to justice in their home countries as a result of domestic amnesties or other transitional justice mechanisms that fall short of prosecution.[10]

With growing frequency, courts in the United States and Europe have been placed in the unenviable position of being asked to weigh the dictates of international criminal and human rights law against the risk that enforcing these principles that may ignite conflict or threaten the stability of fragile governments abroad.[11] These states have increasingly authorized the use of extraterritorial jurisdiction to allow their courts to adjudicate civil and criminal disputes stemming from major human rights atrocities committed abroad.[12] Yet, as a result, their courts have been confronted with the dilemma of how to enforce international criminal law while paying an appropriate degree of respect to the policy decisions of the states where the atrocities occurred, some of which have enacted amnesties or other measures that shield the perpetrators of such crimes from accountability.

A recent series of decisions has revealed a growing international consensus that, at least for a certain number of grave international law offenses, amnesty is impermissible under any circumstance.[13] These decisions also suggest that other mechanisms of transitional justice, such as truth commissions or community service, which states may employ in lieu of prosecution, as well as attempts to mitigate punishment through either reduced sentences or permitting only civil liability, may be considered insufficient as to forgo prosecution at the international level.[14] Many commentators have argued that despite the fact that strong substantive norms establishing several international crimes exist, international procedural law imposing a duty to prosecute remains significantly more limited.[15] If these commentators are correct, and third-party states have no international legal duty to prosecute perpetrators of crimes against humanity, extrajudicial executions, or war crimes committed in the course of internal armed conflicts,

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10. *See infra* Part II.D.

11. *See* Lloyd Axworthy, *Afterword: The Politics of Advancing International Criminal Justice, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 266-68 (Steven Macedo ed., 2006).

12. *See infra* Part III.

13. *See infra* Part II.C.

14. *Id.*

15. *See infra* Part II.D; *see, e.g.,* Charles P. Trumbull IV, *Giving Amnesty a Second Chance,* 25 BERKELEY J. INT'L L. 283, 317 (2007).

then national courts exercising extraterritorial jurisdiction face a difficult task. While several theories of jurisdiction permit third-party state courts to exercise jurisdiction over international offenses, they do not require them to do so.[16] In fact, third-party state courts may have the option to exercise discretion and decline to adjudicate claims involving certain international offenses under classic non-justiciability doctrines, such as the doctrine of international comity or the act of state doctrine.

Thus far, third-party state courts have demonstrated a notable lack of consistency and coherence in their approaches to amnesty and other transitional justice mechanisms.[17] The *Apartheid Litigation,* in which Judges Korman and Scheindlin – two judges from the same U.S. federal district court – reached diametrically-opposed decisions regarding the effect of a single transitional justice mechanism on the same plaintiffs' claims in the span of less than two years, is a particularly apt example of the judicial uncertainty that characterizes this area of international law. Moreover, a number of decisions in which judges have applied non-justiciability doctrines in examining amnesties and other transitional justice mechanisms appear to be based more on the political ideology or biases of the particular decisionmaker rendering the opinion.[18]

This article seeks to explore the recent practice of courts in the United States, Europe, and elsewhere that have been presented with cases presenting a "clash of obligations," in which judges and prosecutors have had to choose between refusing to honor an amnesty at the risk of igniting conflict in a transitioning country and honoring an amnesty that may be impermissible under international law. In addition, this article seeks to offer guidance to future courts faced with such a dilemma, proposing a principled strategy for determining whether a given amnesty deserves recognition or deference, and if so, how much. Significantly, this strategy is derived not from pragmatic or political considerations, but from judicial doctrines deeply established in the legal systems of several states. In proposing such a principled basis for judicial and prosecutorial action, this article seeks to mitigate the tendency of courts to allow powerful actors to award themselves with

16. *See infra* Part III.
17. *Id.*
18. *Id.*

impunity at the very moment in which international law calls most strongly for accountability. In sum, this article will seek to assist courts adhering to the rule of international law when it is in danger of succumbing to the rule of men.

II. THE OBLIGATION TO PUNISH

A. Introduction

For purposes of this article, "amnesty" is defined as an act of clemency granted by a sovereign to persons who have committed a crime or a tort, in order to forgive them for their misdeeds.[19] Amnesty, derived from the Greek word *amnestia* or *amnesis*, signifies forgetfulness, oblivion, or the loss of memory.[20] If a sovereign grants an individual amnesty, that individual is freed from all criminal or civil liability that may arise out of the commission of acts covered by the amnesty.[21] In the case of a blanket amnesty, all investigations or court proceedings related to the covered offenses are terminated upon the grant of amnesty.[22] If an individual has already been convicted, his or her sentence is immediately commuted and all liability is expunged.[23] A conditional amnesty may require that a covered individual perform some act or acts, such as filing a formal application for amnesty, engaging in some form of truth-telling, demonstrating contrition, performing community service, or paying reparations before his or her liability is extinguished. In contrast to pardons, which are granted only after an individual has been prosecuted and convicted of a crime, an amnesty may be granted before any civil or criminal proceedings commence.[24] As noted by the Count of Peyronet, Minister of Charles X, King of France, "[a]mnesty does not restore, it erases. . . . Amnesty turns to the past and destroys even the first trace of the sea."[25]

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19. *See* FAUSTIN Z. NTOUBANDI, AMNESTY FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW 4 (Martinus Nijhoff Publishers 2007).

20. *See* Norman Weisman, *A History and Discussion of Amnesty*, 4 COLUM. HUM. RTS. L. REV. 529, 529 (1972).

21. *See* NTOUBANDI, *supra* note 19, at 32-33.

22. *See* Leila N. Sadat, *National Amnesties and Truth Commissions, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 203, 208-10 (Steven Macedo ed., 2006).

23. *Id.*

24. *Id.* at 10.

25. NTOUBANDI, *supra* note 19, at 11.

B. The Legacy of Amnesties

A brief survey of the historical application of amnesties reveals that any prohibition against them is an extremely recent development. For nearly as long as there have been wars, revolutions, and violent political transitions, there have been amnesties granted in their wake. One of the first-recorded amnesties was granted in 404 B.C., following the revolt of the Spartan provincial government of Athens after Sparta's defeat of the Athenians.[26] Thrasybulus, the leader of the revolt, imposed an amnesty forbidding any punishment of the citizens of Athens for all wrongs committed during the prior regime.[27] The purpose of the amnesty was to "erase civil strife from memory by the imposition of legal oblivion."[28] Thereafter, general and unconditional amnesties became a common feature of peace agreements and legislative enactments following major conflicts and political transitions.[29] Peace treaties containing general amnesties concluded the Thirty-Years War in Europe in 1648, the War of Austrian Succession, the Seven Years War, the French and Indian War, and the Napoleanic Wars, among others.[30] In 1867, U.S. President Andrew Johnson authorized an amnesty in the aftermath of the American Civil War, claiming that punishing war offenders "could only tend to hinder reconciliation among the people and national restoration."[31] Following World War I, the Treaty of Lausanne between the Allied Powers and Turkey granted amnesty to all Turkish nationals, immunizing them from prosecution for the Armenian massacre of 1915.[32]

By the 19th century, the practice of imposing amnesties began to wane. Amnesties were noticeably absent from peace treaties enacted after a conflict in which a clear winner emerged.[33] This trend culminated in the wake of World War II when the Allied Powers established the Charter of the International Military Tribunal of 1945 ("Charter") for the purpose of punishing German

26. *Id.* at 15-16.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 15-18.
31. *Id.* at 25 (citing Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868)).
32. *Id.* at 19.
33. *Id.* at 18-19. Amnesties were absent from treaties concluding the early Napoleonic conflicts, Bismarck's early victories, and World War I (with exceptions including the Treaty of Lausanne).

officials who had committed atrocities during the war.[34] The Charter led to the establishment of the Nuremberg, Tokyo, and Control Council No. 10 tribunals. It further established the principle that individuals could be criminally responsible under international law for the commission of crimes against peace, war crimes, and crimes against humanity.[35]

Over the course of the past 25 years, a number of states, including Argentina, Chile, El Salvador, Guatemala, Haiti, Uruguay, South Africa, Sierra Leone, Afghanistan, Peru, Algeria, and Zimbabwe, have enacted amnesty laws.[36] While some of these amnesties (such as that in Guatemala) purport to exclude a handful of international crimes from their scope, most amount to "blanket amnesties" intended to extinguish all criminal and/or civil liability incurred by covered individuals over a period of time. In fact, as recently as 2005, Algeria enacted a near-blanket amnesty intended to resolve civil conflicts.[37] In March 2008, the Liberian TRC, although precluded by statute from offering amnesties to perpetrators of crimes against humanity and international humanitarian law violations,[38] announced that it would consider applications for amnesty for all other offenses.[39] The skeptics note that even though lower courts in some countries have struck down

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34. *See* Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

35. *Id.* at 20.

36. Trumbull, *supra* note 15, at 295-96.

37. Charter for Peace and National Reconciliation, Alg., Feb. 28, 2006, art. 5. This provides amnesty to all militants not accused of public bombings, mass murder, and rape.

38. Act to Establish the Truth and Reconciliation Commission [TRC] of Liberia, June 10, 2004, art. VII, sec. 26(g), *available at* http://unmil.org/documents/hr/liberiatrcact.pdf ("The TRC shall enjoy and exercise such functions and powers as are relevant for the realization of its mandates. Its functions and powers shall include, but not be limited to . . . [r]ecommending amnesty under terms and conditions established by the TRC . . . provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards.").

39. Press Release, Truth and Reconciliation Commission of Liberia [TRC], TRC Public Bulletin No. 6, Policy Paper on Application for Amnesty; Application for Amnesty May be Done in Writing Within a Limited Period Specified by the TRC (Mar. 31, 2008) (on file with author), *available at* https://www.trcofliberia.org/news-1/press-releases/trc-public-bulletin-no-06-policy-paper-on-application-for-amnesty-application-for-amnesty-may-be-done-in-writing-within-a-limited-period-specified-by-the-trc. In May 2009, some TRC commissioners recommended amnesty for certain individuals, including "perpetrators who made full disclosures during the TRC Public Hearings of their actual roles in the conflict." *Liberians Demand War Crimes Prosecutions* (May 22, 2009), *available at* https://www.trcofliberia.org/news-1/press-releases/liberians-demand-war-crimes-prosecutions/.

amnesties for serious crimes under international law,[40] the courts of Chile, El Salvador, Guatemala, Peru, and South Africa ultimately affirmed their validity on some legal ground.[41]

Moreover, states have increasingly attempted to pair amnesties with other transitional justice mechanisms such as reparations, Truth and Reconciliation Commissions, and reduced sentences.[42] For example, East Timor's Commission for Reception, Truth, and Reconciliation granted amnesties for conduct amounting to war crimes on the condition that the individuals fulfilled orders for community service and made public apologies or other remorseful demonstrations.[43] Rwanda's *gacaca* courts similarly allow perpetrators of crimes other than rape and torture to serve half of their sentence in the form of community service rather than in prison.[44] In 2005, Colombia enacted a Peace and Justice Law, which provides amnesty for paramilitaries and leftist guerillas who turn themselves in for crimes not amounting to "serious crimes under international law," contingent upon reparations and truth-telling.[45] Moreover, perpetrators of serious international crimes that comply with the law's "truth-telling" and reparations requirements are rewarded for their cooperation with dramatically reduced sentences, ranging from 5-8 years in length.[46] Thus, although amnesties have become more controversial over the course of the last 50 years, they nevertheless remain a tool available to policymakers dealing with conflict and violence

40. Sadat, *supra* note22, at 208-10.

41. *Id.* at 203.

42. *See* Truth and Reconciliation Commission Law arts. 1(9), 24-29, U.S. INST. OF PEACE, Oct. 6, 2004 (Indon.) (proposing a TRC that would have allowed the President to grant amnesty for any crime); Truth and Reconciliation Commission Law, *draft,* § 25, U.S. INST. OF PEACE (2007) (Nepal) (providing for a TRC which allowed Commission to recommend amnesty for serious crimes under international law if they were committed in the course of one's "duty" or for political purposes during the armed conflict and conditioning any recommendation for prosecution on the consent of the Government).

43. Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor), Report to the Secretary-General, Summary, UN DOC. S/2005/458 (2005) ¶ 339.

44. Stephanie Wolters, *The Gacaca Process: Eradicating the Culture of Impunity in Rwanda?*, INST. FOR SECURITY STUD., Aug. 5, 2005, at 5-7, *available at* http://www.iss.co.za/Af/current/2005/050805rwanda.pdf.

45. Press Release, Amnesty International, Columbia: Justice and Peace Law Will Guarantee Impunity for Human Rights Abusers (Apr. 26, 2005) (on file with author), *available at* http://www.amnesty.org/en/library/asset/AMR23/012/2005/en/a104b2fe-fa20-11dd-999c-47605d4edc46/amr230122005en.pdf.

46. *Id.*

around the world.

C. From Impunity to Accountability: The Growing Prohibition Against Amnesties

Despite the enduring use of amnesties described above, an increasing body of international, regional, and domestic legal sources purport to prohibit the use of amnesties to eliminate individual criminal responsibility for certain offenses that rise to the level of international-level crimes. Since the establishment of the Nuremberg Charter, several additional treaties have emerged to codify substantive criminal offenses under international law.[47] Additionally, a number of authoritative interpretations of those and other international treaties, as well as a host of decisions by international and regional courts and a number of non-binding pronouncements by international bodies, have given rise to the recognition of additional international crimes. Some treaty-based and customary international law-based norms have even risen to the level of *jus cogens* norms.[48] Over the course of the last twenty years, commentators have argued with increasing persuasiveness that these *jus cogens* norms and other norms not only give rise to substantive international criminal offenses, but also give rise to a universal duty incumbent upon all states to punish the perpetrators of those offenses wherever they are subject to jurisdiction.[49]

1. Treaty-Based Offenses

Soon after the creation of the Charter of the IMT, states codified the laws of war in a series of treaties. These treaties confirmed that certain acts, regardless of the military context in which they were undertaken, were impermissible under international criminal law and would give rise to liability that

47. *See infra* Part II.C.1.

48. *Jus cogens* is defined as "a peremptory norm of general international law . . . accepted and recognized by the international community of States . . . from which no derogation is permitted . . . ." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S 331; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, comment *k* (1987) (*jus cogens* norms "prevail over and invalidate international agreements and other rules of international law in conflict with them").

49. *See, e.g.*, Diane F. Orentlicher, *Settling Accounts: The Duty to Punish Human Rights Violations of Prior Regime*, 100 YALE L. J. 2585, 2593 (1991).

could not be extinguished by a national amnesty. The four 1949 Geneva Conventions, to which almost every country in the world is a party, have been recognized as customary international law binding even states that are not parties.[50] Each Convention contains a specific enumeration of the grave breaches that constitute war crimes under international law.[51] Grave breaches in the context of international armed conflicts[52] include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, willfully depriving a civilian of the rights of fair and regular trial, and unlawful confinement of a civilian.[53] The Conventions confirm that states have a duty to prosecute or extradite those suspected of committing grave breaches. Thus, in the context of international armed conflicts, there is very little debate that grave breaches of the Geneva Conventions constitute war crimes under international law. Thus, every state has an obligation to punish perpetrators of such crimes, regardless of whether or not a given state has purported to

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50. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Oct. 21, 1950, 75 U.N.T.S. 31 [hereinafter Convention for the Amelioration of the Wounded and Sick]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Oct. 21, 1950, 75 U.N.T.S. 85 [hereinafter Convention for Wounded, Sick and Shipwrecked]; Geneva Convention Relative to the Treatment of Prisons in War art. 129, Oct. 21, 1950, 75 U.N.T.S. 135 [hereinafter Convention to the Treatment of Prisoners of War]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Oct. 21, 1950, 75 U.N.T.S. 287 [hereinafter Convention to the Protection of Civilian Persons].

51. *See, e.g.*, Convention for the Amelioration of the Wounded and Sick, *supra* note 50, art. 50.

52. Convention for the Amelioration of the Wounded and Sick, *supra* note 50, art. 49; Convention for Wounded, Sick and Shipwrecked, *supra* note 50, art. 50; Convention to the Treatment of Prisoners of War, *supra* note 50, art. 129; Convention to the Protection of Civilian Persons, *supra* note 50, art. 146. These Conventions all have identical language regarding the obligation to prosecute war criminals: "The High Contracting Parties undertake to enact any legislation necessary to provide effective PeñaPeñal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention . . . . Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts."

53. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507, 513-525 (1999) (citing Rome Statute of the International Criminal Court art. 8.2(a)-(e), July 17, 1998, 2187 U.N.T.S. 90 (2002) [hereinafter Rome Statute]).

extinguish their liability through amnesty.[54]

Similarly, the UN Convention on Genocide (Genocide Convention), which the International Court of Justice has determined constitutes customary international law binding on all states, codifies genocide as a crime under international criminal law.[55] It further requires that states either prosecute offenders or turn them over to an international court, giving rise to the inference that amnesties for such offenses warrant no recognition by third-party states seeking to exercise jurisdiction over them.[56]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) states that each Party must criminalize all acts of torture and must make them punishable by "appropriate Peñalties which take into account their grave nature."[57] Each state party to the Convention is obligated to exercise jurisdiction over individuals suspected of torture in the following instances: if it was committed in their territory, if the offender is a national, or if the victim is a national (if the state considers it appropriate, or if the alleged offender is present in the state's territory and the state does not extradite him or her).[58] These provisions codify torture and other cruel, inhuman, or degrading treatment as offenses under international law. Furthermore, they signify that there is a duty on states exercising jurisdiction, at least pursuant to the bases identified in the Convention, to punish those individuals regardless of whether a particular state has purported to extinguish their liability through amnesty.[59] Additionally, the Torture Committee, which has authority to interpret the Convention, has publicly stated that "amnesty laws should exclude torture from their reach" as they "preclude prosecution of alleged torturers who must, according to articles 4, 5, and 12 of the Convention, be investigated and prosecuted."[60]

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54. *See, e.g.*, Orentlicher, *supra* note 49, at 2593.

55. Convention on the Prevention and Punishment of the Crime of Genocide, art. 5, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

56. *Id.*

57. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 4-5, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

58. *Id.* at art. 5.

59. *Id.*

60. Committee Against Torture, *Concluding Observations on Peru*, ¶¶ 49, 61, U.N. Doc. A/55/44 (Nov. 19, 2000) [hereinafter *Concluding Observations on Peru*].

See also Committee Against Torture, *Concluding Observations on Azerbaijan* ¶ 69, U.N.

Taken together, the Geneva Conventions, the Genocide Convention, and the Torture Convention give rise to a body of broadly-recognized treaty-based offenses under international criminal law. Under international law, states are permitted to exercise their jurisdiction over perpetrators of such offenses, whether or not the state in which the offense occurred has enacted an amnesty. However, scholars, international bodies, courts, and commentators have argued with increasing frequency that these are not the only international crimes for which an "obligation to punish" exists.[61]

2. Offenses Under Customary International Law

Certainly, there are several ways in which a rule of international law, such as the articulation of an internationally-recognized crime, can come about. One, discussed above, is through international agreement, such as in the form of a treaty.[62] However, rules of international law can also be articulated in the form of customary international law, which "results from a general and consistent practice of states followed by them from a sense of legal obligation."[63] Rules of customary international law are thus discerned from observing the practice of states, as well as the pronouncements of bodies created by States to evaluate their compliance with and obligations under international law. It is also possible for such customary international law-based crimes to be accompanied by an obligation to punish, even in the absence of an existing treaty that articulates such an obligation (like the Geneva Conventions), so long as that obligation is independently rooted in customary international law as well.

The international offense rooted in customary international law most frequently claimed by scholars to be accompanied by a corresponding "obligation to punish" is the umbrella offense referred to as "crimes against humanity." First codified in the Charter of the IMT, crimes against humanity are also codified by the Rome Statute in Article 7.[64] Over the course of the past twenty

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Doc. A/55/44 (Nov. 19, 2000) [hereinafter *Concluding Observations on Azerbaijan*].

61. Orentlicher, *supra* note 49, at 2585.

62. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(b) (1987).

63. *Id.* § 102(2) (1987).

64. Rome Statute, *supra* note 53, at art. 7 (defining crimes against humanity as: "any of the following acts when committed as part of a widespread or systematic attack against

years, numerous authorities have asserted that states are obligated to punish suspected perpetrators of crimes against humanity through the use of whatever jurisdictional bases they have at their disposal.[65] In making this argument, they point to several pronouncements by international authorities claiming that amnesties covering such crimes are impermissible. These include the Secretary General of the United Nations, who has stated that "amnesty cannot be granted in respect of international crimes, such as. . .crimes against humanity,"[66] that "United Nations-endorsed peace agreements can never promise amnesties for crimes against humanity,"[67] and that the Security Council should reject endorsements of amnesty for crimes against humanity and "should ensure that no amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court."[68]

Finally, some scholars go even further, looking to subsidiary sources of international law to determine that an even broader category of "gross" or "serious" violations of human rights (often including offenses such as summary execution and enforced disappearances) are accompanied by an "obligation to punish." Sources of law pointing to a customary international law obligation include the Secretary General's report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict societies, which states that UN-endorsed peace agreements should never promise

any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture, (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender...or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any other crimes within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) Other inhumane acts of a similar character internationally causing great suffering, or serious injury to body or to mental or physical health.").

65. Orentlicher, *supra* note 49, at 2585, 2593.

66. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/2000/915 (Oct. 4, 2002).

67. The Secretary General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 10, *delivered to the Security Council*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

68. *Id.* ¶ 64(c).

amnesties for "gross violations of human rights"[69] Additionally, the General Assembly's "Right to a Remedy Principles,"[70] states that "[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."[71] The UN Human Rights Commission, in referring to the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Impunity Principles), has recognized "that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes."[72]

Ironically, some recent comments by the Human Rights Commission, the body with authority to interpret the International Covenant on Civil and Political Rights (ICCPR),[73] suggest that when states offer amnesties for conduct that constitutes a breach of the state's treaty obligations under the ICCPR, the amnesty itself gives rise to a duty incumbent on other States Parties to the Covenant to punish the violators themselves. This effect results from the fact that the ICCPR codifies the right to an "effective remedy."[74] In a 2004 Comment, the Committee stated that where

69. *Id.* ¶ 10.

70. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Right to a Remedy Principle"), G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

71. *Id.*

72. *See* U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report to the Economic and Social Council on the Sixty-First Session of the Commission*, ¶¶ 3, 21, U.N. Doc. E/CN.4/2005/L.10/Add. 17 (Apr. 21, 2005) (*prepared by* Deirdre Kent) ("States must ensure that those responsible for serious crimes under international law are prosecuted, tried, and duly punished").

73. International Covenant on Civil and Political Rights [ICCPR], Human Rights Comm., *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 13, ¶ 15 (May 26, 2004) [hereinafter General Comment No. 31].

74. International Covenant on Civil and Political Rights [ICCPR], G.A. Res. 2200A (XXI), ¶¶ 2, 6-7, 15, U.N. Doc. A/6316 (Dec. 16, 1966) ("Each Party to the present Convention undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority

investigations, which are required in order for individuals to have accessible and effective remedies for the vindication of their rights,[75] reveal violations of rights recognized as criminal under domestic or international law, "States Parties must ensure that those responsible are brought to justice."[76] The Comment further stated that "where public officials or State agents have committed violations of [these rights], the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties," and that "States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law."[77] The General Comment confirmed that "every State Party has a legal interest in the performance by every other State Party of its obligations."[78] Moreover, this Comment was not the only indication that the Committee believes that amnesties may *give rise* to a third-party obligation to punish in the case of serious violations of human rights: rather, the Committee has expressed concern and disapproved of national amnesties in the past, both in the context of Concluding Observations on specific countries and in the course of adjudication under the ICCPR's complaints mechanism.[79]

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provided for by the legal system of the State.").

75. *Id.*

76. *Id.* at ¶ 18; *see also* International Covenant on Civil and Political Rights [ICCPR], Human Rights Comm., *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, ¶ 2, 13-15, U.N. Doc. A/47/40 (March 10, 1992) ("Amnesties are generally incompatible with the duty of States to investigate [torture], to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future").

77. General Comment No. 31, *supra* note 73, ¶ 18.

78. *Id.* at ¶ 2.

79. *See* U.N. Human Rights Council [HRC], *Concluding Observations on Senegal*, at 23, ¶ 103, UN Doc. A/48/40 Vol. 1 (1993) ("[P]articular concern was expressed over the danger that the amnesty laws might be used to grant impunity to officials responsible for violations, who had to be brought to justice."); U.N. Human Rights Council [HRC], *Concluding Observations on Niger*, at 88, ¶.425, U.N. Doc. A/48/40 Vol. 1 (1993) ("The Committee considers that the agents of the State responsible for such human rights violations should be tried and punished. They should in no case enjoy immunity, inter alia, through an amnesty law."); Vicente v. Colombia, ¶ 8.8, CCPR/C/60/D/612/1995 (1995) ("[T]he State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try, and punish those deemed responsible for such violations."); Rodriguez v. Uruguay, ¶¶ 6.3, 12.4, CCPR/C/31/D/194/1985 (1985) ("[A]s a result of Law No. 15,848 no PeñaPeñal sanctions could be imposed on persons responsible for torture and ill-treatment of prisoners . . . . The Committee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as the Law No. 15,848 . . . are incompatible

3. International, Regional, and State Court Decisions on the Obligation to Punish

Over the course of the last two decades, several regional and international claims mechanisms have declared that the obligation to punish perpetrators of a variety of internationally recognized crimes and/or human rights violations is supreme and that state efforts to thwart that obligation through amnesties are illegitimate. In turn, scholars have relied on these decisions in asserting that the obligation to punish perpetrators of such offenses, despite the fact that the territorial state in which they were committed has enacted an amnesty or other transitional justice mechanism, is rooted in customary international law.[80]

In the course of interpreting the American Convention on Human Rights, the Inter-American Court and Inter-American Commission on Human Rights have been particularly insistent about the affirmative right of states to investigate human rights abuses and to punish those who violate them through the use of criminal sanctions.[81] The Inter-American Court first outlined the duty to punish in its 1988 *Velasquez-Rodriguez* case, in which it found that Honduras had a legal duty to "take reasonable steps . . . to carry out a serious investigation of [human rights] violations . . . to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[82] Eight years later, the Inter-American Commission of Human Rights relied on the Court's decision in finding that Chile's amnesty laws violated the right the state's duty to "prevent, investigate and punish any violation of the rights recognized by the Convention."[83] In 2001, the Inter-American Court endorsed the Commission's finding that amnesty laws are incompatible with the

with the obligations of the State party under the Covenant").

80. Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1 (1999); *see also* Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197 (1996).

81. *See, e.g.*, Velasquez-Rodriguez v. Honduras, Inter-Am C.H.R. (ser. C) No. 4 (July 29, 1988); Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/39, ¶ 73 (1996); Barrios Altos Case (Chumbipuma Aguirre y otros v. Peru), Inter-Am. Ct. H.R., (ser. C) No. 75 (March 14, 2001).

82. *Velasquez-Rodriguez*, (ser. C) No. 4, at ¶ 174.

83. *Hermosilla*, Case 10.843, at ¶¶ 72, 73.

state's duty to punish in the *Barrios Altos* case, finding that Peru's self-amnesty laws were manifestly incompatible with the aims and spirit of the Inter-American Convention on Human Rights and stating that the court would refuse to honor any measure designed to eliminate criminal responsibility, "because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."[84]

Additionally, two international-level judicial decisions suggest that amnesties are incompatible with the obligation to punish certain internationally-recognized crimes inherent in customary international law. First, in *Prosecutor v. Furundzija*, a Trial Chamber of the International Tribunal for the Former Yugoslavia (ICTY) about states passing amnesty laws covering perpetrators of torture:

> [T]he national measures, violating the general [prohibition against torture] and any relevant treaty provision, would . . . not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. . . . [P]erpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime (emphasis in original).[85]

Secondly, in 2004, the Special Court for Sierra Leone's Appeals Chamber ruled that a national amnesty for serious international crimes could not bind that court, finding that there is a "crystallising international norm that a government cannot grant amnesty for serious crimes under international law" and that such "a norm that governments cannot grant amnesties for serious crimes under international law before their own national courts is developing under international law."[86]

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84. *Barrios Altos Case*, (ser. C) No. 75, at ¶¶ 41, 43.
85. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998).
86. Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision on Challenge

Finally, scholars and courts point to decisions by the courts of Argentina, Peru, and Colombia, which have each invalidated at least part of an exculpatory law in their country on the basis that it conflicted with an international obligation to punish certain crimes.[87]

D. An Uncertain Rule: Counterarguments against the Prohibition

Despite this growing body of evidence suggesting that a host of offenses are not only prohibited under international law, but also give rise to a universal duty to punish the perpetrators of such offenses, a number of scholars continue to insist that there is an "emerging norm in international law that requires accountability – *but not necessarily prosecution* – for serious violations of international law."[88] These scholars do not dispute that grave breaches of the Geneva Conventions in the course of international armed conflict, genocide, and perhaps torture, give rise to such a duty, as these obligations are codified in treaties that have enjoyed nearly universal accession.[89] However, they note that insofar as the duty to prosecute Grave Breaches of the Geneva Convention is limited to the context of *international* (not internal) armed conflicts,[90] and insofar as there is no treaty-based obligation for

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to Jurisdiction: Lomé Accord Amnesty, ¶¶ 72, 82, 88 (Mar. 13, 2004); Prosecutor v. Taylor, Case No. SCSL-03-01-I, Indictment (Mar. 3, 2003) (Domestic amnesty cannot apply to international crime).

87. Corte Suprema de Justicia [CSJN], 14/6/2005, "Simón, Julio Héctor/ Privación Ilegítima de la Libertad," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-2-2171) (Arg.) (Argentine Supreme Court declares two laws blocking prosecution for crimes committed during the "Dirty War" between 1976 and 1983 to be unconstitutional and void); Corte Constitucional [CC], 18/5/2006, "Ley De Justicia Y Paz / se revisa la constitucionalidad de la Ley 975 de 2005," Jurisprudencia Y Doctrina (2006-35-1807) (Colom.) (Colombian Constitutional Court strikes down provisions of a law authorizing significant sentence reductions for demobilized combatants who confessed to committing internationally-prohibited crimes); Quinto Juzgado PeñaPeñal Especial [QJPE], 2/7/2003 (Peru) (Peruvian lower court dismisses challenges to a prosecution on the basis of amnesty on the basis that the amnesty contravened the American Convention).

88. Trumbull, *supra* note 15 at 319 (emphasis added).

89. Scharf, *supra* note 53, at 519.

90. *See* Convention for the Amelioration of the Wounded and Sick, *supra* note 50, art. 2, 49-50; Convention for Wounded, Sick and Shipwrecked, *supra* note 50, art. 2, 49-50; Convention to the Treatment of Prisoners of War, *supra* note 50, art. 2, 129; Convention to the Protection of Civilian Persons, *supra* note 50, art. 2, 129; However, that does not mean states or international tribunals lack permissive authority to prosecute persons who commit war crimes in internal armed conflicts. Rome Statute, *supra* note 53, at art. 8.2(c), (e).

states to punish crimes against humanity, extrajudicial execution, arbitrary detention, or a host of other offenses, any duty to punish those crimes must stem from customary international law.[91] Thus, the proponents of a duty to punish these crimes must prove that there is a general and consistent practice of states of prosecuting perpetrators of such crimes out of a sense of legal obligation, or *opinio juris.*[92]

On the issue of a "legal obligation" to punish, skeptics criticize proponents of this duty and their weak legal support for often relying only on judicial decisions from special tribunals, regional courts, and non-binding pronouncements from the Secretary General, General Assembly, and UN treaty bodies like the HRC and CAT.[93] Moreover, skeptics' claims are bolstered by a SCSL recent decision, which found that that "there is not yet any general obligation for States to refrain from amnesty laws on [*jus cogens*] crimes," and that states do not "breach a customary [international law] rule" in granting such amnesties in the absence of contrary treaty obligations.[94] Even the Chairman of the Rome Diplomatic Conference acknowledged that the Rome Statute does not automatically preclude amnesties.[95] Rather, several provisions reflect "creative ambiguity" which potentially permits the ICC to recognize an amnesty exception to the court's jurisdiction.[96] These actions all demonstrate that the rule against recognizing amnesties may be less hard and fast than proponents of the duty to punish

91. *See* Scharf, *supra* note 53.

92. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) comment *c* (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (opinio juris sive necessitatis); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.").

93. Scharf, *supra* note 53, at 521 (Those who argue that customary international law precludes amnesty for crimes against humanity base their position on non-binding General Assembly Resolutions, hortative declarations of international conferences, and international conventions that are not widely ratified, rather than on any extensive state practice consistent with such a rule.).

94. Prosecutor v. Kallon & Kambara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72, Decision on Challenge to Jurisdiction, ¶ 71 (Mar. 13, 2004).

95. Scharf, *supra* note 53, at 521-22.

96. *Id.* at 522-525 (For example, Article 16 requires the Court to defer prosecution in favor of a national amnesty if the Security Council adopts a resolution under Chapter VII of the UN Charter requesting the Court to do so; Article 53 provides the Prosecutor with prosecutorial discretion to choose to respect an amnesty deal and thereby terminate an investigation or prosecution if he concludes there are "substantial reasons to believe that an investigation would not serve the best interests of justice.").

acknowledge.

Moreover, as Michael Scharf as noted, "[t]o the extent that any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit crimes against humanity."[97] The skeptics of the duty to punish note that – as detailed in the Introduction – a host of states have enacted amnesties over the course of the last 25 years, Finally, skeptics emphasize that a number of third-party states facilitated or publicly endorsed the granting of amnesties issued by transitioning states, including the United States, which encouraged the Haitian amnesty in 1993. Mexico, Norway, Spain, Venezuela, and Colombia (and again the United States) all subsequently facilitated the peace process and amnesty in Guatemala.[98] As late as 2005, both the United States and France indicated that they would recognize the Algerian amnesty, even though it applies to serious crimes under international law.[99]

As noted above, states have increasingly attempted to pair amnesties with other transitional justice mechanisms such as reparations and Truth and Reconciliation Commissions.[100] Whether these additional mechanisms suffice to satisfy the territorial state's duty under international human rights law to provide victims of atrocities with a remedy remains highly contended. This is evident by the views of scholars and courts which insist that "accountability" for rights violations requires "prosecution."[101] The secondary question of whether these additional procedures satisfy an international duty to prosecute perpetrators of internationally-recognized crimes remains similarly unresolved.

97. *Id.* at 521.

98. Trumbull, *supra* note 15, at 297-98.

99. *Id.* at 298.

100. *See* Truth and Reconciliation Commission Law arts. 1(9), 24-29, U.S. INST. OF PEACE, Oct. 6, 2004 (Indon.) (proposing a TRC that would have allowed the President to grant amnesty for any crime); Truth and Reconciliation Commission Law, *draft,* § 25, U.S. INST. OF PEACE (2007) (Nepal) (providing for a TRC which allowed Commission to recommend amnesty for serious crimes under international law if they were committed in the course of one's "duty" or for political purposes during the armed conflict and conditioning any recommendation for prosecution on the consent of the Government).

101. *See, e.g., Velasquez-Rodriguez,* (ser. C) No. 4, ¶ 166; *Barrios Altos Case,* (ser. C) No. 75, at ¶ 41; Orentlicher, *supra* note 49, at 2593.

E. Conclusion

The state of international law regarding the "duty to punish" is in large part uncertain, as evidenced by the vociferous debate over an internationally-recognized duty of all states to assert jurisdiction over and punish perpetrators of internationally-recognized crimes.[102] Both camps agree that for certain treaty-based offenses – namely genocide, grave breaches of the Geneva Conventions, and torture (albeit on potentially more limited jurisdictional grounds) – such a duty to punish exists as a specific rule of international law, and states are obligated to disregard any national amnesty purporting to otherwise extinguish a perpetrator's liability.[103] However, whether there is an international duty to punish non-treaty-based international offenses, such as crimes against humanity and war crimes in an internal conflict, is far less clear. Finally, it is uncertain what effect, if any, other transitional justice measures will have on the international duty to punish offenders of any of the above-mentioned international crimes.

It is with this somewhat ambiguous legal standard that the courts of third-party states, purporting to exercise "universal" or other forms of extraterritorial jurisdiction, are presented when they attempt to hear claims against individuals accused of violating international criminal law abroad. If proponents of the international duty to punish a wide range of international crimes are correct, then third-party states have no obligation to recognize a domestic amnesty. Rather, they have an obligation to *disregard* such measures. In this scenario, domestic amnesties would constitute impermissible attempts by a single state to thwart international law binding on the entire international community. However, if the skeptics are correct and there is no international duty to punish those who have committed crimes against humanity, war crimes in the context of internal armed conflicts, and other offenses such as extrajudicial execution and arbitrary detention, then states could establish jurisdiction over violators of international law, but there would be no mandatory obligation to do so. If universal and extraterritorial jurisdictions are merely permissive, then third-party states and their courts would have the freedom to decline jurisdiction over international crimes on a

102. *See* Orentlicher, *supra* note 49, at 2585; Trumbull, *supra* note 15, at 297.
103. *Id.*

discretionary basis.

The remainder of this paper will examine the standards - or lack thereof - which the courts of third-party states have followed when evaluating whether to give effect to a domestic amnesty or other transitional justice measure falling short of prosecution. The article will conclude by proposing a more principled approach by which courts faced with the choice of whether to decline to exercise extraterritorial jurisdiction because an offender's home state has enacted an amnesty covering the crimes of which he or she is accused.

III. THIRD-PARTY STATE TREATMENT OF DOMESTIC AMNESTIES—A SURVEY OF GLOBAL APPROACHES

A. Introduction—Extraterritorial Jurisdiction

Over the course of the last two decades, as the concept of individual criminal liability under international law has become increasingly accepted and as nations have enacted regulations in the transnational areas of trade, antitrust, securities, and other commercial matters with increasing frequency, the courts of those nations have become increasingly comfortable with exercising jurisdiction over claims arising outside of their own borders.[104] As the Restatement of the Foreign Relations Law of the United States confirms, there are several internationally-recognized bases on which a state can apply its own laws and regulations to conduct arising elsewhere.[105] States are permitted to prescribe law with respect to "conduct outside [their] territory that has or is intended to have a substantial effect within [their] territory" (the effects doctrine)[106]; actions and interests of their nationals outside their territory (the nationality principle)[107]; "conduct outside [their] territory by persons not its nationals that is directed against the security of the state" (the protective principle)[108]; and "certain offenses recognized by the community of nations as of universal concern," even in the absence of other bases of jurisdiction

104. *See, e.g.*, Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, 18 Hum. Rts. Watch 5(D), June 27, 2006, at 25-26, 58 *available at* http://www.hrw.org/reports/2006/ij0606/ij0606web.pdf.

105. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

106. *Id.* at § 402(1)(c).

107. *Id.* at § 402(2).

108. *Id.* at § 402(3).

(universal jurisdiction).[109]

Of these four bases, universal jurisdiction is certainly the most controversial.[110] The Restatement declares that "universal jurisdiction... is a result of universal condemnation of those activities and general interest in cooperating to suppress them,"[111] and that the list of offenses, while including "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes," is subject to expansion and may encompass claims (for example, based on certain acts of terrorism and other offenses) other than those specifically articulated in the Restatement.[112] The list of offenses giving rise to universal jurisdiction is contested as well, in part because the Restatement is merely an interpretation of international law and not legally binding, even for courts in the United States.[113] However, the controversial nature of universal jurisdiction - and the less controversial, but still occasionally contested practice of extraterritorial jurisdiction - has not prevented it from becoming increasingly accepted and utilized by courts in North America and Europe.[114] As the following

109. *Id.* at § 404.

110. For example, several governments have recently expressed the position that exercise of universal jurisdiction itself impermissibly intrudes on the sovereignty of other nations, regardless of whether or not a supposedly "impermissible" amnesty is at issue. In the context of an amicus brief filed in support of 38 multinational corporations named as defendants in an ATS claim stemming from their transactions with the South African government during the apartheid era, the US government stated, "a suit brought in United States court to redress those wrongs is not a proper function of a United States court and will often be viewed by the foreign state's new government as an infringement on its sovereignty." Brief of the Solicitor General of the United States, *In re Apartheid Litigation*, 76 USLW 3405 (Jan 10, 2008) (petition for certiorari) at 19.18. Other countries have similarly protested that the assertion of authority over their own nationals with regard to their conduct in a third country is "inconsistent with established principles in international law" (*See* Aide Memoire from the Government of Switzerland) and that such assertion "infringes the sovereign rights of States to regulate their citizens and matters within their territory" (*See* letter to U.S. Secretary of State from British Ambassador, on behalf of the Government of the United Kingdom, with concurrence of the Government of Germany).

111. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, comment *a* (1987).

112. *Id.*

113. *See id.* at Foreward, IX, ("The formulation of legal rules in the Restatement is the considered opinion of The American Law Institute. As was said of the prior Restatement, it is 'in so sense an official document of the United States.' The American Law Institute is a private organization, not affiliated with the United States Government or any of its agencies. In a number of particulars the formulations in [the] Restatement are at variance with positions that have been taken by the United States Government.").

114. For a comprehensive overview of the exercise of universal jurisdiction in Europe,

discussion demonstrates, these courts are varied in their approaches to dealing with truth commissions, amnesties, attempts at mitigation, and other transitional justice mechanisms.

B. The United Kingdom

The United Kingdom permits courts in England and Wales to exercise universal jurisdiction over torture[115] and certain war crimes including grave breaches of the Geneva Conventions and Additional Protocol I,[116] and to exercise extraterritorial jurisdiction (on the basis of territoriality or nationality/residence) over genocide and crimes against humanity.[117]

By far the most well-known instance in which universal jurisdiction has been exercised against an individual accused of committing internationally-prohibited offenses, despite the fact that a domestic amnesty purported to immunize that individual, is the *Pinochet* case in the United Kingdom, the final judgment of which was issued in 1999 by the House of Lords.[118] In 1996, individuals from Argentina and Chile, who were unable to bring claims against the military leaders of those countries because of amnesty laws enacted by their governments, filed criminal complaints in Spain alleging counts of torture and conspiracy to commit torture, as well as other offenses.[119] Among those complaints was one accusing General Pinochet of bearing primary responsibility for over 2,000 "disappearances" and killings over the course of his 1973-1990 dictatorship.[120] In October 1998, while General Pinochet was in Britain, a Spanish judge petitioned the

see Human Rights Watch, *supra* note 104. In 2003, Mexico agreed to extradite a former Argentine military official to Spain to face trial for offenses committed in Argentina during its "Dirty War." The Mexican Supreme Court authorized Cavallo's extradition on charges of genocide and terrorism, but not on charges of torture, which a lower court had barred on grounds of an expired statute of limitations. *See* Gretchen Peters, *Mexico Gives Boost to Universal Jurisdiction,* CHRISTIAN SCI. MONITOR, June 16, 2003, *available at* http://news.findlaw.com/csmonitor/s/20030616/16jun2003902750.html.

115. Criminal Justice Act, 1988, c. 33, § 134 (Eng.), *available at* http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880033_en_1.htm.

116. Geneva Conventions Act, 1957, 5 & 6 Eliz. 2, c. 52, §§ 1, 1A, (Eng.), *available at* http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1957/cukpga_19570052_en_1.

117. International Criminal Court Act, 2001, c. 17, §§ 50, 51 (Eng.), *available at* http://www.opsi.gov.uk/ACTS/acts2001/20010017.htm.

118. In re Pinochet, 38 I.L.M. 430 (1999) [hereinafter *Pinochet*, Final Judgment].

119. NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT, 32-66 (U. Penn. Press 2005).

120. *Id.* at 47.

British authorities to arrest him, and they complied.[121] General Pinochet challenged the authority of the British government to extradite him to Spain, saying that he enjoyed both head-of-state immunity for the crimes he was accused of committing and that he benefited from the amnesty enacted in his home country in 1978.[122] Pinochet's attorneys argued that even if the court found that it had the authority to exercise jurisdiction over him, it should nevertheless decline to do so on the ground of non-justiciability. They claimed that decisions relating to the recognition of the Chilean amnesty were a matter of domestic concern, and the state had already appointed a Truth and Reconciliation Commission in 1990 as its method of dealing with the legacy of violence during that period of its history.[123]

Both the initial (November 1998) and final (March 1999) House of Lords decisions determined that General Pinochet was not immune from prosecution for torture and conspiracy to commit torture committed after the United Kingdom ratified the Torture Convention in 1998.[124] However, both judgments contained language suggesting that the British courts could decline to prosecute a perpetrator of universally-prohibited crimes on the basis of a foreign state's amnesty laws.[125] Lord Lloyd of Berwick was particularly adamant on this point in the initial House of Lords decision.[126] He noted an expert testifying on Pinochet's behalf opined that the situation in Chile at the time was precarious, and if foreign courts were to intervene, the balance achieved by Chile's Truth and Reconciliation Commission might be undermined.[127] Referring to this testimony in detail, Lord Lloyd

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121. *Id.* at 33-35.

122. *Id.* at 41.

123. *Id.*

124. *Pinochet*, Final Judgment, 38 I.L.M. at 904; Regina v. Bow St. Metropolitan Stipendiary Magistrate, 3 W.L.R. 1456 (1998) [hereinafter *Pinochet*, Initial Judgment].

125. *Id.*

126. *See Pinochet*, Initial Judgment, 3 W.L.R. at 1479-96.

127. *Id.* at 1482 (discussing evidence presented by Professor Walters that "there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile. It is felt that the current stable position has been achieved by a number of internal measures including the establishment and reporting of the Rettig Commission on Truth and Reconciliation. The intervention of a foreign court in matters more proper to internal domestic resolution may seriously undermine the balance achieved by the present democratic government.").

further noted that he was not convinced that a prohibition against amnesties for crimes such as torture was solidified in customary international law.[128] Noting that recent state practice suggested that amnesty was permissible, Lord Lloyd concluded that even if General Pinochet did not enjoy head-of-state immunity, there were "compelling reasons" for the court to find the case non-justiciable on other grounds.[129] Lord Lloyd made clear that he based his finding of non-justiciability not on a specific legal doctrine, but rather on the ground that the courts of the United Kingdom were "simply not competent to adjudicate,"[130] because, in his words, "we are not an international court."[131] For an English court to investigate and pronounce on the validity of amnesty in Chile would be to assert jurisdiction over the internal affairs of that state at the very time when the Supreme Court in Chile is itself performing the same task."[132] Furthermore, Lord Lloyd declared that even if the UK Parliament had provided for the exercise of universal jurisdiction in the Criminal Justice Act, the demands of the non-justiciability doctrine should take precedent.[133]

In the final Pinochet judgment, Lord Saville of Newdigate, in overruling Lord Lloyd's reasoning, held that the doctrine of non-justiciability does not apply to cases involving treaties which set out an obligation to extradite or prosecute and where one of the parties is a state objecting to England's jurisdiction.[134] Because Chile, Spain, and England had all been parties to the Torture Convention since 1988, Lord Saville found that they had "clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an

128. *Id.* at 1490 ("Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about 1 million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government . . . state practice does not at present support an obligation to extradite or prosecute in all cases.").

129. *Pinochet*, Initial Judgment, 3 W.L.R. at 1494.

130. *Id.* at 1495.

131. *Id.*

132. *Id.*

133. *Id.* (citing Lord Wilberforce in *Buttes Gas and Oil Co. v. Hammer* [1982] A.C. 888).

134. Regina v. Bow St. Metropolitan Stipendiary Magistrate, 2 W.L.R. 827 (1999).

interference in their sovereignty," and that arguments based on non-justiciability were not applicable.[135]

Lord Saville's approach to amnesty laws that target extraditable or prosecutable offenses for which states have a treaty-based obligation is in line with the opinions of other courts and scholars who have considered the issue. Scholars on both sides of the debate have acknowledged that third-party states have clear obligations when it comes to exercising jurisdiction over allegations of genocide, torture, and grave breaches of the Geneva Conventions.[136] Insofar as Lord Lloyd of Berwick invoked the doctrine of non-justiciability with respect to those crimes, his opinion runs afoul of an increasingly clear international legal obligation incumbent not only on parties to the Genocide Convention, Torture Convention, and Geneva Conventions, but upon third-party states as a matter of customary international law.[137]

C. Spain

Spain recognizes universal jurisdiction and has exercised it more frequently than its European counterparts. Article 23.4 of Spain's Law on Judicial Power states that Spain's courts can exercise extraterritorial or universal jurisdiction for crimes including genocide, terrorism, and crimes that "under international treaties and agreements, must be prosecuted in Spain."[138]

In the 2007 *Scilingo* case, the Supreme Court held that Spain had jurisdiction to prosecute an Argentine navy officer present in Spanish territory for crimes against humanity based on allegations that he perpetrated dozens of extrajudicial executions during Argentina's Dirty War.[139] The court reached this conclusion despite Scilingo's argument that the Spanish courts should recognize Argentina's amnesty laws as extinguishing his liability for the offenses.[140] The tribunal countered that the amnesty had no

135. *Id.* at 904.

136. *See generally* ANDREW CLAPMAN, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (Academy of Eurpoean Law ed., Oxford University Press 2006).

137. *See Regina*, 2 W.L.R. at 904.

138. Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495, 504-05 (2007).

139. *Id.*

140. *Id.*

value outside of Argentina.[141] Moreover, the Court ruled that amnesty provided it with an affirmative justification to exercise jurisdiction, as its existence proved that that no court in Argentina would be able to prosecute the crimes.[142]

While the Spanish Supreme Court's decision in *Scilingo* determined that an amnesty enacted abroad would not bar an individual's subsequent prosecution for covered offenses in Spain, it did not determine whether Spain would similarly exercise its jurisdiction in response to other transitional justice mechanisms. For example, under Spanish law, a court can decline to prosecute an individual if he has been "punished" abroad, leaving some doubt as to how a Spanish court would respond if an individual brought before the court had been awarded a dramatically reduced sentence (or one ordering community service) by the courts of the country in which his offenses were committed.[143]

Despite these ambiguities, the clear articulation by the Spanish courts that amnesties for crimes other than those treaty-based crimes giving rise to a clear international duty to prosecute will not be enforced outside the issuing territory is significant. Moreover, the decision demonstrated that Spanish courts appear to consider the availability of an alternative forum in which investigation or prosecution can be held as a predicate consideration, if not a requirement, to a finding of non-justiciability in Spain.

D. France

Although France only recognizes universal jurisdiction over claims of torture,[144] its highest court has exercised this power in at least one case — that of Ely Ould Dah. Ould Dah, an Army Captain in Mauritius, was accused of ordering and participating in the arrest and torture of two Mauritanian soldiers as part of a government-sponsored crackdown against thousands of African Mauritanians accused of plotting a conspiracy.[145] Two of his victims

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141. *Id.* at 505 (citing STS, (J.T.S., No. 1362) § II (2004)).

142. Audiencia Nacional, Apr. 19, 2005 (R.G.D., No. 16/2005, at Part III, § 6).

143. Human Rights Watch, *supra* note104, at 25-26.

144. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 689 (Fr.) (providing for universal jurisdiction over offenses committed outside of France when an international convention gives jurisdiction to French courts to deal with this offense and referring only to the Torture Convention as an available basis).

145. Trial Watch, *Ely Ould Dah*, http://www.trial-ch.org/en/trial-watch/profile/db/facts/ely_ould-had_266.html (last visited Mar. 2, 2009).

had fled to France, where they became political refugees, and filed a private criminal complaint with the French courts.[146] Ould Dah was arrested in July 1999, in France, while there for a training program.[147] However, the French authorities released him into house arrest in September 1999, and by April 2000, he had escaped back to Mauritania.[148] Thereafter, a French examining magistrate ordered that Ould Dah be tried in absentia before the Cour d'assises of Nimes, a decision that was confirmed by that court.[149]

Ould Dah appealed the decision, arguing that the courts should refrain from exercising jurisdiction over him on the basis of an amnesty issued by the government of Mauritius relieving all state actors from liability in connection with the government crackdown.[150] The Appeals Court of Nimes flatly rejected Ould Dah's claims, holding that the foreign amnesty was valid only in the territory of the issuing state, and that if France were to afford it recognition, France would violate its own international obligations and abnegate the very principle and purpose of universal jurisdiction.[151] Following the Cour de Cassation's decision, in 2005, the Cour d'assises of Nimes finally tried Ould Dah in absentia on charges of torture in violation of the Torture Convention, found him liable on the charges of directly participating in torture, and sentenced him to the maximum available Peñalty of ten years in prison.[152]

The case of Ely Ould Dah in France demonstrates that while France may have unnecessarily narrowed the scope of universal jurisdiction, it has recognized that, at least in the case of torture, courts may not dismiss claims on non-justiciability grounds, even where the defendant has been granted amnesty by his home state.

E. Denmark

Danish law provides for the exercise of universal jurisdiction over offenses listed in treaties to which Denmark is a party that also contain an international obligation to prosecute or extradite, including torture and grave breaches of the Geneva

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. Human Rights Watch, *supra* note 104, at 58.
152. Trial Watch, *supra* note 145.

Conventions.[153] Denmark's Peñal Code also gives Denmark jurisdiction over any crime carrying a Peñalty of more than one year of imprisonment if it is also a crime in the territorial state and the accused cannot be extradited there.[154] According to Human Rights Watch, Danish authorities have investigated several complaints on this basis since 2001, three of which had led to a prosecution.[155]

However, Danish prosecutors admittedly take amnesties issued in the territorial state into account when deciding whether to exercise universal jurisdiction. According to Human Rights Watch, the Danish Special International Crimes Office (SICO) declined to investigate at least three cases involving international crimes committed during the Lebanese civil war on the basis of an amnesty law issued by the Lebanese government in 1991.[156] Apparently, SICO applies a list of criteria to each amnesty in order to determine whether it will be afforded comity. Because all of the amnesties that SICO has considered have been "general" – applying to both sides of a conflict rather than one – SICO has never "disqualified" an amnesty for comity purposes.[157]

As discussed in the context of the *Pinochet* decisions, Denmark's willingness to apply the non-justiciability doctrine of international comity likely contravenes its international legal obligations under the related treaties.[158] Moreover, while it is encouraging that SICO applies a principled list of criteria to amnesties in order to determine whether they are appropriate subjects of international comity, the criteria apparently do not take the substantive nature of the alleged offenses into account. Finally, the risk that prosecutorial discretion could be based on political rather than legal considerations is extremely high, given the unwillingness of SICO to actually disclose the list on which it makes its comity evaluations.

153. STRAFFELOVEN [PEÑAPEÑAL CODE] § 8(5) (Den.).

154. *Id.* § 8(6).

155. Human Rights Watch, *supra* note 104, at 46.

156. *Id.* at 25.

157. *Id.* at 26.

158. In order to apply the doctrine of non-justiciability and decline jurisdiction over the offenses of genocide, grave breaches of the Geneva Conventions, and torture, Denmark's international legal obligations will likely be contravened.

F. United States

In the last twenty five years, the courts of the United States, with some support from Congress and the Supreme Court, have interpreted the Alien Tort Statute (ATS), 28 U.S.C. § 1350, to provide extraterritorial and universal jurisdiction over crimes prohibited under international law when raised pursuant to a civil claim bought by an alien.[159] A recent amendment to the ATS known as the Torture Victims Protection Act (TVPA) provides a cause of action for U.S. nationals, as well as aliens, for torture and extrajudicial executions.[160] The Supreme Court confirmed in its 2005 decision in *Sosa v. Alvarez-Machain* that the ATS permits suits for offenses that violate international norms recognized at the time of the statute's enactment in 1789 (including piracy) as well as for causes of action that have entered the modern law of nations since that time.[161] Courts have interpreted the ATS to permit claims alleging violations of the law of war, crimes against humanity, genocide, and torture, among other offenses, often in the absence of any internationally-recognized jurisdictional basis other than universal jurisdiction.[162] Several claims brought under the ATS have implicated amnesties enacted in the territorial state of the offense. However, the courts that have considered the issue have dealt with those amnesties in strikingly different ways.

1. Disregarding the Amnesty

In the course of adjudicating claims brought pursuant to the ATS, several U.S. courts have mentioned that the territorial state has enacted an amnesty but pay no further regard to it thereafter. For example, in *Barrueto v. Larios*, the family of a Chilean

159. Although the practice of recognizing universal civil jurisdiction is less common among States than that of recognizing universal criminal jurisdiction, according to the Restatement, it is nevertheless a legitimate exercise of State power. *See* RESTATEMENT (THIRD) OF FOREIGN RELATION LAW OF THE UNITED STATES § 404, comment *b* (1987) ("In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis . . . .").

160. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 1350, 106 Stat. 73 (1992).

161. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

162. Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995); Doe v. Islamic Salvation Front, 993 F. Supp. 3d 8 (D.D.C. 1998); Filartiga v. PeñaPeña-Irala, 630 F.2d 876 (2d Cir. 1980). Note that U.S. courts must also satisfy the U.S. Constitution's requirements for exercising personal and subject matter jurisdiction in ATS cases.

economist, killed by Pinochet's military officers under Pinochet's command, sued one of the military officers who had been present at his execution and subsequently relocated to the United States under the ATS and TVPA for extrajudicial killing, torture, crimes against humanity, and cruel and degrading treatment.[163] Despite the fact that Larios was purportedly covered by the Chilean amnesty at issue in the *Pinochet* case, the District Court denied his motion to dismiss the case without discussing any potential international comity concerns.[164] A jury went on to find in favor of the plaintiffs, and the Court of Appeals for the Eleventh Circuit affirmed, again without any detailed consideration of the amnesty.[165]

Similarly, in *Arce v. Garcia*, three Salvadoran plaintiffs brought claims under the ATS and TVPA against two retired Salvadoran generals living in Southern Florida.[166] Neither the Southern District of Florida nor the Eleventh Circuit mentioned the El Salvadoran amnesty even in passing in their decisions.[167] Although it does not appear that the defendants attempted to raise amnesty as a defense, the omission is still noteworthy as a federal court has an obligation to satisfy its subject matter jurisdiction *sua sponte*.[168]

2. Amnesty Not a Bar to Exercise of Jurisdiction

Additionally, several U.S. courts considering ATS cases have evaluated the claims of defendants who have argued that suits against them should be dismissed on the basis of amnesties enacted elsewhere, but have rejected their claims.

For example, in 2003, a group of Salvadorans brought claims under the ATS and TVPA against Colonel Nicolas Carranza, a naturalized U.S. citizen living in Memphis.[169] They alleged that as

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163. Barrueto v. Larios (Barrueto I), 205 F. Supp. 2d 1325 (S.D. Fla. 2002).
164. *Id.*
165. Barrueto v. Larios, 402 F.3d 1148 (11th Cir. 2005).
166. Arce v. Garcia, No. 02-14427 (11th Cir. 2005), *available at* http://www.cja.org/cases/Romagoza_Docs/AppellateDecision%202.28.5.pdf. The Eleventh Circuit additionally upheld the three plaintiffs' jury award for $54.6 million in compensatory and punitive damages.
167. *Id.*
168. *See id.* at 6 ("Before we evaluate these claims, we must determine whether we have jurisdiction because courts have a duty to consider their subject-matter jurisdiction sua sponte."), citing *TVA v. Whitman*, 336 F.3d 1236, 1257 n.34 (11th Cir. 2003).
169. Chavez v. Carranza, No. 03-2932, 2005 WL 2659186, at *1 (W.D. Tenn. 2005).

El Salvador's Vice-Minister of Defense from 1979-1981, Carranza bore responsibility for the extrajudicial killings and torture of the individuals and members of their immediate families committed by the Salvadoran security forces.[170] Unlike in *Barrueto* and *Arce*, the defendant in *Carranza* moved for summary judgment on the grounds that the plaintiffs' claims were barred by Salvadoran amnesty law, one that U.S. courts were obligated to recognize.[171] In considering his motion, the court considered the broad scope and unconditional and general nature of the amnesty, as well as the treatment of the amnesty law by the Salvadoran government (upholding its constitutionality and refusing prosecutions on two separate occasions).[172] After engaging in a careful analysis under the international comity doctrine, the court found that Supreme Court precedent required an actual conflict between domestic and foreign law before the doctrine of comity could apply.[173] The court concluded that because it was possible for persons regulated by the laws of both El Salvador and the United States to comply with both, the doctrine of comity was inapplicable.[174]

Additionally, the Court in *Carranza* pointed to a situation where the international comity doctrine might allow U.S. courts to withhold jurisdiction based on an amnesty or other transitional justice mechanism enacted abroad. In that case, *Sarei v. Rio Tinto, PLC,*[175] citizens of Papua New Guinea had filed ATS claims against the most powerful active mining conglomerate in the country, accusing it of aiding and abetting genocide and war crimes committed by the govenrment, among other offenses.[176] However, the government of Papua New Guinea had passed a law prohibiting citizens from filing claims involving foreign mining projects in foreign courts.[177] The *Carranza* court speculated that this sort of law might give rise to the conflict of laws required to

170. *Id.*

171. *Id.* at *1-2.

172. *Id.* at *3-4.

173. *Id.* at *4.

174. *Id.* (finding, "El Salvador's amnesty law cannot be construed to prohibit legal claims filed outside El Salvador . . . Application of the ATS or TVPA in United States federal court does not interfere with the application of the Salvadoran amnesty law. Similarly, Plaintiffs may be barred from filing suit in El Salvador, but they are not barred from filing suit under United States law.").

175. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

176. *Id.* at 1121.

177. *Id.* at 1201.

trigger the applicability of the doctrine of international comity.[178]

Following his conviction in a subsequent jury trial,[179] Carranza appealed to the Court of Appeals for the Sixth Circuit, alleging in part that the District Court should have found that the Salvadoran amnesty law was a bar to the plaintiffs' claims against him.[180] The Sixth Circuit quickly dispensed with Carranza's claim, finding that an actual conflict between Salvadoran and American law would have to exist in order for the doctrine of international comity to be applicable, and that no conflict existed because the Salvadoran Amnesty law did not apply extraterritorially and because it was possible for both the plaintiffs and Carranza to comply with both countries' laws simultaneously.[181]

At the same time that the *Carranza* case was filed in the Tennessee District Courts, another Salvadoran plaintiff brought an action under the ATS and TVPA in the Eastern District of California.[182] The plaintiff alleged that Alvaro Rafeal Saravia, a current resident of Modesto, California and the former chief of security for the organizer of El Salvadoran paramilitary groups, had been complicit in the assassination of the well-known civilian leader Archbishop Oscar Romero and had incurred liability for extrajudicial execution and crimes against humanity under the ATS and TVPA.[183] Interestingly, Saravia had been under indictment in El Salvador for the murder of Archbishop Romero at the time that the amnesty law was enacted.[184] After the amnesty law was issued, the judge dismissed the case against him, finding that the amnesty, which extinguished all liability for political crimes, applied to the assassination.[185] That decision was upheld by

178. However, even acknowledging that the law at issue in *Rio Tinto* the *Carranza* Court declared the doctrine of international comity inapplicable to all claims brought under the TVPA and the ATS in the wake of Congress's clear decision to open U.S. courts to claims of that nature. *Carranza*, 2005 WL 2659186, at *5 ("the doctrine of comity is only relevant in the absence of contrary congressional direction; it has 'no application' where Congress has spoken on the issue"); *see* Maxwell Commc'n Corp. v. Societe Generale (*In re* Maxwell Commc'n Corp.), 93 F.3d 1036, 1049 (2d Cir. 1996)).

179. Carranza was found guilty of torture, extrajudicial killing, crimes against humanity and liable to each of four plaintiffs for $500,000 in compensatory damages and $1 million in punitive damages. *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009).

180. *Id.* at 494.

181. *Id.* at 495 (finding in part that Salvadoran law did not bar plaintiffs from suing Carranza in the United States).

182. Doe v. Saravia, 348 F. Supp. 2d 1112, 1118 (E.D. Cal. 2004).

183. *Id.*

184. *Id.* at 1130.

185. *Id.* at 1133.

the First Criminal Chamber of El Salvador in 1993, where the court held that its decision had *res judicata* effect with regard to Saravia.[186]

Rather than suggest that the Salvadoran amnesty and judicial decisions were entitled to international comity, the court in *Doe v. Saravia* held that the amnesty actually allowed the plaintiffs to satisfy the "exhaustion of domestic remedies" requirement of the TVPA.[187] El Salvadoran law would prevent the plaintiffs from publicly or privately pursuing justice in El Salvador.[188] The Court further held that Saravia was liable under the ATS for extrajudicial killing and crimes against humanity, and awarded the plaintiff $5 million in compensatory damages and $5 million in punitive damages.[189]

Finally, in the recent series of decisions in the *Apartheid Litigation*, three judges – two judges of the Second Circuit Court of Appeals and District Judge Scheindlin – declined to dismiss actions against the multinational corporate defendants on the basis of the objections of the South African government and the TRC process previously undertaken in South Africa in the wake of Apartheid. In the Second Circuit case, which was decided under the name *Khulumani*, Judges Katzmann and Hall reversed the District Court's decision to dismiss the case and then remanded it to the District Court for consideration of the justiciability of the plaintiffs' claims.[190] Judge Scheindlin, in turn, based her analysis of the effect of the TRC process on the plaintiffs' claims according to a classic interpretation of the doctrine of international comity in the United States, under which "a true conflict" must exist between the laws of a foreign jurisdiction and the United States.[191]

In determining whether litigation against the corporate defendants in the *Apartheid Litigation* under the ATS in the U.S. courts constituted a "true conflict" with the TRC process in South Africa, Judge Scheindlin analyzed the degree to which the corporate defendants' actions had been previously addressed by the TRC process and the legal effect of the TRC on the plaintiffs'

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186. *Id.*
187. *Id.* at 1153.
188. *Id.*
189. *Id.* at 1159.
190. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260-61 (2d Cir. 2007).
191. In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009).

claims against the corporations in South Africa.[192] Judge Scheindlin found, first, that the TRC process had not been exclusive and that where the TRC did not grant an individual amnesty, the individual could still be subjected to civil and/or criminal proceedings.[193] The corporate defendants in the case had not appeared before the TRC, nor had they been granted amnesty by it.[194] Thus, she found that no conflict existed between the TRC process and litigation against the corporate defendants in the U.S. courts.[195]

Secondly, Judge Scheindlin considered whether the doctrine of international comity would have been triggered even if there was a true conflict between U.S. law and the TRC process. Judge Scheindlin first noted that a court should ordinarily consider whether an adequate forum exists in the objecting nation and whether the defendant was subject to jurisdiction in the foreign forum before applying the doctrine of international comity.[196] However, she acknowledged that in extreme cases in which a foreign sovereign's interests were affronted by the conduct of litigation in a U.S. forum, dismissal might be warranted even if the defendant was not amenable to suit elsewhere.[197] However, in analyzing the specific claim before her, she found both that no alternative forum for the plaintiffs' claims existed in South Africa and that as litigation in the U.S. did not conflict with the goals of the TRC process, the case was not an "extreme" one in which the plaintiffs' claims could be dismissed even in the absence of such an alternative forum.[198] Thus, Judge Scheindlin upheld her court's jurisdiction over the plaintiffs' claims.

3. Amnesty as a Bar to Exercise of Jurisdiction

As noted above, in a vigorous dissent in the Second Circuit's decision on the Apartheid-era ATS claims, Judge Korman echoed the calls of Lord Lloyd of Berwick in the *Pinochet* case and implored the District Court to decline to exercise jurisdiction over the case on the basis of a broadly articulated non-justiciability

192. *Id.* at 285.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 283 (citing *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998)).
197. *Id.*
198. *Id.* at 285-86.

doctrine.[199] Judge Korman argued that any inquiry by a U.S. court into the potential effect of U.S. litigation on South African political dynamics would be completely inappropriate:

> [I]t is only for the South African government, through its elected representatives, to say whether this litigation conflicts with its policies, just as it earlier decided for the same reasons to reject the Truth and Reconciliation Commission's recommendation that a once-off wealth tax be imposed on all corporations. Surely this is not a dispute for a United States district judge to resolve. Yet, the majority contemplates a remand that would subject a foreign democratic nation to the indignity of having to defend policy judgments that have been entrusted to it by a free people against an attack by private citizens and organizations who have lost the political battle at home. This dispute is not the business of the Judicial Branch of the United States.[200]

However, aside from Judge Korman's isolated expression of hostility to the notion that a U.S. court would adjudicate claims purportedly addressed by a territorial state that declined prosecution of crimes under international law,[201] U.S. courts have been generally receptive to the prospect of exercising jurisdiction to hold such individuals accountable for their offenses.[202] However, U.S. courts have been hesitant to adjudicate one particular category of ATS and TVPA claims: those which would require U.S. courts to decline to recognize amnesty law and other transitional justice mechanisms facilitated or previously supported by the United States or to which the United States is a party. In these types of cases, the courts have found the political question and comity doctrines far more appealing, although on slightly muddled grounds.[203]

For example, in *In re Nazi Era Cases Against German Defendants Litigation*, a New Jersey District Court found that it lacked competence to adjudicate the plaintiffs' ATS claims brought against corporations that aided and abetted the Nazi government during the Holocaust era.[204] In the wake of World War

199. *See Khulumani.* at 156 (Korman, J., dissenting).
200. *Id.*
201. *Id.*
202. *Supra*, Parts III.F.a-b.
203. *In re* Nazi Era Cases Against German Defendants Litigation, 129 F. Supp. 2d 370 (D.N.J. 2001).
204. *Id.* at 371-72.

II, the U.S. government had entered into a Foundation Agreement with Germany, choosing to provide reparations to victims rather than letting individual plaintiffs bring actions against those who supported the Nazi regime's egregrious policies. The Agreement also intended to restore the German economy, thus ensuring that Germany could better withstand the alternative ideology offered by the Soviet Union.[205] The *Nazi Era Cases* court found that the Agreement did not extinguish any legal claims, but rather "facilitate[d] an agreement between victims, German Industry, and German government" intended to "bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace."[206] Additionally, the court emphasized the Statement of Interest (SOI) filed by the United States which, while not binding, asked the court to treat the Foundation as the plaintiffs' exclusive remedy for Nazi-era claims and to dismiss their case in response.[207] However, the court eventually determined that all of the plaintiffs' claims should be pursued through the Foundation instead of the courts, as the political question doctrine counseled for dismissal of the case.[208] Specifically, the court found that allowing the action to proceed in the face of executive disapproval would express a lack of respect due to the coordinate branches of government and could potentially embarrass the country through "multifarious pronouncements by various departments on one question."[209]

The court similarly determined that the Nazi-era cases were non-justiciable on the basis of the doctrine of international comity. In determining whether to lend effect to the German Foundation Law, an enactment of another country, the court found that it would consider "whether giving effect to a foreign judicial act would be prejudicial to the interests of the United States."[210] It also found that the "true conflict" requirement for a comity inquiry had been met because German Foundation Law would only function if all pending litigation in the United States ceased.[211]

In determining whether it had the authority to challenge the validity of the German Foundation law, the court in *Nazi Era*

205. *Id.* at 376.
206. *Id.* at 380.
207. *Id.*
208. *Id.* at 388-89.
209. *Id.* at 382.
210. *Id.* at 387.
211. *Id.*

Cases found that "United States courts ordinarily refuse to review acts of foreign governments, and instead defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States."[212] It held that it was "not in a position to question whether the payment structure under the German Foundation Law [was] adequate or legal," as such an evaluation would need to be made by either the German courts or through diplomatic channels, and the German courts had already determined that the law was constitutional.[213] This component of the court's reasoning departed dramatically from the international comity inquiry generally followed by other U.S. courts, and appears to have conflated the doctrine of international comity with the act of state doctrine.[214]

Because the court's holding under the political question doctrine was sound, its misapplication of the doctrine of international comity had no real bearing on the outcome of the case. However, the cases that the court relied upon appear to preserve the doctrine for applicability to future cases. For instance, the court held that U.S. courts ordinarily allow the acts of foreign governments "to have extraterritorial effect in the United States."[215] The court also indicated that comity might be extended to foreign proceedings when doing so would not be contrary to the interests of the United States.[216]

In evaluating the significance of the court's holding in *Nazi Era Cases* to cases involving transitional justice mechanisms more broadly, it is critical to note the significant involvement of the United States in the negotiation and implementation of the German Foundation Agreement. Despite repeatedly emphasizing that the SOI submitted by the executive branch was not binding on

212. *Id.* (citing Pravin Banker Assoc., Ltd., v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir.1997)).

213. *Id.* at 388.

214. *See generally In re Nazi Era Cases*, 129 F. Supp. 2d 370.
(while the Act of State doctrine precludes the courts from declaring the Act of another sovereign invalid, the court in *Nazi Era Cases* was not asked to find the German Foundation Law invalid, but to find that it would not be unreasonable for the United States to apply its own law (the ATS) to adjudicate the plaintiffs' claims. As the Foundation agreement, a German public enactment, had no legal effect outside its own borders, finding the ATS applicable would not necessarily have required the court to find that the Foundation law was somehow invalid.).

215. *In re Nazi Era Cases*, 129 F. Supp 2d at 387 (citing *Pravin Banker*, 109 F.3d at 854).

216. *Pravin Banker*, 109 F.3d at 854.

its decision, the court's opinion failed to inquire about America's interest in the adjudications. In particular, there is no mention of the place of the ATS in the hierarchy of American policies relevant to the case. Rather, the court appears to have assumed that the SOI submitted by the executive was conclusive authority on the nature of America's interest in the cases.

These U.S. cases reveal that while courts generally refuse to apply amnesty laws of other countries, they typically consider non-justiciability doctrines to be applicable, subject to some threshold requirements. However, beyond these common themes, justiciability inquiries appear widely scattered. It is particularly noteworthy that none of the courts have distinguished between claims arising from treaties as opposed to customary international law under the ATS and TVPA. Some courts have not mentioned the potential for non-justiciability at all. Some, such as Judge Korman, have considered the doctrine automatically applicable, while others have insisted on first recognizing a "true conflict." Once the courts proceed to an examination of justiciability, their findings have been even less clear. While all the courts appear to have engaged in some sort of "interest balancing," the roles of the Executive and Congress in articulating that interest appear to be uncertain, as does the process of determining the interest of the foreign state. Moreover, one court has emphasized that the availability of an alternative forum is a predicate to finding the doctrine of international comity available, while another has determined that the mere presence of the ATS means that comity is unavailable altogether.[217]

G. Conclusion

Although the frequency with which courts in the United

217. *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1236 (11th Cir. 2004); Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998) ("When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation."); Presbyterian Church of Sudan v. Talisman Energy Inc., 2005 WL 2082846, at *7 (S.D.N.Y., Aug. 30, 2005) ("the adequacy of the forum is a *prerequisite* to applying the international comity doctrine").

217. *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1236 (11th Cir. 2004); Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998) ("When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation."); Presbyterian Church of Sudan v. Talisman Energy Inc., 2005 WL 2082846, at *7 (S.D.N.Y., Aug. 30, 2005) ("the adequacy of the forum is a *prerequisite* to applying the international comity doctrine").

States and Europe exercise extraterritorial and universal jurisdiction to adjudicate alleged violations of international criminal law has increased, there is still no systematic approach to adjudication of such claims. This lack of clarity undermines the very body of international law from which the courts derive their authority. Furthermore, existing legal principles recognized by all of the judicial systems provide a reasonably clear framework in which courts and prosecutors can determine justiciability of claims without succumbing to purely power-based considerations. The following section of this paper will seek to assist courts in upholding the rule of law in situations where they are most at risk of being undermined by the rule of men.

IV. THE OBLIGATION TO RESPECT: A PRINCIPLED STRATEGY FOR DECLINING TO EXERCISE EXTRATERRITORIAL JURISDICTION IN THE WAKE OF TRANSITION

A. Introduction

As demonstrated in the preceding sections, it is very likely that states other than those in which an offense that violates international criminal law occurs have a mandatory obligation to exercise jurisdiction over acts such as genocide, grave breaches of the Geneva Conventions, and torture. Additionally, there is strong evidence suggesting that third-party states are merely permitted, although not obligated, to exercise jurisdiction over crimes against humanity, war crimes committed in the context of an internal-armed conflict, and other offenses recognized under international law. Under these circumstances, the courts of a variety of nations have sharply disagreed on the proper approach to take in considering whether or not to exercise their jurisdiction.

This lack of clarity[218] has at least two negative consequences for the international law that such extraterritorial jurisdiction is intended to bolster. First, by engaging in an unprincipled approach to adjudication of claims regarding genocide, torture, and grave breaches of the Geneva Conventions, third-party states threaten to breach their own international obligations to hold perpetrators of those offenses accountable.[219] Moreover, in deferring to amnesties

218. In Europe, which exercises criminal jurisdiction, prosecutorial discretion plays much the same role as the non-justiciability doctrines in American courts, which apply extraterritorial civil jurisdiction under the ATS and TVPA.

219. Scharf, *supra* note 53, at 513.

(or solely reparations in the case of the German Foundation Agreement) for any situation other than those in which the law clearly provides courts with a reason to do so, the courts of third-party states undermine the fragile rule that currently exists in the international sphere. As Martti Koshinniemi emphasized, "[t]he universalization of the Rule of Law calls for the realization of criminal responsibility in the international as in the domestic sphere. In the liberal view, there should be no outside-of-law; everyone, regardless of place of activity or formal position, should be accountable for their deeds."[220] Amnesties and other exculpatory mechanisms are the extreme manifestation of "the rule of men," as they "represent an attempt to trump the application of rules of law."[221] In doing so, Richard Goldstone has argued that they "constitute a threat to both the legitimacy and fairness of the rules,"[222] and Michael Scharf has concurred that they "breed contempt for the law and encourage future violations," whether or not they are paired with conditions short of prosecution.[223] Insofar as the courts and prosecutors of third-party states derive their authority to exercise extraterritorial jurisdiction from international law, they should make every effort to avoid undermining that very body of law when they abstain from applying it.

This section will examine the various legal doctrines under which states may decline to exercise jurisdiction, such as when the state where the offense took place has enacted an amnesty or other transitional justice mechanism short of prosecution that purports to extinguish perpetrators' liability for that second category of offenses. Additionally, it will illustrate specific guidelines that courts can use to determine whether they have a justifiable legal basis for declining to adjudicate claims implicating an amnesty or other transitional justice mechanism. In basing their decisions on such principled grounds, national courts can provide their most critical benefit to international law and mitigate the ability powerful actors have to award themselves with impunity for the very offenses which international law most strenuously seeks to deter.

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220. Martti Koskenniemi, *Between Impunity and Show Trials*, 2002 MAX PLANCK Y.B. U.N. L., at 2.

221. *See* Sadat, *supra* note 22.

222. *Id.*

223. Scharf, *supra* note 53, at 513-14.

B. Inquiry #1: Predicate Inquires—Choice of Law, the Act of State Doctrine, and Exhaustion of Local Remedies

1. Domestic Amnesties are not Enforceable Outside the Enacting State.

One of the oldest principles of international law is the "public law taboo," otherwise known as the "revenue rule," in which the courts of one sovereign refuse to "take notice" or "enforce" the public laws of another.[224] Dating from 18th-century England,[225] the rule reinforces the concept that while states may be free to enact certain laws (even, perhaps amnesties extinguishing liability for crimes against humanity, some war crimes, and other offenses) within their own territories, other sovereigns are not obligated to give effect to expressions of their counterparts' national interest. Thus, it is imperative that third-party states exercising extraterritorial and universal jurisdiction first recognize that domestic amnesty laws only bar prosecutions within the states that enact them.[226]

2. The Act of State Doctrine Does Not Bar a Court's Exercise of Extraterritorial or Universal Jurisdiction Simply Because the Territorial State Has Enacted an Amnesty.

As demonstrated in *Nazi Era Cases*, courts occasionally assume that if they attempt to adjudicate the liability of an amnesty beneficiary, they will effectively declare the foreign amnesty invalid and in contravention of the state doctrine act, according to which "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[227] However, in exercising extraterritorial

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224. Sadat, *supra* note 22, at 208 ("many states refuse to enforce foreign public law and would consider criminal proceedings as well as amnesty laws 'public,' applying what one writer has dubbed the 'public law taboo'").

225. *See* Holman v. Johnson, 1 COWP 341 (K.B. 1775); *see also* Pasquantino v. United States, 544 U.S. 349 (2005).

226. *See, e.g.*, Diane F. Orentlicher, *Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction*, *in* JUSTICE FOR CRIMES AGAINST HUMANITY 234 (Mark Lattimer & Philippe Sands eds., Hart Publ'g 2003) ("As a matter of international law, states generally are not required to give extra-territorial effect to another state's amnesty law. The state that enacts an amnesty is exercising only its own prescriptive jurisdiction; it is not enacting international law. When the amnesty covers crimes that are subject to universal jurisdiction, other states would remain free to apply their own law to the conduct at issue.").

227. Underhill v. Hernandez, 168 U.S. 250 (1897).

jurisdiction over a claim arising in another state, the third-party state does not challenge the legality of the amnesty issued in the territorial state; it merely asserts that it too has the power to exercise its jurisdiction over the conduct giving rise to the offense.[228] The Act of State doctrine is triggered in the context of such a case, if at all,[229] when a defendant argues that his alleged substantive offense was connected to a legitimate public policy decision of the territorial state.[230] To the extent that courts rely on precedent under the act of state doctrine in dealing with the effect of an amnesty or other transitional justice mechanism on the justiciability of a claim, they are in error.

3. Domestic Amnesties Satisfy Any Exhaustion of Local Remedies Requirement

Finally, some laws and doctrines articulated by the courts of certain states require that plaintiffs exhaust available local remedies in the country where their claims arose before they petition third-party courts to assert extraterritorial jurisdiction over claims arising under international law.[231] Under international law, however, claimants need only resort to such local remedies that are "available" and potentially "effective" before they may

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228. Three conditions must be met for a court to find that a claim is barred by the doctrine, namely: (1) an official act of a foreign sovereign, (2) performed within its own territory, and (3) a claim seeking relief that would require the court to declare the foreign sovereign's act invalid. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l., 493 U.S. 400 (1990).

229. There is some controversy over whether the Act of State doctrine is applicable at all in the context of cases involving offenses under international-level offenses, particularly those rising to the level of violations of *jus cogens* norms.

230. *See* Sarei v. Rio Tinto, 487 F.3d 1193 (9th Cir. 2007) (Defendants alleged that because the operations of a mining company were memorialized in an official act of the Papua New Guinea government, any attempt to adjudicate claims that the company committed systematic racial discrimination and environmental pollution in violation of international law would run afoul of the Act of State Doctrine, because it would call the sovereign acts of the PNG government into question.).

231. *See* Torture Victim Protection Act of 1991 ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). In 2008, the Court of Appeals for the Ninth Circuit held that "ATS claims are appropriately considered for exhaustion under both domestic prudential standards and core principles of international law . . . [w]here the 'nexus' to the United States is weak," particularly "with respect to claims that do not involve matters of 'universal concern.'" Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008). *See also* Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005). Other U.S. courts have thus far declined to require plaintiffs to "exhaust" local remedies in ATS cases.

take their claims elsewhere. Courts determining whether local remedies are likely to be effective may consider whether there has been an unreasonable delay in local proceedings, whether pursuing local remedies would be futile, and whether the claimant actually has access to an effective remedy under the territorial state's laws.[232] As the court in *Saravia* correctly held, the presence of an amnesty in the territorial state proves that local remedies are unavailable, and thus that the exhaustion of remedies requirement has been satisfied.[233]

C. *Inquiry #2: Applicability of the International Comity and Abstention Doctrines*

The non-justiciability doctrine most frequently invoked in extraterritorial jurisdiction cases over offenses committed in a state that later enacted an amnesty or other transitional justice measure short of prosecution is that of international comity. Dating back to 16th-century Europe, the doctrine was imported into English common law by Lord Mansfield in the 18th century, and later into American common law by Justice Story.[234] The U.S. Supreme Court described the doctrine as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws,"[235] and "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[236] The doctrine is not obligatory on courts, but is rather a discretionary rule of "practice, convenience, and expediency,"[237] which allows them to grant "voluntary

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232. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 306, U.N. Doc. A/56/10 (July 26, 2001).

233. *Id.* at 1153. *See also* Emeka Duruigbo, Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection, 29 Fordham Int'l L.J. 1245, 1264 (2006) (citing the Permanent Court of International Justice's *Panevezys-Saldutskis Railway case* ("There can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief. . . .")).

234. *See* JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423-24 (2d Cir. 2005) (citing Somerset v. Stewart, 98 Eng. Rep. 499 (1772)); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 35 (8th ed. 1883).

235. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

236. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S.D. Iowa, 482 U.S. 522, 544 (1987).

237. Pravin Banker Assoc., Ltd., v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d

deference to the acts of other governments."[238] Normally, courts employ the comity doctrine in order to dismiss a case in favor of a foreign court's judicial pronouncement or proceeding regarding the same case.[239] However, at least one Supreme Court Justice has argued that the doctrine is relevant in ATS cases as well.[240] The doctrine is notoriously ill-defined at its margins, and thus it poses the greatest risk of allowing impermissible political considerations to trump the rule of law. The following principles are intended to assist courts in navigating this doctrine while remaining as faithful to the dictates of the law as possible.

1. The Doctrine of International Comity is not Applicable to Treaty-Based Claims Giving Rise to an International Duty to Prosecute.

Certain international treaties (which have entered customary international law) give rise to an affirmative obligation on the part of third-party states to exercise jurisdiction over individuals accused of genocide, grave breaches of the Geneva Conventions, and torture.[241] These international treaties and customary international law render the doctrine of international comity incompatible with a state's international law obligations, because a state has a mandatory obligation under international law to exercise extraterritorial jurisdiction over these offenses, and not merely a permissive right to do so. For example, if the prosecutorial authorities in Denmark refrain from exercising jurisdiction on comity grounds when doing so would conflict with a domestic amnesty as a matter of policy, these authorities may bring Denmark in violation of its international obligations under the Genocide, Torture, and Geneva Conventions. Similarly, in the United States, the ATS may authorize causes of action that derive from universally recognized and specific international law norms that are binding on the United States. The ATS may also incorporate the specific international duty to hold the perpetrators

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Cir.1997).

238. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4473 (1981).

239. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 344 (S.D.N.Y. 2003).

240. Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004).

241. *See generally* Genocide Convention, *supra* note 55; *see also* Torture Convention, *supra* note 57.

of that specific category of crimes accountable. It would be fundamentally paradoxical to suggest that a court should make a discretionary decision to dismiss such a claim on comity grounds, thereby subverting a legal norm established by international law.[242] Thus, courts exercising extraterritorial jurisdiction should seriously consider finding the doctrine of international comity inapplicable in situations in which they are adjudicating claims alleging genocide, torture, or grave breaches of the Geneva Conventions.

2. The Doctrine of International Comity is Not Applicable If the Law of the Forum State Strongly Favors Adjudication or If the Forum Finds the Particular Amnesty Repugnant to its Public Policy.

Even if a court is contemplating exercising jurisdiction over offenses other than those involving an international duty to prosecute (such as crimes against humanity, war crimes committed during an internal armed conflict, and extrajudicial executions), there may be other policies of the third-party state that mitigate against the doctrine of international comity. As the Second Circuit recently explained in *JP Morgan Chase Bank*, the doctrine of international comity, as originally applied in England and the United States, was not to be extended in a way that would contradict the law or policy of the forum state.[243] While Lord Mansfield refused to apply the comity doctrine where it would oblige England to return an American-owned slave to his purported owners,[244] Story described Lord Mansfield's refusal as allowing the doctrine to provide free and slave states with a "principled way to accommodate (and, if necessary, avoid) the law of the others."[245]

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242. This is particularly true given that U.S. courts typically interpret statutes – including the ATS – according to the "Charming Betsy canon," which states that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1904).

243. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (citing Somerset v. Stewart, 98 Eng. Rep. 499 (1772), *as reprinted in* Robert M. Cover, *Justice Accused* 87 (1975) (finding the doctrine of comity inapplicable and ordering the release of an American-owned slave held on board ship in England); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS # (8th ed. 1883).

244. *Id.*

245. *See JP Morgan Chase Bank*, 412 F.3d at 423-24 (citing *Bank of Augusta v. Earle,* 38 U.S. 519, 589,(1839) (citing Justice Story for the proposition that comity is "inadmissible when contrary to [the forum state's] policy, or prejudicial to its interests").

The courts of third-party states would similarly be justified in finding the doctrine of international comity inapplicable to amnesties or other transitional justice measures if the courts were to consider these measures repugnant or in direct contradiction of policies of the forum state. Professor Leila Sadat suggests that a court could find that amnesties which regimes grant to themselves or which are extracted by successor regimes with threats of rebellion and violence are "blatantly self-interested and illegitimate," or "against public policy and extracted by duress."[246] The district court in *Chavez v. Carranza* agreed when it held that even if El Salvador's amnesty legislation conflicted directly with the ATS, it would "run contrary to Congress' clear intent to provide a means for victims of violations of the law of nations to seek redress" if the court were to decline jurisdiction on the basis of international comity.[247] However, courts hailing from states that have assisted or encouraged the issuance of amnesties in the recent past may have difficulty establishing that the law and policy of their state is strongly in favor of accountability for perpetrators of the worst crimes under international law, unless the third-party state's officials have consistently stated, for example, that amnesties for crimes against humanity or other specific offenses are impermissible.

3. Courts Should Not Yield in Favor of Fora That Will Offer Litigants No Legitimate Prospect of Recovery

A final potential prerequisite to the application of the international comity doctrine is the availability of an adequate remedy providing a "legitimate prospect of recovery" for the plaintiffs in the foreign forum.[248] Several courts considering ATS claims have found that the adequacy of the territorial state as an alternative forum is a prerequisite to application of the doctrine of international comity.[249] In *Mujica v. Occidental Petroleum Corp*,

246. Sadat, *supra* note 22, at 208.

247. Chavez v. Carranza, No. 03-2932, 2005 WL 2659186, at *5 (W.D. Tenn. 2005).

248. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1163 (C.D. Cal. 2005). The application of the comity doctrine is in deference to a foreign amnesty or other measure raised in the context of claims under the ATS and TVPA in the United States, as well as in the *Scilingo* case in Spain.

249. *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004); Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir.1998) ("When a court dismisses on the ground of comity, it should normally consider whether an adequate forum exists in the objecting nation . . . ."); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.

the court noted that the doctrine of international comity as applied to judgments from foreign courts only applies:

> where there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction... under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the systems of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.[250]

Thus, it determined that:

> If a court may disregard a foreign judgment that is obtained through fraud or that failed to abide by principles of due process, similarly courts should not yield in favor of fora that will offer litigants no legitimate prospect of recovery.... [T]he existence of an adequate alternative forum... is a *necessary* condition to apply the doctrine of international comity.[251]

Certainly, a blanket amnesty would render the foreign state an inadequate alternate forum. However, it is less clear whether a state that allowed victims to bring their claims against a perpetrator to a Truth and Reconciliation Commission in their home country and provided those victims with reparations would satisfy the precondition for the application of international comity.

4. Some Jurisdictions Require That A "True Conflict" Exist Between Domestic and Foreign Law in Order for the International Comity Doctrine to be Triggered.

Even if a court does not find that a particular amnesty is repugnant to its nation's public policy, the application of the doctrine of international comity may still be ill-advised. As noted above, a number of U.S. courts have found that Supreme Court

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Supp. 2d 289, 343 (S.D.N.Y. 2003) ("the adequacy of the forum is a *prerequisite* to applying the international comity doctrine").

250. *Mujica*, 381 F. Supp. 2d 1134, 1163 (C.D. Cal. 2005).

251. *Id.*

precedent requires a predicate inquiry into whether a "true conflict of law" exists before the doctrine of international comity can be applied.[252] Moreover, they have defined a "conflict" as foreign law that prohibits compliance with an order of the third-party state.[253] In an ATS case dealing with events in Colombia, the court found that because Colombia's courts had not already made any findings of liability or provided any remedies, there was no *present conflict* between domestic and foreign law, and no reason to believe that the defendant corporation would be unable to comply with an order or judgment of the U.S. court.[254] Similarly, in *Carranza*, the court found that El Salvador's amnesty law had no effect outside the country and did not purport to prohibit Salvadorans from bringing lawsuits elsewhere, thus there was no conflict between the amnesty law and the ATS and TVPA in the United States.[255] In *Apartheid Litigation*, Judge Scheindlin made the same finding with regard to the TRC process in South Africa, noting that the process was not exclusive, that the defendants had not been granted amnesty pursuant to the process nor participated in it, and thus that the plaintiffs retained the right to bring claims against them; thus, ATS litigation in the United States did not create a "true conflict" with the TRC process.[256] Employing similar reasoning, many courts in the United States, which require a true conflict in order to apply the international comity doctrine, may be compelled to exercise jurisdiction over claims against individuals despite the fact that they benefit from an amnesty in the state in

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252. Hong Kong & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 999 (9th Cir. 1998) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798, (1993) (limiting the application of the international comity doctrine to cases in which "there is in fact a true conflict between domestic and foreign law.")). *See also* United International Holdings, Inc. v. Wharf Holdings Ltd., 210 F.3d 1207, 1223 (10th Cir. 2000) ("In general, we will not consider an international comity or choice of law issue unless there is a 'true conflict' between United States law and the relevant foreign law."); *In re* Maxwell Communication Corp., 93 F.3d 1036, 1049 (2d Cir. 1996) ("International comity comes into play only when there is a true conflict between American law and that of a foreign jurisdiction.").

253. *See In re* Grand Jury Proceedings, 40 F.3d 959, 964 (9th Cir. 1994) ("A party relying on foreign law to contend that a district court's order violates principles of international comity bears the burden of demonstrating that the *foreign law bars' compliance with the order.*") (emphasis added); *In re* Grand Jury Proceedings, 873 F.2d 238, 239-40 (9th Cir. 1989).

254. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1156 (C.D. Cal. 2005).

255. *Chavez*, 2005 WL 2659186, at *4.

256. In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 285 (S.D.N.Y. 2009).

which they occurred.

As noted by the *Carranza* court, some states have enacted amnesty legislation which purports to have extraterritorial effect and bars would-be plaintiffs from raising claims against alleged perpetrators in *any* forum, not just the domestic courts in their home country.[257] It is these sorts of provisions, like the Compensation Act at issue in *Rio Tinto*, that raise the specter of a "true conflict" and trigger the applicability of the doctrine of international comity in the United States. That statute prohibited citizens of Papua New Guinea from filing claims involving foreign mining projects in foreign courts, which is exactly what the plaintiffs in the ATS suit before the Ninth Circuit had attempted to do.[258] If a court in a third-party state encounters such a provision, it should not automatically defer to the laws of the territorial state. Rather, at that point, the court is justified in applying a reasoned analysis under the international comity doctrine.

5. If There is a "True Conflict," or if the Jurisdiction Does Not Require a Conflict in Order to Trigger the Comity Inquiry, then the Court Should Decline to Exercise Jurisdiction Only if Doing Otherwise Would Be "Unreasonable."

Even if international law has not yet crystallized around an obligation on the part of states to prosecute perpetrators of international criminal offenses (i.e. crimes against humanity, war crimes in internal conflicts, and extrajudicial executions), pronouncements by the UN and other international bodies suggest that such an obligation may very well be developing. Sadat and others have argued that the courts of third-party states should begin an international comity analysis with a presumption that deference should not be shown to the amnesty in the territorial state.[259] Thereafter, courts should apply whatever test is typically applied in their country in order to assess whether international comity should be shown. In the United States, this test is laid out in the Restatement § 403, which instructs courts to award comity if exercising jurisdiction over the activity would be "unreasonable."[260] The Restatement provides a "nonexhaustive"

257. *Id.* at *3-4.
258. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1201 (C.D. Cal. 2002).
259. Sadat, *supra* note 22, at 210.
260. RESTATEMENT (THIRD) OF FOREIGN RELATION LAW OF THE UNITED STATES

list of factors to be considered in making such a reasonableness determination, the overarching effect of which is to ask the court to weigh the interests of the third-party state in adjudicating the claim against the interests of the territorial state in doing so itself.[261]

Several of the factors outlined in §403(2) have been identified by the U.S. courts as indicating a strong third-party state interest in adjudicating claims alleging internationally-prohibited conduct. For example, the court in *Filartiga v. Peña-Irala*[262] held that any claim over which a U.S. court could exercise jurisdiction pursuant to the ATS would necessarily entail "a wrong of mutual, and not merely several, concern to states."[263] Other courts have echoed these sentiments since that time, arguing that "the nations of the world have demonstrated that such wrongs are . . . capable of impairing international peace and security."[264] Some courts have recognized that when a plaintiff's claims allege violations of norms not merely cognizable under the ATS and/or TVPA, but also constituting *jus cogens*, the United States would have a particularly strong interest in their adjudication, since they constitute offenses of universal concern by virtue of "the depths of the depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon the victims, and the consequential disruption of the domestic and international order they produce."[265]

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§ 403(1) (1987).

261. *Id.* at § 403(2) ("Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has a substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.").

262. Filartiga v. Peña-Irala, 630 F. 2d 876, 888 (2d Cir. 1980).

263. *Id.*

264. Flores v. S. Peru Copper Corp., 414 F.3d 233, 249 (2d Cir. 2003).

265. Tachonia v. Mugabe, 234 F. Supp. 2d 401,416 (S.D.N.Y. 2002); *see also*

It is only in the context of a full comity analysis that the views of the adjudicating state's executive branch should be considered with respect to any risks that adjudication of the private claims at issue might pose to the stability of the territorial state or to international peace and security. Even then, the courts should not automatically defer to the views of the executive branch of their government. Rather, separation of powers and rule of law principles require the courts to afford the opinions of the executive branch with "persuasive deference."[266] For the purposes of the international comity doctrine, the executive's opinions (as well as those of the governments of other countries) are akin to expert testimony on the likelihood of political repercussions. Certainly, they are worthy of consideration, but they should also be evaluated by the court for persuasiveness and for consistency with other factual information.[267] Thus, in *Rio Tinto*, the Ninth Circuit weighed a Statement of Interest (SOI) from the U.S. State Department suggesting that adjudication of claims arising in Papua New Guinea would interfere with the ongoing peace process there, with factual submissions from participants in the Bougainville peace process and members of the PNG government indicating that conditions in PNG had changed since the SOI had been written.[268] Similarly, the *Talisman* court held in relation to other third-party state requests for comity that

> [W]hile a court may decline to hear a lawsuit that may interfere with [another] State's foreign policy... dismissal is only warranted as a matter of international comity where the nexus

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Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 343 (S.D.N.Y. 2003); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 106 (2d Cir. 2000) (stating that the enactment of the TVPA "communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business").

266. Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680-81 (2000) ("as with many issues concerning federal policy, 'persuasiveness deference' may be proper. But these forms of deference are not Chevron deference . . . .").

267. As Judge Hall noted in the Second Circuit's recent *Khulumani* decision: "Mere executive fiat cannot control the disposition of a case before a federal court. Our principle of separation of powers not only counsels the judiciary to conduct an independent inquiry - it requires us to do so. Regardless of what else *Sosa* holds, it did not doubt that ATCA suits are *law suits* constitutionally entrusted to the judiciary. . . . Thus a district court must weigh the [SOI], as well as other relevant facts, in . . . exercising its own discretion before deciding whether to dismiss a compliant." 504 F.3d at 292 (Hall, J., concurring); *see also* Beth Stevens, *Upsetting Checks and Balances: The Bush Administration's Effort to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 170, 191 (2004).

268. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1206-07 (C.D. Cal.2002).

> between the lawsuit and the foreign policy is sufficiently apparent and the importance of the relevant foreign policy outweighs the public's interest in vindicating the values advanced by the lawsuit.[269]

6. Courts Should Decline to Exercise Jurisdiction if Doing So Would Violate the Principle of "Double Jeopardy" or "*Ne Bis En Idem*"

One additional consideration not specifically articulated in the Restatement test is the risk that an exercise of jurisdiction by a third-party state over a particular individual would violate the principle of "double criminality." While this risk is not posed in situations involving a blanket amnesty, it may arise if a territorial state has enacted a conditional amnesty requiring truth-telling or measures such as reduced sentences or community service requirements for perpetrators, as have South Africa, Colombia, East Timor, and Rwanda, among others. Sadat argues, "in the case of conditional amnesties, where the defendant has voluntarily come forward and placed him or herself in jeopardy of prosecution by confessing the crime . . . the forum state should examine the particular proceeding to see if the principle of *ne bis en idem* should attach and immunize the particular defendant from subsequent prosecutions."[270] She argues that where a particular transitional justice mechanism has employed "judicial or quasi-judicial proceedings and . . . particularized consideration of a defendant's guilt or innocence,". a defendant may have already been "put in jeopardy" of criminal proceedings.[271] Similarly, Douglas Cassel has argued that the practice of awarding reduced punishments in return for confessions by perpetrators, employed by the ICTR, ICTY, and Colombia, is permissible under

269. *See Talisman*, 2005 WL 2082846, at *7 (rejecting Canada's request for comity on the grounds that an ATS lawsuit would interfere with its policy of using the prospect of future trade and economic revitalization in Sudan).

270. Sadat, *supra* note 22, at 336 n.135.

271. *Id.* at 337 n.142. Michael Scharf has similarly noted that individuals accused of committing violations of international criminal law before the ICC may be able to invoke Article 20 of the Rome Statute, which codifies the *ne bis in idem* principle in certain situations if their territorial state has undertaken some measure more rigorous than a blanket amnesty but still less so than a full criminal prosecution. *See* Scharf, *supra* note 53, at 525.

international law.[272]

This is not to suggest that any transitional justice measure more rigorous than amnesty will raise the spectre of double criminality. As the recent decision of the Constitutional Court for Colombia to strike down some portions of its sentencing program demonstrates, there may be a certain threshold at which a sentence or punishment is too disproportionately light to completely extinguish an individual's liability.[273] Additionally, the Inter-American Commission found in a case involving Chile that the mere fact that Chile had created a truth commission and enacted reparations did not obviate the need for investigation or even criminal punishment of those responsible for large-scale "disappearances" and other crimes.[274] Thus, courts evaluating such transitional mechanisms should do so on a case-by-case basis, considering the type of proceeding adopted, whether individual guilt was established, and the proportionality of any punishment imposed.

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272. Douglas Cassel, Professor, Notre Dame Law School, Written Testimony Before the Constitutional Court of Indonesia (July 6, 2006), *in* INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (ICTJ) AMICUS BRIEF TO THE INDONESIAN CONSTITUTIONAL COURT, July 2006, at 11 [hereinafter Cassel, Written Testimony Before the Constitutional Court of Indonesia] (citing ICTY, *Prosecutor v. Plavsic*, Case IT-00-39&40/1, Trial Chamber, Sentencing Judgment, 27 February 2003, ¶¶ 66-81).

273. *Id.* (noting that the Constitutional Court for Colombia struck down key portions of Colombia's Justice and Peace Law in May 2006. That law allowed reduced sentences for members of illegal armed groups who confessed to certain serious crimes. The Court found that provisions are what allowed individuals to apply up to eighteen months of time spent in demobilization camps as part of their period of imprisonment. As those perpetrators were only serving between five and eight years for crimes against humanity in the first place, this provision effectively allowed perpetrators of some of the worst crimes known to man to serve only three and a half years in prison. The Court ruled that time spent in demobilization camps could not be counted toward the minimum prison time, so that minimum imprisonment would truly be five years, and that individuals would have to disclose all offenses in order to receive such a reduced sentence, with a threat of additional time applied if additional information regarding crimes committed was later uncovered. Individuals and groups benefiting from the reduced sentences were also ordered to pay reparations to their victims.).

274. Naomi Roht-Arriaza, Professor, UC Hastings Law School, Written Testimony Before the Constitutional Court of Indonesia (July 6, 2006), *in* INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (ICTJ) AMICUS BRIEF TO THE INDONESIAN CONSTITUTIONAL COURT, July 2006, at 3 [hereinafter Roht-Arriaza, Written Testimony Before the Constitutional Court of Indonesia] (citing Carmelo Soria Espinoza v. Chile, Case 11.725, Report No 133/99, OEA/Ser.L /V/II.106 Doc. 3 rev. at 494 (1999)).

7. If the Territorial State has Authorized an Ongoing Truth and Reconciliation Commission or Similar Institution with the Power to Recommend Prosecutions, the International Abstention Doctrine May Allow the Court to Decline to Exercise Jurisdiction.

The doctrine of international abstention, another non-justiciability doctrine may encourage a third-party state to decline to exercise extraterritorial jurisdiction where the territorial state has authorized an ongoing truth and reconciliation commission with the power to recommend prosecutions. In contrast to the doctrine of international comity, which focuses on prior judgments and legislative decisions made by a foreign state, the doctrine of international abstention is typically applied in the context of parallel judicial proceedings regarding the same claim but ongoing in more than one state.[275] When deciding whether to defer an action in favor of an ongoing truth commission or other transitional justice mechanism in the territorial state, a court should balance the interests of the third-party state, the territorial state, and the international community.[276] If, as in the truth commission example, the territorial state has "taken explicit, targeted steps to address the situation giving rise to the litigation in the [third-party state]," and such steps include at least quasi-judicial proceedings, the third-party state's courts may be justified in dismissing claims without prejudice until those proceedings have concluded in the territorial state.[277] If the territorial state does not implement a reparations program or provide some sort of recovery at the conclusion of the TRC process, the claimants would then be free to bring their claims before the third-party state's courts.

D. Inquiry #3: Applicability of the Political Question Doctrine

Even if the doctrines of international comity and international abstention allow extraterritorial jurisdiction over claims subject to

275. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1160 (C.D. Cal. 2005) (citing Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004)); *see also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 939 (D.C. Cir. 1984).

276. *Id.* ("federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum").

277. *Id.* at 1163.

an amnesty in the territorial state, the political question doctrine might still provide third-party courts with a legal basis for declining jurisdiction. This doctrine requires courts to dismiss individual claims otherwise properly presented to the courts for adjudication if: (1) it would be impossible for the court to undertake independent resolution of the issue without expressing a lack of respect towards coordinate branches of the government; (2) the case implicates an unusual need for unquestioning adherence to a political decision already made by the government of the third-party state; or (3) the case creates the potential for the third-party state to be embarrassed about multifarious pronouncements made by various departments on one question.[278]

1. Claims Brought Pursuant to Statutes Providing for Extraterritorial and/or Universal Jurisdiction are Generally Justiciable; Courts Should Award No More than "Persuasiveness" Deference to the Views of the Executive Branch

As established by several courts, the political question doctrine is an exception to the principle of separation of powers, in which a state's judiciary declines to adjudicate a question of law despite the fact that the legislature has previously given it the power to do so.[279] Thus, it would be inappropriate for courts to dismiss claims on the basis of the political question doctrine *sua sponte*, in the absence of a specific request that they do so from the political branches of their government. Where the views of the executive branch are given deference in the course of an international comity inquiry, they are to be awarded "serious weight," but not "complete deference" in the context of an inquiry under the political question doctrine, particularly when a given state has more than one "political branch" with authority to express an interest in adjudication of a particular claim. In the *Sarei* case, the Ninth Circuit affirmed that the Executive Branch's view did not control the determination of whether a political question existed, in keeping with prior determinations by other circuits.[280] Finding otherwise would have threatened to render the

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278. Baker v. Carr, 369 U.S. 186, 217 (1962).

279. *See* Kadic v. Karadzic, 70 F.3d at 250 (2d Cir. 1995); RESTATEMENT (THIRD) OF FOREIGN RELATION LAW OF THE UNITED STATES § 111(2) (1987).

280. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d at 1201(C.D. Cal. 2002) ("ultimately, it is our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy

court "a mere errand boy for the Executive Branch, which may choose to pick some people's chestnuts from the fire, but not others."[281] Recently, two prominent scholars emphasized that courts dealing with claims based on international law should not award more than "respectful consideration" to the views of the Executive Branch. Excessive judicial deference would have the effect of substituting the long-term perspective embodied in the judiciary for the short-term and self-interested perspective of the Executive during times of international stress, undermining the rule of law in the area most concerned with restraining executive power in times of crisis.[282]

In the recent *Apartheid Litigation* decision, Judge Scheindlin similarly awarded less than complete deference to the views of the Executive Branch in the course of her political question doctrine inquiry. First, she found that "the Executive Branch is not owed deference on every topic; rather this Court will give serious consideration to the Executive's views only with regard to the case's 'impact on foreign policy,'"[283] and also that "deference does not mean delegation; the views of the Executive Branch—even where deference is due—are but one factor to consider and are not dispositive."[284] Subsequently, in considering the United States' Statement of Interest in the case, Judge Scheindlin analyzed it critically, finding that it relied on an "erroneous premise": that the court's assertion of jurisdiction over the plaintiffs' claims would second-guess the decision made by the United States to permit and encourage commerce with South Africa during the Apartheid era. Judge Scheindlin rejected that premise, finding that any claim that adjudicating the case "would have a substantial chilling effect on

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about a case proceeding"); *see also* Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 555-56 (2d Cir. 1988) (reviewing executive SOI for "arbitrariness"); *Ungaro-Benages*, 379 F.3d at 1236 ("a statement of national interest alone...does not take the present litigation outside the competence of the judiciary"); Regan v. Wald, 468 U.S. 222 (1968) (while the Administration's views were nevertheless entitled to review the underlying facts submitted to it, as well as the position of the United States for consistency across successive presidencies).

281. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

282. Derek Jinks & Neal Katyal, *Disregarding Foreign Relations Law,* 116 YALE L.J. 1230, 1262-63 (2007).

283. *See* In re S. African Apartheid Litig., 617 F. Supp. 2d 228, 281 (S.D.N.Y. 2009). (citing City of New York v. Permanent Mission of India to the United Nations, 446 F.3d 365, 376, n.17 (2d Cir. 2006).

284. *Id.* (citing *Khulumani*, 504 F.3d at 263-64 & n. 13).

doing lawful business in a pariah state" was "speculative at best."[285] Moreover, she rejected the SOI's additional concern that "adjudication of these cases will be an irritant in U.S.-South African relations," finding that "[a] speculative conflict with the goal of maintaining good relations with a foreign nation . . . . . . is not the type of conflict that normally triggers dismissal under the political question doctrine."[286] Thus, while Judge Scheindlin considered the Executive Branch's SOI, she ultimately found its opinions unpersuasive and declined to defer to them.

2. The Political Question Doctrine May Require Dismissal of a Case Where the Government of the State Purporting to Assert Jurisdiction was Involved in the Negotiation of the Amnesty.

As demonstrated above, there is one situation in which the political question doctrine may unavoidably counsel the courts of a third-party state to decline jurisdiction over internationally-recognized offenses: when the political branches of that state played an active role in the negotiation of the amnesty (or transitional justice measure) in question, or even strongly endorsed the measure after its enactment. Certainly, if a court were to determine that a coordinate branch of its own government encouraged another state to violate its own international duty to hold perpetrators of such offenses accountable, such a finding would likely "embarrass" the forum's government. As long as the political question doctrine remains a valid ground for determining the justiciability of a claim, and as long as "embarrassment" is seen as a valid ground for abstention, the doctrine would seem to permit the courts to decline to exercise jurisdiction in such situations.

VI. CONCLUSION

State practice in the areas of amnesty and extraterritorial jurisdiction reveal that there has been a paradigm shift from impunity to accountability in the wake of political transitions in the last quarter-century. Today, the leaders of states throughout the world are often constrained in their ability to "wipe the slate clean" in the aftermath of various atrocities. While perpetrators of egregious international offenses remain able to evade punishment

285. *Id.*
286. *Id.* n.349.

for their actions, the tide is clearly turning in favor of accountability. The increasing willingness of third-party states to condemn those responsible for certain deplorable offenses has a strong potential to strengthen this trend of accountability, provided that states exercise their judicial authority in a principled manner.

This paper has demonstrated that there are a host of situations in which it is perfectly acceptable for a court to decline to exercise jurisdiction over offenses arising outside its territory, particularly when the state in which the offenses occurred has made (or is in the process of making) a legitimate effort to hold the perpetrators accountable for their actions. However, the decision to decline jurisdiction should not be made out of a general hesitance to adjudicate claims arising abroad, or even as a reaction to opposition expressed by certain political actors, unless their arguments for abstention are independently convincing. Third-party state courts which have been delegated the responsibility to adjudicate such claims are in a unique position to provide such accountability in situations in which it may be unavailable elsewhere. It is their duty to exercise that power responsibly so that the "clash of obligations" does not result in a reaffirmation of the rule of men, but rather in a resounding confirmation of the international rule of law in the area in which the potential to promote international peace and security is the strongest.