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

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ABSTRACT

As transnational civil and criminal and civil litigation in response to major human rights atrocities increases in frequency, courts in countries other than those in which the atrocities were committed have increasingly been confronted with the dilemma of how to exercise their perceived international obligations while paying an appropriate degree of respect to the decisions of courts and legislatures in the countries where the atrocities occurred. A recent series of decisions has revealed a growing international consensus that amnesties for a certain number of grave offenses under international law are impermissible under any circumstance. These decisions also suggest that other mechanisms of transitional justice that states may attempt to employ as a substitute for prosecution (such as truth commissions or community service) or attempts at mitigation of punishment for certain offenders (through reduced sentences or civil liability only) may be considered insufficient to prevent prosecution at the international level. However, as several commentators have recently revealed, the extent to which traditional notions of sovereignty have been altered by the increasing strength of international law remains in doubt. These commentators persuasively argue that while strong substantive norms establishing several international crimes have been established, international procedural law imposing a duty to prosecute may still be far more limited.

If this second group of commentators is correct, and there is in fact no international legal duty to prosecute perpetrators of offenses such as crimes against humanity, extrajudicial executions, and war crimes committed in the course of internal armed conflicts, then national courts exercising extraterritorial jurisdictions face a rather more difficult task. While several theories of jurisdiction permit these third-state courts to exercise jurisdiction over international offenses, they do not require them to do so. Moreover, while the “public” laws establishing amnesties, truth commissions, or other transitional justice mechanisms have no legal force outside of the State which enacts them, the courts of one State may still defer to the enactments of another sovereign in certain situations. In fact, third-state courts may very well have the option to exercise discretion and decline to adjudicate claims involving these international offenses under classic non-justiciability doctrines such as the doctrine of international comity or the act of state doctrine.

Unfortunately, thus far, third-state courts have demonstrated a notable lack of consistency and coherence in their approaches to various sorts of amnesties and transitional justice mechanisms employed by the governments of the States in which the offenses occurred. Even more significantly, those States that have applied the doctrine of comity in examining such amnesties do not appear to have done so in a particularly principled matter. Rather, it is in the course of such comity inquiries that courts are most likely to decline to exercise jurisdiction over a case alleging international crimes on grounds that seem politically-motivated or grounded in purely subjective determinations.

The following paper seeks to explore the recent practice of courts in the United States, Europe, and elsewhere that have been placed in the unenviable position of being told to weigh the internationally-imposed obligation to deny impunity to the perpetrators of international crimes against claims by the states in which those crimes occurred that doing so will undermine their efforts to satisfy their obligations to their own people, and to bring peace to their lives, even at the high cost of amnesty. Moreover, it seeks to offer guidance to future courts faced with such a dilemma, proposing a principled strategy for determining whether a given amnesty should be awarded some degree of 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, it seeks to mitigate the urge of courts in such situations to allow powerful actors to award themselves with impunity at the very moment in which international law has the best chance of constraining executive power. In sum, this paper will seek to assist courts in maintaining adherence to the rule of international law when it is most in danger of succumbing to the rule of men.
TABLE OF CONTENTS

I. INTRODUCTION

II. THE OBLIGATION TO PUNISH

A. Introduction ...................................................................................................................................................... 8
B. The Legacy of Amnesties .................................................................................................................................. 9
   A. Treaty-Based Offenses ....................................................................................................................................... 10
   B. Offenses under Customary International Law .................................................................................................. 12
C. From Impunity to Accountability: The Growing Prohibition Against Amnesties ......................................... 10
D. An Uncertain Rule: Counterarguments against the Prohibition ........................................................................ 17
E. Conclusion ......................................................................................................................................................... 20

III. THIRD STATE TREATMENT OF DOMESTIC AMNESTIES – A SURVEY OF GLOBAL APPROACHES .......... 21

A. Introduction - Extraterritorial Jurisdiction ........................................................................................................ 21
B. The United Kingdom ........................................................................................................................................... 22
C. Spain .................................................................................................................................................................... 25
D. France .................................................................................................................................................................. 26
E. Denmark ............................................................................................................................................................... 27
F. United States ......................................................................................................................................................... 28
   A. Disregarding the amnesty .................................................................................................................................. 29
   B. Amnesty not a bar to exercise of jurisdiction .................................................................................................. 30
   C. Amnesty as a bar to exercise of jurisdiction .................................................................................................. 32
   G. Conclusion ......................................................................................................................................................... 36

IV. THE OBLIGATION TO RESPECT: A PRINCIPLED STRATEGY FOR DECLINING TO EXERCISE
   EXTRATERRITORIAL JURISDICTION IN THE WAKE OF TRANSITION ......................................................... 36

A. Introduction ......................................................................................................................................................... 36
B. Inquiry #1: Predicate Inquires – Choice of Law, the Act of State Doctrine, and Exhaustion of Local Remedies .................................................................................................................................................. 38
   a. Domestic amnesties are not enforceable outside the enacting state .................................................................. 38
   b. 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 .......................................................................................................... 38
   c. Domestic amnesties satisfy any exhaustion of local remedies requirement ............................................................ 39
C. Inquiry #2: Applicability of The International Comity and Abstention Doctrines .............................................. 40
   a. The doctrine of international comity is not applicable to treaty-based claims giving rise to an international duty to
      prosecute .............................................................................................................................................................. 40
   b. The doctrine of international comity is not applicable (a) if the law or policy of the forum state strongly favors
      adjudication or (b) if the forum finds the particular amnesty repugnant to its public policy .................................... 41
   c. Courts should not yield in favor of fora that will offer litigants no legitimate prospect of recovery .......................... 42
   d. Some jurisdictions require that a “true conflict” exist between domestic and foreign law in order for the international
      comity doctrine to be triggered ............................................................................................................................ 43
   e. 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.” .......................... 45
   f. Courts should decline to exercise jurisdiction if doing so would violate the principle of “Double Jeopardy” or “ne bis
      in idem” .......................................................................................................................................................... 47
   g. If the territorial State has authorized an on-going 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 .......................................................................................................................................................... 48
D. Inquiry #3: Applicability of the Political Question Doctrine .............................................................................. 49
   a. 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 .......................... 49
   b. The Political Question Doctrine may require dismissal of a case where the government of the State purporting to assert
      jurisdiction was some way involved in the negotiation of the amnesty .................................................................. 50

VI. CONCLUSION .................................................................................................................................................... 51
I. INTRODUCTION

In late 2006, human rights organizations such as Human Rights Watch roundly condemned the continued failure of the government of Afghanistan to hold several of its most powerful members accountable for gross violations of human rights. Human Rights Watch noted that although the Afghan legislature had enacted an “Action Plan on Peace, Reconciliation, and Justice” in 2005, according to which it pledged to hold accountable perpetrators of war crimes and crimes against humanity committed in the early 1990s during the Taliban’s rise to power, as of late 2006, it had essentially declined to implement that legislation.1 Human Rights Watch further reiterated its belief that that several highly-placed members of the Afghan government and legislature (including several parliamentarians, the Minister of Energy, the Army Chief of Staff, and the Vice President) were suspected of having committed such offenses.2 In a December 2006 press release, it cautioned that the courts of several European countries, including the United Kingdom and The Netherlands, had proven willing to exercise the doctrine of universal jurisdiction in order to prosecute former government officials from third states for such crimes.3 In ominous tones, the organization suggested that the Afghan Parliament’s failure to take steps to hold current officials accountable for their past deeds would not go unnoticed by other members of the international community.

Yet rather than responding to the organization’s call by taking steps to implement its Action Plan, less than two weeks after Human Rights Watch issued its December 2006 press release, the lower house of the Afghan Parliament approved a bill that would provide an absolute amnesty for warlords and others accused of those very crimes.4 The bill, along with the resolution accompanying it, specifically criticized human rights organizations for “naming and shaming” alleged war criminals.5 Although it spurred sharp criticism from human rights groups, the UN, and a small number of parliamentarians, by February 2007, the bill had passed both legislative houses and awaited only the signature of President Hamid Karzai to become law. Under intense pressure from the United Nations Mission in Afghanistan, President Karzai made

2 Id.
3 Id.
5 Id.
one key alteration to the bill, amending the text to clarify that the amnesty would not “affect individuals’ ... criminal or civil claims against persons with respect to individual crimes.”  While Karzai’s amendment preserved the rights of individual victims to bring war crimes charges against offenders, the law banned the Afghan authorities from prosecuting accused war criminals on their own. Dismayed, researchers at Human Rights Watch noted that the bill placed Afghanistan in violation of its international obligations, stating “Afghanistan has not just the right but the obligation to prosecute perpetrators of war crimes, crimes against humanity and torture.”  Yet at no point did the Afghan bill come under strong criticism from the United States, whose military has been present in the country since 2002, or from NATO, whose International Security Assistance Force had approximately 47,000 troops stationed in the country as of April 1, 2008. Rather, the United States and the nations of Europe looked on almost passively as Afghanistan joined the group of over 15 countries to have enacted measures amounting to amnesty for egregious crimes over the course of the past quarter-century.

Just months after the amnesty bill was enacted in Afghanistan, a federal court in the United States upheld claims brought by two groups of South Africans against a group of 38 major multinational corporations, alleging that they 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, against a motion for dismissal by the defendants on jurisdictional grounds. In a fractured opinion, a three-judge panel of the Second Circuit sent the case – entitled *Khulumani v. Barclay Nat. Bank Ltd.* – back to the lower court for a consideration of the justiciability of the plaintiffs’ claims. The two judges in the majority 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 US-based litigation in no way imperiled

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8 See infra section II(D). These countries include Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, South Africa, Mozambique, Sierra Leone, Afghanistan, Peru, Algeria, Zimbabwe, and Indonesia.
10 Id.
the political or financial stability of the country. However, the lone dissenting judge on the panel 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 in which those acts occurred to decline to punish their perpetrators. 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.”

While the case with which it dealt was unique in several respects, the Second Circuit’s Khulumani decision raises important questions that have plagued the courts of the United States and several European nations 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 in which 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 obtain accountability for the perpetrators of universally condemned crimes but who have been denied access to justice in their home countries as a result of domestic amnesties.

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 that law may ignite conflict or threaten the stability of fragile governments abroad. These States have increasingly authorized the use of extraterritorial jurisdiction to allow their courts to adjudicate civil and criminal and civil disputes stemming

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11 Khulumani v. Barclay Nat. Bank Ltd., 509 F.3d 148 (2d Cir. 2007). (denying defendants’ motion to stay the proceedings pending the Supreme Court’s consideration of their petition for certiorari).
12 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 complaints and are awaiting rehearing by the District Court. See American Isuzu Motors, Inc. v. Ntsebeza, 128 S.Ct. 2424 (2008).
from major human rights atrocities committed abroad. Yet as a result, their courts have been confronted with the dilemma of how to enforce the dictates of international criminal law while paying an appropriate degree of respect to the decisions of the governments 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 amnesties for a certain number of grave offenses under international law are impermissible under any circumstance. These decisions also suggest that other mechanisms of transitional justice that states may attempt to employ as a substitute for prosecution (such as truth commissions or community service) or attempts at mitigation of punishment for certain offenders (through reduced sentences or civil liability only) may be considered insufficient to prevent prosecution at the international level. However, several commentators have argued that while strong substantive norms establishing several international crimes have been established, international procedural law imposing a duty to prosecute may still be far more limited. If this second group of commentators is correct, and there is in fact no international legal duty incumbent on third states to prosecute perpetrators of offenses such as crimes against humanity, extrajudicial executions, and war crimes committed in the course of internal armed conflicts, then national courts exercising extraterritorial jurisdictions face a rather more difficult task. While several theories of jurisdiction permit these third-state courts to exercise jurisdiction over international offenses, they do not require them to do so. In fact, third-state courts may very well have the option to exercise discretion and decline to adjudicate claims involving these international offenses under classic non-justiciability doctrines such as the doctrine of international comity or the act of state doctrine.

Unfortunately, thus far, third-state courts have demonstrated a notable lack of consistency and coherence in their approaches to amnesties and other transitional justice mechanisms. Even more significantly, those States that have applied non-justiciability doctrines in examining such amnesties do not appear to have done so in a particularly principled matter. Rather, it is in the course of such inquires that courts are most likely to decline to exercise jurisdiction over a case alleging international crimes on grounds that seem politically-motivated or based on the personal views of the adjudicators.
The following paper seeks to explore the recent practice of courts in the United States, Europe, and elsewhere that have been presented with cases that present such a "clash of obligations," and 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 on the one hand, and honoring an amnesty that may be impermissible under international law on the other. Moreover, it seeks to offer guidance to future courts faced with such a dilemma, proposing a principled strategy for determining whether a given amnesty should be awarded some degree of 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, it seeks to mitigate the urge of courts in such situations to allow powerful actors to award themselves with impunity at the very moment in which international law has the best chance of constraining executive power. In sum, this paper will seek to assist courts in maintaining adherence to the rule of international law when it is most in danger of succumbing to the rule of men.

II. THE OBLIGATION TO PUNISH

A. Introduction

For purposes of this paper, “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 deeds.\(^ {13} \) Amnesty, derived from the Greek word work *amnestia* or *amnesis*, signifies forgetfulness, oblivion, or the loss of memory.\(^ {14} \) If an individual is granted amnesty by a sovereign, he is freed from criminal and/or civil liability arising out of the commission of all acts covered by the amnesty and may no longer be prosecuted for them.\(^ {15} \) In the case of a blanket amnesty, all investigations or court proceedings in respect to the covered offenses are cancelled upon granting of an amnesty, and if an individual has already been convicted, his or her sentence is immediately commuted and all liability is expunged.\(^ {16} \) A conditional amnesty may require that covered individuals perform some act or acts, such as making a formal application for amnesty, engaging in some form of truth-telling, demonstrating contrition, performing


\(^{15}\) See Ntoubandi at 32-33.  

\(^{16}\) *Id.*
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 such proceedings occur.\(^{17}\) As noted by the Count of Peyronet, Minister of Charles X, King of France, “Amnesty does not restore, it erases....Amnesty turns to the past and destroys even the first trace of the sea.”\(^{18}\)

**B. The Legacy of Amnesties**

Certainly, a brief survey of the historical application of amnesties reveals that any prohibition against them must be 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 BC, following the revolt of the Spartan provincial government of Athens imposed after Sparta’s defeat of the Athenians. 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, in an attempt to “erase civil strife from memory by the imposition of legal oblivion.”\(^{19}\) Thereafter, general and unconditional amnesties became a common feature of peace agreements and legislative enactments following major conflicts and political transitions worldwide. 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 Napoleonic Wars, among others.\(^{20}\) In 1867, US 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.”\(^{21}\) Following World War I, the Treaty of Lausanne between the Allied Powers and Turkey granted amnesty to all Turk nationals, immunizing them from prosecutions for the massacres of Armenians in 1915.\(^{22}\)

By the 19\(^{th}\) century, the practice of imposing amnesties began to wane somewhat, with amnesties notably absent from peace treaties enacted in the aftermath of a conflict in which a

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\(^{17}\) *Id* at 10.

\(^{18}\) Ntoubandi, *supra* n. 1, at 11.

\(^{19}\) *Id.* at 15-16.

\(^{20}\) *Id.* at 15-18.

\(^{21}\) *Id.* at 25, citing Proclamation of 7 September 1867 by Andrew Johnson (Proclamation No. 15, 15 Stat. 711 (Sept. 7, 1867)).

\(^{22}\) *Id.* At 19.
clear winner emerged.\textsuperscript{23} This trend culminated in the wake of World War II with the establishment of the Charter of the International Military Tribunal of 1945 by the Allied Powers for the purpose of punishing German officials who had committed atrocities during the war.\textsuperscript{24} The Charter in turn led to the establishment of the Nuremberg, Tokyo, and Control Council No. 10 Tribunals. The Charter established principles that individuals could be criminally responsible under international law for the commission of crimes against peace, war crimes, and crimes against humanity.

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

Since the establishment of the Charter of the IMT, a several additional treaties have emerged that codify substantive criminal offenses under international law. 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 additional international crimes recognized by customary international law. Some of these treaty- and customary international law-based norms have risen to the level of \textit{jus cogens} norms, defined as “peremptory norms of international law...norm[s] accepted and recognized by the international community of States...from which no derogation is permitted.”\textsuperscript{25} Over the course of the last twenty years, commentators have argued with increasing persuasiveness that these treaty- and customary law-based norms (\textit{jus cogens} norms and others) 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.\textsuperscript{26}

\textit{a. Treaty-Based Offenses}

\textsuperscript{23} Id. 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).
\textsuperscript{24} The Charter of the International Military Tribunal for the Trial of the Major War Criminals of the European Axis of 1945 (Signed on August 8, 1945 by the Allied Powers (governments of France, Great Britain, the United States of America and the Soviet Union).
Soon after the creation of the Charter of the IMT and in the wake of World War II, the States of the world made the decision to codify the laws of war in a series of treaties and to confirm that certain acts, regardless of the military context in which they were undertaken, were impermissible under international law and would give rise to liability under international criminal law that could not be extinguished by a national amnesty. The four 1949 Geneva Conventions,\textsuperscript{27} to which almost every country in the world is a party, and which have been recognized as customary international law binding even States that are not Parties, each contain a specific enumeration of the “Grave Breaches” that constitute war crimes under international law.\textsuperscript{28} The Conventions confirm that states have a duty to prosecute or extradite those suspected of committing such “Grave Breaches” in the context of international armed conflicts.\textsuperscript{29} “Grave Breaches” 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.\textsuperscript{30} 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, and that every State has an obligation to punish perpetrators of such crimes, regardless of whether or not a given State has purported to extinguish their liability through an amnesty.

Similarly, the UN Convention on Genocide (Genocide Convention), which the International Court of Justice has determined constitutes customary international law binding on


\textsuperscript{28} See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 UST 3114, 75 UNTS 31.

\textsuperscript{29} Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129, and Geneva Convention IV, Article 146 all contain and obligation to prosecute war criminals. They have identical language: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal 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.”

all states, codifies genocide as a crime under international criminal law. 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 deserve no regard by third states seeking to exercise jurisdiction over them.

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 penalties which take into account their grave nature.” Each State Party to the Convention is obligated to exercise jurisdiction over individuals suspected of torture (a) if it was committed on their territory, (b) if the offender is a national, (c) if the victim is a national (if the State considers it appropriate, (d) if the alleged offender is present on the State’s territory and it does not extradite him/her. These provisions not only codify torture and other cruel, inhuman, or degrading treatment as offenses under international law, but also 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 an amnesty. 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.”

Taken together, the Geneva Conventions, Genocide Convention, and Torture Convention give rise to a body of offenses under international criminal law over which a number of states other than that in which a given offense occurs are justified in exercising its jurisdiction, 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.

\[ b. \textit{Offenses under Customary International Law} \]

\[ 32 \text{id. at art. V.} \]
\[ 33 \text{Torture Convention, 23 ILM 1027, 1465 UNTS 85 (1984), art. 4.} \]
\[ 34 \text{id. at art. 5.} \]
Over the course of the past twenty years, a number of authorities have asserted that crimes against humanity constitute another category of prohibited conduct that states are obligated to punish through the use of whatever jurisdictional bases they have at their disposal.36 First codified in the Charter of the IMT, crimes against humanity are also codified by the Rome Statute in Article 7.37 In making this argument, they point to several pronouncements by international authorities claiming that such amnesties covering such crimes are impermissible. These include the Secretary General of the United Nations, whose report on the establishment of the Special Court for Sierra Leone (SCSL) stated that, “amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity, or other serious violations of international humanitarian law.”38 The Secretary General also stated in his report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights” and stated that the Security Council should “[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, including those related to ethnic, gender, and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.”39

Other sources of evidence pointing to a customary law obligation to punish perpetrators of crimes against humanity include the General Assembly’s 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

36 Orentlicher, Settling Accounts, supra n. __, at 2585, 2593.
37 Rome Convention, supra n. __, at Art. 7 (defining crimes against humanity as: “any of the following acts when committed as part of a widespread or systematic attack against 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.”
Principles”), which state that 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.” Further, 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), referred to favorably, recognized “that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes.”

Further, scholars have argued, and some courts have agreed, that breaches of international and regional human rights treaties may give rise to a duty to punish that is not affected by the enactment of an amnesty in the territorial state of the offense. For example, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) codifies the right to an “effective remedy.” Article 6(1) codifies the right to life, and Article 7 codifies the prohibition against torture. In a recent General Comment, the Human Rights Committee, which has authority to interpret the Convention, stated that where investigations (required under Art. 2 so that individuals have accessible and effective remedies to vindicate their rights) reveal violations of rights recognized as criminal under domestic or international law (specifically mentioning crimes against humanity), “States Parties must ensure that those responsible are brought to justice.”

42 International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 15, 999 UNTS 171, art. 2(3) (“[e]ach 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 provided for by the legal system of the State.”).
43 Id. at art. 6 (“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”).
44 Id. at art. 7 (“no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment...”).
45 Human Rights Committee, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 18; see also .” ICCPR General Comment 20 (Fourty-fourth session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment, A/47/40 (1992) 193 at paras. 13-15 (“[a]mnesties are generally
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.” The General Comment confirmed that “every State Party has a legal interest in the performance by every other State Party of its obligations.”

The Human Rights 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.

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. Particularly noteworthy in this respect is the Velasquez Rodriguez case, in which the Court found that Honduras had a legal duty to “take reasonable steps...to carry out a serious investigation of violations...to identify those responsible [for forced disappearances], to impose the appropriate punishment, and to ensure the victim adequate compensation.” This case was interpreted by the Commission, which found that Chile’s amnesty laws violated the right to judicial protection in the convention as well as the state’s duty to “prevent, investigate and punish” any violations of the rights found in the Convention. The Court later confirmed its holding in Velasquez in the Barrios Altos case, in which it found that Peru’s amnesty laws lacked legal effect due to their manifest incompatibility with the American Convention, and stated that all measures designed to eliminate responsibility 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.”)

46 Id.
47 Id at para. 2.
48 See HRC, Concluding Observations on Senegal, UN Doc. A/48/40 Vol. 1 (1993) 23, para. 103 (expressing “particular concern 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.”); HRC, Concluding Observations on Niger, UN. Doc. A/48/40 Vol. 1 (1993) 88, para. 425 (“State agents responsible for human rights abuses should be punished and should “in no case enjoy immunity through an amnesty law.”); Jose Vincente et. al v. Columbia, CCPR/C/60/D/612/1995 (HRC, 1995) (“the 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, CCPR/C/31/D/194/1985 (HRC 1985) (amnesty law was “incompatible with the obligations of the State party under the Covenant” since it provided amnesty for perpetrators of torture)
were inadmissible before the court “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.”

Additionally, a number of scholars claiming that a customary international law obligation exists on states to punish perpetrators of internationally-recognized crimes despite amnesties issued by the territorial state in which they were committed point to two international decisions suggesting that such amnesties are impermissible. In *Prosecutor v. Furundzija*, a Trial Chamber of the International Tribunal for the Former Yugoslavia (ICTY) said in dicta that if a State were to pass an amnesty law covering perpetrators of torture said the following:

“...[T]he national measures, violating the general [prohibition against torture] and any relevant treaty provisions, would...not be accorded international legal recognition. Proceedings could be initiated by [ ] 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 authorizing 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.”

Similarly, the SCSL’s Appeals Chamber more recently ruled that a national amnesty for serious international crimes could not bind an international court, finding also that “a norm that governments cannot grant amnesties for serious crimes under international law before their own national courts “is developing under international law.” Finally, scholars and courts point to decisions by the courts of Argentina, Peru, and Columbia 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.

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54 *Simon, Julio Hector y otros s/privacion ilegitima de la libertad*. Supreme Court, causa No. 17/768 S.1767.XXXVIII (14 June 2005) (Argentine Supreme Court declares two laws blocking prosecution for crimes committed during the “Dirty War” between 1976 and 1983 to be unconstitutional and void); Case No. C-370/2006, (D-6032) Regarding the Law of Justice and Peace, (May 2006) (Columbian Constitutional Court strikes down provisions of a law authorizing significant sentence reductions for demobilized combatants who confessed to committing internationally-prohibited crimes); *Quinto Juzgado Penal Especial, 5th* Special Criminal Court (2 July
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.”55 These authors do not dispute scholars’ claims 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.56 However, they note that insofar as the duty to prosecute Grave Breaches is limited to the context of international (not internal) armed conflicts,57 and insofar as there is no treaty-based obligation for 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. 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.58

On the issue of a “legal obligation” to punish, skeptics say that since proponents of the duty often rely 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, the legal basis for their claims is not particularly strong.59 Moreover, skeptics’ claims are bolstered by a recent decision of the SCSL, which found that that there is “no general

2003) (Peruvian lower court dismisses challenges to a prosecution on the basis of amnesty on the basis that the amnesty contravened the American Convention).
56 Scharf, The Amnesty Exception, supra n. __, at 519.
57 See Geneva Conventions I, II, III, and IV, art. 2. 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, Art. 8.2(c) and (e).
58 Restatement, supra n. __, § 102(2) (Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation); Id. at comment c (“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.”).
59 Scharf, The Amnesty Exception, supra n. __, 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).
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 treaty obligations to the contrary.\(^{60}\) Even the Chairman of the Rome Diplomatic Conference has acknowledged that the Rome Statute does not automatically preclude amnesties; rather, several provisions reflect “creative ambiguity” which could potentially allow the ICC to recognize an amnesty exception to the court’s jurisdiction.\(^{61}\) These actions all demonstrate that the rule against recognizing amnesties may be less hard and fast than proponents of the duty to punish acknowledge.

Even more detrimentally to the case of the proponents of the duty to punish, “to 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.”\(^{62}\) The skeptics of the duty to punish note that a host of states have enacted amnesties over the course of the last 25 years, including Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, Sough Africa, Mozambique, Sierra Leone, Afghanistan, Peru, Algeria,, Zimbabwe, and Indonesia. While some of these amnesties (such as that in Guatemala) purport to exclude a handful of international crimes from their scope, most are “blanket amnesties” intended to extinguish all criminal and/or civil liability incurred by covered individuals over the course of a period of time. In fact, as recently as 2005, Algeria enacted a near-blanked amnesty intended to resolve civil conflicts,\(^{63}\) and Columbia enacted a demobilization program that, while requiring perpetrators of crimes against humanity to serve 5-7 year sentences in exchange for truth-telling and reparations, awarded amnesty to guerillas and paramilitary fighters for all other crimes. As recently as March 2008, the Liberian TRC, which is precluded by statute from offering amnesties to perpetrators of crimes against humanity and international humanitarian law violations, announced that it would


\(^{61}\) Scharf, *The Amnesty Exception*, supra n. __, 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 is he concludes there are “substantial reasons to believe that an investigation would not serve the best interests of justice.”)

\(^{62}\) Id. at 521.

\(^{63}\) Algeria’s Charter for Peace and National Reconciliation will provide amnesty to all militants not accused of public bombings, mass murder, and rape.
begin considering applications for amnesty for all other offenses. The skeptics note that even though lower courts in some countries have struck down amnesties for serious crimes under international law, the courts of Chile, El Salvador, Guatemala, Peru, and South Africa ultimately affirmed their validity on some legal ground. Finally, skeptics point to the fact that a number of third-party States have publicly endorsed or facilitated the granting of amnesties issued by transitioning states, including the United States, which encouraged the Haitian amnesty in 1993, and Mexico, Norway, Spain, Venezuela, and Columbia (and again the United States), all of which facilitated the peace process and amnesty in Guatemala. 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.

Increasingly, States have attempted to pair amnesties with other transitional justice mechanisms such as reparations or Truth and Reconciliation Commissions. For example, East Timor’s Commission for Reception, Truth, and Reconciliation was authorized to grant amnesties for conduct amounting to war crimes on the condition that individuals fulfilled orders for community service and made public apologies or other demonstrations of remorse. Rwanda’s *gacaca* courts can similarly order community service rather than prison for perpetrators who confess to crimes other than genocide or rape. In 2005, Columbia enacted a Peace and Justice Law, which provides paramilitaries and leftist guerillas who turn themselves in amnesty for crimes not amounting to “serious crimes under international law,” contingent upon reparations and truth-telling. Notably, those who have committed such international crimes are rewarded for truth-telling and providing reparations with dramatically reduced sentences, ranging from 5-7 years in length. Whether these additional

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66 Trumball, *supra* n. __, at 297.

67 Id.

68 See Truth and Reconciliation Commission Law of Indonesia (TRC Law), arts. 1(9), 24-29 (proposing a TRC that would have allowed the President to grant amnesty for any crime); draft Truth and Reconciliation Law of Nepal (TRC Law), § 25 (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).

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, as seen by the views of scholars and courts which insist that “accountability” for rights violations is synonymous with “prosecution.” The secondary question of whether these additional procedures satisfy an international duty to prosecute perpetrators of internationally-recognized crimes is similarly unresolved.

E. Conclusion

As evidenced by the vociferous debate between the proponents of an internationally-recognized duty incumbent upon all states to assert jurisdiction over and punish perpetrators of internationally-recognized crimes and their skeptical counterparts, the state of international law regarding the “duty to punish” is in large part uncertain. Both camps agree that for certain treaty-based offenses, namely genocide and 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. However, whether there is an international duty to punish non-treaty-based international offenses like 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 like reduced sentences and community service imposed by territorial States 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 the proponents of the international duty to punish a wide range of international crimes are correct, then such third-party States have no obligation to pay any regard to a domestic amnesty, and actually have an obligation to disregard such measures. In this scenario, domestic amnesties would constitute an impermissible attempt 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 have a permissive right to establish jurisdiction over violators of international law, but no mandatory obligation to do so. If universal and extraterritorial jurisdiction are merely permissive, then third-party States and their courts have the freedom to decline jurisdiction over international crimes on a discretionary basis. The remainder of this paper will examine the standards (or lack thereof) according to which the courts of third-party States that have considered the question have evaluated whether to give effect to a domestic amnesty. It will conclude by proposing a more principled approach by which courts faced with such a choice – whether or not to decline to exercise extraterritorial jurisdiction because an offender’s home state has enacted an amnesty covering the crimes of which s/he is accused – may proceed in such a discretionary inquiry.

III. THIRD STATE TREATMENT OF DOMESTIC AMNESTIES – A SURVEY OF GLOBAL APPROACHES

A. Introduction - Extraterritorial Jurisdiction

Over the course of the last twenty years, as the concept of individual criminal liability under international law became increasingly accepted, and as nations began to enact regulations in the transnational areas of trade, antitrust, securities, and other commercial matters with increasing frequency, the courts of those nations became increasingly comfortable with exercising extraterritorial jurisdiction over claims arising elsewhere than within the borders of their own nation-state. 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. 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); the actions and interests of their nationals outside their territory (the nationality principle); conduct outside their territory that is directed against the security of the State (the protective principle); and certain offenses recognized by the community of nations as of universal concern, even in the absence of other bases of jurisdiction (universal jurisdiction).

70 Restatement, supra n. __, at § 402(1)(c).
71 Id. at 402(2)
72 Id. at 402(3)
73 Id. at § 404.
Of all of these bases, universal jurisdiction is certainly the most hotly contested.\textsuperscript{74} The Restatement declares that “universal jurisdiction...is a result of universal condemnation of those activities and general interest in cooperating to suppress them;” 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, the last edition of which was published in 1987.\textsuperscript{75} The list of offenses giving rise to universal jurisdiction is contested as well, not least because the Restatement is not a legally-binding interpretation of international law, even for courts in the United States. However, the controversial nature of universal jurisdiction – and the less controversial (but still occasionally contested) practice of extraterritorial jurisdiction more generally – has not prevented it from becoming increasingly accepted and utilized by courts in North America and Europe.\textsuperscript{76} As the following review demonstrates, these courts have varied in their approaches to dealing with truth commissions, amnesties, attempts at mitigation, and other “transitional justice” mechanisms.

\textbf{B. The United Kingdom}

\textsuperscript{74} 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 a 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, \textit{In re Apartheid Litigation}, 76 USLW 3405 (Jan 10, 2008) (petition for certiorari) at 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). \textit{Id.} at 20.

\textsuperscript{75} \textit{Id.} at § 404, comment \textit{a}.

The United Kingdom permits courts in England and Wales to exercise universal jurisdiction over torture and certain war crimes including grave breaches of the Geneva Conventions and their first additional protocol, and extraterritorial jurisdiction (on the basis of territoriality or nationality/residence) over genocide and crimes against humanity.

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 in which was issued in 1999 by the House of Lords. 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 (which, as discussed below, also recognizes universal jurisdiction) alleging counts of torture and conspiracy to commit torture, among other offenses. 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. In October 1998, while General Pinochet was in Britain, a Spanish judge requested the British authorities to arrest him, and they complied. 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. 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, as decisions relating to the recognition of the Chilean amnesty were a matter of domestic concern and as the State had appointed a Truth and Reconciliation Commission in 1990 as its method of dealing with the legacy of violence during that period of its history.

The House of Lords, in initial (November 1998) and final (March 1999) decisions, determined that General Pinochet was not immune from prosecution for torture and conspiracy to commit torture committed on or after the date upon which the United Kingdom had ratified the Torture Convention in 1998. However, both judgments contained language suggesting that

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78 Geneva Conventions Act 1957, section 1, 1A.
80 R. v. Bow Street Magistrates Court; ex parte Pinochet (No. 1), 4 All ER 897 (1998).
81 R. v Bow S Magistrates ex p. Pinochet (No. 2), 1 All ER 577 (1999).
the British courts could decline to extradite or prosecute a perpetrator of universally-prohibited crimes on the basis of a foreign state’s amnesty laws. Lord Lloyd of Berwick was particularly adamant on this point in the initial (November 1998) House of Lords decision. An expert testifying on Pinochet’s behalf had suggested that the situation in Chile at the time was precarious, and that the balance that had been achieved by that country’s Truth and Reconciliation Commission might be undermined if a foreign court were to intervene in the matter. Lord Lloyd referred to this testimony in detail in his opinion, and further noted that he was not convinced that an international prohibition against amnesties for crimes such as torture had really solidified in customary international law.\textsuperscript{82} Noting that a great deal of recent State practice suggested that such amnesties were permissible, Lord Lloyd concluded that even if General Prinocchet did not enjoy head-of-state immunity, “there are compelling reasons for regarding the present case as falling within the non-justiciability principle.” Lord Lloyd made it clear that he based his finding of non-justiciability not on the political question doctrine, and not on the international comity doctrine, but on the ground that the courts of the United Kingdom were “simply not competent to adjudicate.” Lord Lloyd argued, “...we are not an international court. For an English court to investigate and pronounce on the validity of the 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.” Furthermore, he rejected arguments that Parliament had provided for the exercise of universal jurisdiction in the Criminal Justice Act, claiming that the demands of the non-justiciability doctrine trumped even Parliament’s commands.\textsuperscript{83}

In the final Pinochet judgment, Lord Lloyd of Berwick’s reasoning was rejected by Lord Saville of Newdigate, who found that at least where a case involved a treaty laying out an obligation to extradite or prosecute to which the State objecting to England’s jurisdiction was a Party, the doctrine of non-justiciability could not apply. Since Chile, Spain, and England had all

\textsuperscript{82} (“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.”).

\textsuperscript{83} Application of the non-justiciability doctrine is an “obligation, and not a discretion” (citing Lord Wilberforce in \textit{Buttes Gas and Oil Co. v. Hammer} [1982] A.C. 888).
been parties to the Torture Convention since 1988, Lord Saville found that they “clearly and unambiguously agreed that official torture should now be dealt with in a way which would otherwise amount to an interference in their sovereignty,” and that no arguments based on non-justiciability were applicable.

Lord Saville’s approach to the issue of amnesty laws targeting offenses which States have a treaty-based obligation to extradite or prosecute is clearly in line with the opinions of courts and scholars who have considered the issue. Scholars on both side of the debate with respect to crimes against humanity and war crimes have acknowledged that third-party States have particularly clear obligations when it comes to exercising jurisdiction over allegations of genocide, torture, and grave breaches of the Geneva Conventions. 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 all parties to the Genocide Convention, Torture Convention, and Geneva Conventions, but upon States not Parties as a matter of customary international law.

C. Spain

Spain recognizes universal jurisdiction and has exercised it the most frequently of its European counterparts. Article 23.4 of Spain’s Law on Judicial Power states that “Spanish jurisdiction is competent to try acts committed by Spaniards or foreigners outside the national territory” for crimes recognized “under Spanish law,” including “genocide,” “terrorism,” and crimes that “under international treaties and agreements, must be prosecuted in Spain.”84

Recently, in the Scilingo case, the Supreme Court held that Spain had jurisdiction to prosecute an Argentine navy officer present in Spanish territory for dozens of extrajudicial executions committed during Argentina’s Dirty War. The court reached this conclusion despite the fact that Scilingo had argued that the Spanish courts should recognize Argentina’s amnesty laws as extinguishing his liability for the offenses. The tribunal countered that the amnesty had “no value” outside Argentina.85 The Supreme Court found that not only was it not bound by the amnesty, but that the 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

85 Id. at 505, citing STS, (J.T.S., No. 1362) § II (2004).
However, according to Human Rights Watch, “Spanish law prevents a prosecution only where the individual has been acquitted, pardoned, or punished abroad; an amnesty does not amount to a pardon, because the latter implies that the individual was prosecuted and convicted before the punishment was annulled,” 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.

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 (like extrajudicial execution) will not be enforced outside the issuing territory is an important one in keeping with the “public law taboo” discussed below. The Spanish courts have clearly considered the potential applicability of non-justiciability doctrines in situations in which individuals have already been at least investigated in their home states. However, the Spanish courts also appear to see the availability of an alternative forum in which investigation or prosecution can occur to be a predicate consideration (if not a requirement) to a finding of non-justiciability.

D. France

Although France only recognizes universal jurisdiction over claims of torture, it’s 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 Mauritians accused of plotting a conspiracy. Two of his victims had fled to France, where they became political refugees, and filed a private criminal compliant with the French courts. Ould Dah was arrested in July 1999 in France while there for a training program. However, the French authorities released Ould Dah, placing him under house arrest, in

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87 Code of Criminal Procedure (Code de procédure pénale) 1957, as amended by the Act of December 1992, art. 689 available at http://www.legifrance.gouv.fr/html/codes_traduits/cphtmlA.htm (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).
89 Id.
September 1999. By April 2000, he had escaped back to Mauritania. 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. Ould Dah appealed against 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 resulting from the government crackdown. 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, it would violate its own international obligations and abnegate the very principle and purpose of universal jurisdiction.\(^9\)

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 ten years in prison, the maximum available penalty.\(^9\)

The case of Ely Ould Dah in France demonstrates that while France may have unreasonably narrowed the scope of universal jurisdiction, it has embraced the “public law taboo” as well and has recognized that at least in the case of torture, doctrines of non-justiciability are unavailable to the courts.

E. Denmark

Danish law provides for the exercise of universal jurisdiction over offenses under treaties to which Denmark is a Party that give rise to an international obligation to prosecute or extradite, including torture and grave breaches of the Geneva Conventions.\(^9\) Denmark’s Penal Code also provides it with jurisdiction over any crime carrying a penalty of more than one year of imprisonment if it is also a crime in the territorial state and the accused cannot be extradited to the territorial state.\(^9\) According to Human Rights Watch, several complaints have been investigated on this basis since 2001, with three cases leading to a prosecution.\(^9\) 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

\(^9\) Human Rights Watch, *Universal Jurisdiction in Europe*, supra n. __ at 58.

\(^9\) Trial Watch, *Ely Ould Dah*, supra n. __.

\(^9\) Penal Code (*Straffeloven*) 1930, section 8 (5).

\(^9\) Penal Code, section 8 (6).

\(^9\) Human Rights Watch, *Universal Jurisdiction in Europe*, supra n. __ at ?. 
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.\(^95\) Apparently, SICO applies a list of criteria to each amnesty in order to determine whether it will be afforded comity. As 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.\(^96\)

As discussed in the context of the Pinochet decisions, Denmark’s willingness to apply the non-justiciability doctrine of international comity in order to decline jurisdiction over offenses including genocide, grave breaches of the Geneva Conventions, and torture likely contravenes its international legal obligations under the related treaties. 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, this criteria apparently does not take the substantive nature of the alleged offenses into account. Finally, the risk that prosecutorial discretion could be applied on political rather than legal bases is extremely high, given the unwillingness of SICO to actually disclose the list on which it makes its comity evaluations.

F. United States

Over the course of 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.\(^97\) A recent amendment to the ATS, the Torture Victims Protection Act (TVPA, 106 Stat. 73) provides a cause of action for US nationals as well as aliens particularly for torture and extrajudicial executions. The Supreme Court confirmed in \textit{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

\(^95\) \textit{Id}. at 25.
\(^96\) \textit{Id}. at 26.
\(^97\) 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. \textit{See} Restatement, \textit{supra} n., at § 404, comment b (“In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis...”).
law of nations since that time.⁹⁸ 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 jurisdictional basis other than universal jurisdiction.⁹⁹ 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.

a. 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 have paid no further regard to it thereafter. For example, in Barrueto v. Larios, the family of a Chilean economist killed by military officers under Pinochet’s command sued one of the military officers present at his execution, who had relocated to the United States, under the ATS and TVPA for extrajudicial killing, torture, crimes against humanity, and cruel and degrading treatment.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

Similarly, in Arce v. Garcia, in which three Salvadoran plaintiffs brought claims under the ATS and TVPA against two retired Salvadoran generals living in Southern Florida, neither the Southern District of Florida, nor the Eleventh Circuit,¹⁰³ mentioned the El Salvadoran amnesty even in passing in their decisions. It does not appear that the defendants even attempted

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¹⁰¹ Id.
¹⁰² Barrueto v. Larios, 402 F.3d 1148 (11th Cir., 2005).
to raise the amnesty as a defense, but as federal courts have an obligation to satisfy themselves that they have subject matter jurisdiction *sua sponte*, the omission is still noteworthy.\(^{104}\)

b. **Amnesty not a bar to exercise of jurisdiction**

In 2003, a group of Salvadorans brought claims under the ATS and TVPA against Colonel Nicolas Carranza, a naturalized US citizen living in Memphis, alleging that as Vice-Minister of Defense of El Salvador from 1979-1981, he bore responsibility for the extrajudicial killings and/or torture of themselves and members of their immediate families committed by the Salvadoran security forces. Unlike in *Barrueto* and *Arce*, the defendant in *Carranza* moved for summary judgment on the grounds that the plaintiffs’ claims were barred by the Salvadoran amnesty law, which the US courts were obligated to recognize.\(^ {105}\)

After considering the scope (broad) and nature (unconditional and general) 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), the court engaged in a careful analysis under the international comity doctrine, finding that Supreme Court precedent required an actual conflict between domestic and foreign law before the doctrine of comity could apply.\(^ {106}\) 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.\(^ {107}\) Specifically, it held, “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.”\(^ {108}\)

As an example of a situation in which the international comity doctrine might apply, the Court pointed to *Sarei v. Rio Tinto*, a Ninth Circuit case in which the government of Papua New Guinea had passed a law prohibiting citizens from filing claims involving foreign mining projects in foreign courts, and in which citizens of that country had

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\(^{104}\) 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).


\(^{106}\) *Id.* at *3.

\(^{107}\) *Id.* at *4.

\(^{108}\) *Id.*
brought ATS claims against the most powerful mining conglomerate active in the country, accusing it of aiding and abetting genocide and war crimes, among other offenses.\textsuperscript{109}

Although it had found the doctrine of international comity inapplicable to the case because of the absence of a conflict between the laws of the United States and those of another country, the Court further declared the doctrine of international comity was not applicable at all to claims brought under the TVPA and the ATS in the wake of Congress’s clear decision to open US courts to claims of that nature.\textsuperscript{110} It concluded, “for the Court to decline jurisdiction in this case in deference to El Salvador's amnesty legislation would run contrary to Congress’ clear intent to provide a means for victims of violations of the law of nations to seek redress.”\textsuperscript{111}

At the same time that the \textit{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 against Alvaro Rafeal Saravia, the former chief of security for the organizer of El Salvadoran paramilitary groups, and a current resident of Modesto, California, alleging that he 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.\textsuperscript{112} Interestingly, Saravia had been indicted for the murder of Archbishop Romero in El Salvador at the time that the amnesty was enacted. After the amnesty law was issued, the judge had dismissed the case against him, finding that the amnesty, which extinguished all liability for political crimes, covered the assassination.\textsuperscript{113} That decision had been upheld by the First Criminal Chamber of El Salvador in 1993, which held that its decision had \textit{res judicata} effect with regard to Saravia.\textsuperscript{114}

Rather than suggesting that the Salvadoran amnesty and judicial decisions establishing its applicability to Saravia were entitled to international comity, the court in \textit{Doe v. Saravia} found that the amnesty allowed the plaintiffs to satisfy the “exhaustion of domestic remedies” requirement in the TVPA, as the law proved that the plaintiffs were unable to publicly or

\textsuperscript{110} \textit{Chavez}, 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. \textit{In re Maxwell Communication Corp.}, \textit{93 F.3d} at 1047”).
\textsuperscript{111} \textit{Id}.
\textsuperscript{113} \textit{Id.} at 1133-34.
\textsuperscript{114} \textit{Id}.
privately pursue justice in El Salvador. 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 and $5 million in punitive damages.

Finally, in the recent decision of the Second Circuit in *Khulumani*, two members of a three-judge panel first reversed the District Court’s decision to dismiss the case against corporations accused of aiding and abetting international crimes during South Africa’s apartheid regime for lack of subject matter jurisdiction and remanded for a consideration of the justiciability of the claims, and then rejected a motion by the defendants for a stay in the proceedings while they petitioned the Supreme Court for review of the decision. The majority of the panel, in remanding the case to the District Court, suggested that in applying non-justiciability doctrines to the plaintiffs’ claims, it consider not only the views of members of the South African government, which had vigorously opposed the litigation, but also those of the former Commissioners and committee members of South Africa’s Truth and Reconciliation Commission and a group of South African organizations, unions, and political parties, which had submitted amicus briefs arguing that the litigation did not conflict with the policies of the TRC. However, the remaining judge on panel, in a vigorous dissent, 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 doctrine. Judge Korman expressed his belief that any inquiry by a United States court into the potential effect of US 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.”

c. Amnesty as a bar to exercise of jurisdiction

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115 *Id.* at 1153.
116 *Id.* at 1157-59.
119 See *Id.* at 156 (Korman, J., dissenting).
120 *Id.*
Aside from Judge Korman’s isolated expression of hostility to the notion that a US court would adjudicate claims purportedly addressed by a territorial state in a transitional justice strategy declining prosecution of crimes under international law, the United States courts have been generally receptive to the prospect of exercising their jurisdiction in order to hold such individuals accountable for their offenses. However, there is one category of ATS and TVPA claims involving transitional justice mechanisms that the American courts have proven generally hesitant to adjudicate: those which would require the US courts to decline to recognize amnesties and other transitional justice mechanisms facilitated or previously supported by the United States or to which the US is a party. In these cases, the courts have found the political question and comity doctrines far more appealing, although on slightly muddled grounds.

For example, in *In re Nazi Era Cases Against German Defendants Litigation*, the District Court for the District of New Jersey found that it lacked competence to adjudicate the ATS claims of individuals brought against corporations that aided and abetted the Nazi government during the Holocaust era.\(^\text{121}\) The Court found that in the wake of World War II, the United States government had entered into a Foundation Agreement with Germany, choosing to provide reparations to victims and yet to restore the German economy so that it could better withstand the alternative ideology offered by the Soviet Union, rather than letting individual plaintiffs bring actions against those who supported the Nazi regime’s egregious policies.\(^\text{122}\) The 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.”\(^\text{123}\) It further pointed to the Statement of Interest (SOI) filed with the Court by the United States, which, while non-binding, nevertheless asked the Court to treat the Foundation as the plaintiffs’ exclusive remedy for Nazi-era claims and to dismiss their case in response.\(^\text{124}\) The Court eventually determined that all of plaintiffs’ claims should be pursued through the Foundation instead of the courts, as the political question doctrine counseled for dismissal of the case.\(^\text{125}\) 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

\(^{121}\) See *In re Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp.2d 370 (D.N.J., 2001).
\(^{122}\) Id. at 376.
\(^{123}\) Id. at 380.
\(^{124}\) Id.
\(^{125}\) Id.
could potentially embarrass the country through “multifarious pronouncements by various departments on one question.”\textsuperscript{126}

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, the enactment of another country, the Court found that “a district court must generally make appropriate findings as to whether giving effect to a foreign judicial act would be prejudicial to the interests of the United States, and exercise its discretion in determining whether it will recognize foreign proceedings based on those findings.”\textsuperscript{127} It also found that although a “true conflict” was a predicate requirement for a comity inquiry, because the German Foundation Law would only function if all pending litigation in the United States ceased, that requirement was satisfied.\textsuperscript{128}

In determining whether it had the authority to challenge the validity of the German Foundation law, the Court in \textit{Nazi Era 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.”\textsuperscript{129} The Court 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 the political branches of the US, through diplomatic channels, and the German courts had already determined that the law was constitutional and the exclusive remedy under the German legal system for Nazi-era claims.\textsuperscript{130} This component of the Court’s reasoning departed rather dramatically from the international comity inquiry generally followed by the courts in the United States, and appears to have conflated the doctrine of international comity with that the act of state doctrine.\textsuperscript{131} However, as 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. Further, even

\begin{flushright}
\textsuperscript{126} \textit{Id.} at 383.
\textsuperscript{127} \textit{Id.} at 387.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} (citing \textit{Pravin Banker Assoc., Ltd., v. Banco Popular Del Peru}, 109 F.3d 850, 854 (2d Cir.1997)).
\textsuperscript{130} \textit{Id.} at 388.
\textsuperscript{131} While the Act of State doctrine precludes the courts from declaring the Act of another sovereign invalid, the court in \textit{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.
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though its particular findings with respect to international comity may have been in error, the
cases on which the Court relied in holding that US courts ordinarily allow the acts of foreign
governments “to have extraterritorial effect in the United States” affirmed that “courts will not
extend comity to foreign proceedings when doing so would be contrary to the policies or
prejudicial to the interests of the United States,” preserving the doctrine for applicability in
future cases.

In evaluating the significance of the Court’s holding in *Nazi Era Cases* to cases involving
transitional justice mechanisms more broadly, it is critical note the significant involvement of the
United States in the negotiation and implementation of the German Foundation Agreement.
Despite repeatedly emphasizing that the Statement of Interest submitted by the Executive Branch
was not binding on its decision, the court in *Nazi Era Cases* engaged in no inquiry regarding
whether the policies of the United States as reflected by the existence and continued
Congressional approval of the ATS figured into such a calculation of the American “national
interest.” Rather, the Court appears to have assumed that the Statement of Interest submitted by
the executive, while not dispositive of the claim, was the conclusive authority on the nature of
America’s interest in the particular adjudication.

This brief survey of the US courts’ treatment of transitional justice mechanisms in the course
of exercising extraterritorial jurisdiction under the ATS reveals that while the courts generally (a)
recognize the “public law taboo” and refuse to apply the amnesty laws of other countries, but (b)
typically consider non-justiciability doctrines to be potentially applicable, subject to some
threshold requirements. However, beyond these two common themes, the decisions appear
widely scattered in certain respects. It is particularly noteworthy that none of the courts has
distinguished between claims under the ATS and TVPA stemming from treaties giving rise to a
duty to extradite or prosecute on the one hand and those arising from customary international law
on the other in the course of the justiciability inquiry. Some courts have not mentioned the
potential for non-justiciability at all. Some have considered the doctrine automatically
applicable (Judge Korman), while others have insisted on recognizing a “true conflict” first.
Once the courts proceed to an examination of justiciability, moreover, their findings have been
somewhat less than clear. While all of the courts appear to have engaged in some sort of
“interest balancing,” the roles of the Executive and Congress in articulating that interest appear

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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.

G. Conclusion
Clearly, although the frequency with which courts in the United States and Europe exercise extraterritorial and universal jurisdiction to adjudicate claims alleging violations of international criminal law is increasing, this rise in judicial activity has yet to result in a systematic, principled approach to adjudication of such claims, particularly when they implicate an amnesty or other transitional justice measure in the territorial state of the offense. As the following section will demonstrate, this lack of clarity undermines the very body of international law from which the courts derive their authority to exercise jurisdiction in the first place. Furthermore, it is unnecessary, as existing legal principles recognized by all of the judicial systems at issue in this paper provide a reasonably clear framework according to which courts and prosecutors can determine the justiciability of a particular claim 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 in which it is 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, there is a significant possibility that States other than those in which an offense amounting to a violation of international criminal law occurs have a mandatory obligation to exercise jurisdiction over offenses such as genocide, Grave Breaches of the Geneva Conventions, and torture. However, there is strong evidence suggesting that third 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 disagreed sharply (among and between national systems) about the proper approach that they should take in considering whether or not to exercise their jurisdiction.
This lack of clarity in the courts’ (and prosecutors’) approach has at least two negative consequences for the international rule of law that such extraterritorial jurisdiction is intended to bolster. First, in engaging in a less-than-principled 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 the perpetrators of at least those offenses accountable for their acts. Moreover, in deferring to amnesties (or reparations alone, in the case of the German Foundation Agreement) in any situation other than those in which the law clearly provides courts with a reason to do so, the courts of third-party States actively undermine even the fragile rule of law that currently exists in the international sphere. As Martti Koskenniemi has 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.” 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.” In doing so, Richard Goldstone has argued that they “constitute a threat to both the legitimacy and fairness of the rules,” and Michael Scharf has concurred that they “breed[ ] contempt for the law and encourage[ ] future violations,” whether or not they are paired with conditions not amounting to prosecution. Insofar as the courts and prosecutors of third-party States derive their authority to exercise extraterritorial jurisdiction from international law, this paper argues that they should make every effort to avoid undermining that very body of law in when they abstain from applying it.

This section will examine the various legal doctrines under which states may decline to exercise jurisdiction over such offenses because the State in which they occurred has enacted an amnesty or other transitional justice mechanism not amounting to prosecution that purports to extinguish perpetrators’ liability for that second category of offenses. Additionally, it will lay out specific guidelines according to which courts can determine whether they have a justifiable

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133 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.
134 Scharf, The Amnesty Exception, supra n. __, at 513.
135 Martti Koskenniemi, Between Impunity and Show Trials, 2.
137 Id.
138 Scharf, The Amnesty Exception, supra n. __, at 513-514.
basis, grounded in the rule of law, 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 the international rule of law and mitigate the ability powerful actors to award themselves with impunity for the very offenses which international law most strenuously seeks to deter.

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

a. *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,” according to which the courts of one sovereign refuse to “take notice” or “enforce” the public laws of another.\(^\text{139}\) Dating from 18\(^\text{th}\)-century England,\(^\text{140}\) 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 under no obligation 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 a domestic amnesty only bars prosecutions within the State that enacted it.\(^\text{141}\)

\[\text{b. The act of state doctrine does not bar a court’s exercise of extraterritorial or universal jurisdiction simply because the territorial state has enacted an amnesty.}\]

As demonstrated in the decision in *Nazi Era Cases*, courts occasionally assume that if they attempt to adjudicate the liability of an individuals who is the beneficiary of an amnesty in his or her home state, they will effectively declare the foreign amnesty invalid, in contravention of the act of state doctrine, 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.”\(^\text{142}\) However, in


\(^{140}\) See *Holman v. Johnson* (Kings Bench, 1775); see also *Pasquantino v. United States* __ U.S. __ (2005).

\(^{141}\) See, e.g., Diane F. Orentlicher, *Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction*, in Justice for Crimes Against Humanity, Mark Lattimer and Philippe Sands QC (Eds.) (2003) at 234 (“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.”).

exercising extraterritorial 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.¹⁴³ The
act of state doctrine is triggered in the context of such a case – if at all¹⁴⁴ – when a defendant
argues that a substantive offense of which he is accused was connected to a legitimate public
policy decision of the territorial state.¹⁴⁵ 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 the claim, they are in error.

  c. Domestic amnesties satisfy any exhaustion of local remedies requirement

Finally, claims under the TVPA in the United States and in some European countries
require that plaintiffs exhaust available local remedies before the courts of those countries can
assert extraterritorial jurisdiction.¹⁴⁶ However, under international law, claimants need only
resort to such local remedies that are “available” and potentially “effective” before they may 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 laws of the territorial state.¹⁴⁷ As the court in Saravia correctly determined,
the presence of an amnesty in the territorial state proves that local remedies are “unavailable”
and thus that any exhaustion of remedies requirement has been satisfied.¹⁴⁸

¹⁴³ 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
¹⁴⁴ 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.
¹⁴⁵ See Sarei v. Rio Tinto, 487 F. 3d 1193 (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).
¹⁴⁶ See TVPA, supra n. __ (“[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.”). The
Court of Appeals for the Ninth Circuit recently held that the ATS does not contain any exhaustion requirement
¹⁴⁷ Comment No. 4 on Art. 44 of ILC Draft Articles on Responsibility of States for Internationaly Wrongful Acts,
¹⁴⁸ Id. at 1153.

39/52
C. Inquiry #2: Applicability of The International Comity and Abstention Doctrines

The non-justiciability doctrine most frequently invoked in cases involving extraterritorial jurisdiction over offenses committed in a State that later enacted an amnesty or other transitional justice measure not amounting to prosecution is that of international comity. Dating from 16th century Europe, the doctrine was imported into English common law by Lord Mansfield in the 18th century, and into American common law by Justice Story.\(^\text{149}\) The US Supreme Court has 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,”\(^\text{150}\) and “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”\(^\text{151}\) The doctrine is not obligatory on courts, but is rather a discretionary rule of “practice, convenience, and expediency,”\(^\text{152}\) which allows them to grant “voluntary deference to the acts of other governments.”\(^\text{153}\) 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.\(^\text{154}\) However, at least one US Supreme Court Justice has argued that the doctrine is relevant in ATS cases as well.\(^\text{155}\) While the doctrine is notoriously ill-defined at the edges, 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.

\[\text{a. The doctrine of international comity is not applicable to treaty-based claims giving rise to an international duty to prosecute.}\]


\(^{150}\) *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 40 L.Ed. 95 (1895).


\(^{153}\) 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4473 (1981)).

\(^{154}\) *Talisman*, 244 F.Supp.2d at 342, citing Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.3d 452 (2d Cir. 1985).

\(^{155}\) *Sosa*, 542 U.S. at 761, 124 S.Ct. 2739 (Breyer, J., concurring).
As discussed earlier in this paper and as reflected in the decisions of the courts in *Pinochet* in the United Kingdom, *Scilingo* in Spain, and *Ely Ould Dah* in France, 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. Insofar as a State has a mandatory obligation to exercise extraterritorial jurisdiction over these offenses, and not merely a permissive right to do so, the doctrine of international comity is rendered inapplicable. Certainly, insofar as 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, they may bring Denmark in violation of its international obligations under the Genocide, Torture, and Geneva Conventions. Similarly, in the United States, insofar as the ATS authorizes causes of action that derive from universally recognized and specific international law norms, it might also be thought to incorporate the specific international duty to hold the perpetrators 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 the international community acting in concert (the obligation to punish) in the face of recalcitrance from a lone objecting State. Thus, courts extraterritorial jurisdiction should seriously consider finding the doctrine of international comity inapplicable to claims alleging genocide, torture, or grave breaches of the Geneva Conventions.

b. *The doctrine of international comity is not applicable (a) if the law or policy of the forum state strongly favors adjudication or (b) 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 availability of 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.\(^\text{156}\) While Lord

Mansfield refused to apply the comity doctrine where it would oblige England to return an American-owned slave to his purported owners.\textsuperscript{157} Story described it 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.”\textsuperscript{158} 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 it were to consider them repugnant or in direct contradiction of policies of the forum state. Sadat, for example, suggests that a court could find that amnesties granted by regimes to themselves or 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.”\textsuperscript{159} The court in \textit{Chavez v. Carranza} essentially stated as much 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.\textsuperscript{160} However, as the above review of state practice has demonstrated, courts hailing from State that have assisted or encouraged the issuing of amnesties by States 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.

\textit{c. 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 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 \textit{Scilingo} case in Spain, is the availability of an adequate remedy providing a “legitimate prospect of recovery” for the plaintiffs in the foreign

\textsuperscript{157} Id.

\textsuperscript{158} See JP Morgan Chase Bank, 412 F.3d 418, 423-24 (2d. Cir. 2005) citing \textit{Bank of Augusta v. Earle}, 38 U.S. 519, 589, 13 Pet. 519, 10 L.Ed. 274 (1839) (citing Justice Story for the proposition that comity is “inadmissible when contrary to [the forum state's] policy, or prejudicial to its interests”).

\textsuperscript{159} Sadat, \textit{supra} n._ at __.

\textsuperscript{160} 2005 WL 2659186, \textit{supra} n._ at *5.
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. In *Mujica*, 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.” 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....the existence of an adequate alternative forum...is a necessary condition to apply the doctrine of international comity.”

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 relating to the perpetrator before the court to a Truth and Reconciliation Commission in their home country and provided those victims with reparations would satisfy this precondition for the application of international comity.

d. 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 doctrine of international comity may still be unavailable. A number of US courts have interpreted Supreme Court precedent to require a predicate inquiry into whether a true conflict of law exists before the doctrine of international comity can be applied. Moreover,
they have defined a “conflict” to mean that the foreign law would prohibit compliance with an order of the third party State.\textsuperscript{166} In an ACTA case dealing with events in Columbia, the court found that the fact that since Columbia’s courts had not already made any findings of liability or provided any remedies relating to the issues before the court, 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 US court.\textsuperscript{167} Similarly, in \textit{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, there was no conflict between the amnesty law and the ATS and TVPA in the US.\textsuperscript{168} 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 that are covered by an amnesty in the State in which they occurred.

As noted by the \textit{Carranza} court, some States have enacted legislation purporting to have extraterritorial effect. It is these sorts of provisions, like the Compensation Act at issue in \textit{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 purported to do.\textsuperscript{169} Should a court in a third-party State encounter such a provision, it should not automatically defer to the laws of the territorial state; rather, at that point, the court has a legitimate justification for applying a reasoned analysis under the international comity doctrine.

\textit{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.”); \textit{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.”).

\textsuperscript{166} See \textit{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); \textit{In re Grand Jury Proceedings}, 873 F.2d 238, 239-40 (9th Cir.1989) (same).

\textsuperscript{167} \textit{Mujica v. Occidental Petroleum Corp.}, 381 F.Supp.2d 1134, 1156 (C.D. Cal., 2005).

\textsuperscript{168} \textit{Id.}

e. 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.”

Certainly, as demonstrated above, even if international law has not yet crystallized around an obligation on the part of States to prosecute perpetrators of international criminal offenses such as crimes against humanity, war crimes in internal conflicts, and extrajudicial executions, numerous pronouncements on the part of the United Nations and international and regional bodies and courts suggest that such an obligation may very well be developing. Thus, 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.\textsuperscript{170} 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(2), which instructs courts to award comity if exercising jurisdiction over the activity would be “unreasonable.” The Restatement provides a “nonexhaustive” 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.\textsuperscript{171}

Several of the factors outlined in §403(2) have been identified by the US courts as indicating a strong third-party State interest in adjudicating claims alleging internationally-prohibited conduct. For example, the court in \textit{Filartiga v. Pena-Irala} held that any claim over which a US court could exercise jurisdiction pursuant to the ATS would necessarily entail “a wrong of mutual, and not merely several, concern to States.”\textsuperscript{172} Other courts have echoed these sentiments since that time, arguing that “the nations of the world have demonstrated that such

\textsuperscript{170} Sadat, \textit{supra} n.__ at 210.

\textsuperscript{171} Restatement, \textit{supra} n.__, at 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 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 expectation 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.”).

\textsuperscript{172} \textit{Filartiga v. Pena-Irala}, 630 F. 2d 876, 888 (2d Cir.1980).
wrongs are...capable of impairing international peace and security.” Some courts have recognized that when a plaintiffs’ 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 consequent disruption of the domestic and international order they produce.”

It is only in the context of a full comity analysis that the views of the executive branch of the third-party State or of the governments of other States regarding 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 more broadly should have any bearing on the court’s decision with respect to that doctrine. Even then, the courts should not automatically defer to their views; rather, separation of powers and rule of law principles require the courts to afford the opinions of the Executive Branch with “persuasive deference.” 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 be evaluated by the court for persuasiveness and for consistency with other factual information at its disposal. Thus, in *Rio Tinto*, the Ninth Circuit weighed a Statement of Interest (SOI) from the US 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

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173 *Flores v. Southern Peru Copper Corporation*, 414 F. 3d 233, 250 (2d Cir. 2003).
174 *Tachonia v. Mugabe*, 234 F.Supp.2d 401, 415-416 (S.D.N.Y. 2002); see also *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, 100 (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”).
175 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”).
176 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 ATS 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 Harvard H.R.J. 170, 191.
government indicating that conditions in PNG had changed since the SOI had been written.177
Similarly, the Talisman court held in relation to other third-State requests for comity that “while 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 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.”178

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\textit{f. Courts should decline to exercise jurisdiction if doing so would violate the principle of “Double Jeopardy” or “ne bis en idem”}
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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, Columbia, 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 defendant from subsequent prosecutions.”179 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.180 Similarly, Douglas Cassel has argued that the practice of awarding reduced punishments in return for confessions by perpetrators, employed by the ICTR, ICTY, and Columbia, is permissible under international law.181

177 Sarei, 487 F.3d at 1206-07.
178 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).
179 See supra n.__ at n. 135.
180 Id. at 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, The Amnesty Exception, supra n. __, at 525.
However, as the recent decision of the Constitutional Court for Columbia 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. These views have not gone unchallenged by certain authorities, such as the Inter-American Commission, which found in a case involving Chile that the mere fact that it had created a truth commission and enacted a reparations law had not obviated the need for investigation, and where, warranted, criminal punishment of those responsible for large-scale “disappearances” and other crimes.

Finally, a separate but related non-justiciability doctrine, that of international abstention, may encourage a third-party State to decline to exercise extraterritorial jurisdiction if the territorial State has authorized an ongoing truth and reconciliation commission with the power to recommend prosecutions for individual perpetrators at the conclusion of its work. In contrast to the doctrine of international comity, which focuses on prior judgments or 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. In order to decide whether to defer an action in favor of and ongoing Truth Commission in the territorial State, a court should weigh the interests of a third-party State, the territorial State, and

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182 Id. (noting that the Constitutional Court for Columbia struck down key portions of Columbia’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 what allowed individuals to apply up to 18 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 3 ½ 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.).


184 Mujica, 381 F.Supp.2d at 1157 (citing Ungaro-Benages, 379 F.3d at 1238); see also Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 939 (D.C.Cir.1984).
the international community of resolving the particular dispute in the foreign forum. 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. If at the conclusion of the TRC process the territorial State does not implement a reparations program and/or provide the claimants with some sort of recovery, they would be free to bring their claims before the third-party State’s courts at that time.

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

Even if the doctrines of international comity and international abstention do not counsel against exercising extraterritorial jurisdiction over claims subject to an amnesty in the territorial State, one additional non-justiciability doctrine might still provide third-party courts with a legal basis for declining jurisdiction. The political question doctrine requires courts to dismiss individual claims otherwise properly presented to the courts for adjudication if it would be impossible for the court to undertake independent resolution of the issue without expressing lack of the respect due coordinate branches of the government, if the case implicates an unusual need for unquestioning adherence to a political decision already made by the government of the third-party State, or if the case creates the potential for the third-party State to be embarrassed by from multifarious pronouncements made by various departments on one question.

a. 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 that have considered the question, the political question doctrine is certainly an exception to the rule, particularly when (as in every country examined in this paper) a State’s legislature has deliberately entrusted claims alleging violations of internationally-prohibited crimes to the judiciary for resolution. Certainly, these cases, sounding in criminal law in Europe and in tort in the United State, fall within the judicial power,

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185 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”).
186 Id. at 1163.
188 See Kadic, 70 F. 3d at 249; Restatement § 111(2).
and courts should only decline to perform their constitutionally- or legislatively-entrusted duty if doing so is absolutely necessary. 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 to be afforded “persuasiveness” 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 or category of claims. In the *Sarei* case, the Ninth Circuit affirmed that the Executive Branch’s view did not control its determination of whether a political question existed, in keeping with prior determinations by the courts of several other circuits.  

Finding otherwise would have threatened to render the court “a mere errand boy for the Executive Branch, which may choose to pick some people’s chestnuts from the fire, but not others.” 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, as awarding 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 in times of international stress, undermining the rule of law in the very area most concerned with restraining executive power in times of crisis.

b. The Political Question Doctrine may require dismissal of a case where the government of the State purporting to assert jurisdiction was some way involved in the negotiation of the amnesty.

One situation in which the political question doctrine may unavoidably counsel for the courts of a third-party State to decline to exercise jurisdiction over internationally-recognized offenses is that in which the political branches of that State played an active role in the

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189 *Sarei,* 487 F. 3d at 1205 (“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 about a case proceeding”); *see also National Petrochemical Co. of Iran v. M/T Stolt Sheaf,* 860 F.2d 551, 555 (2d Cir. 1988) (reviewing executive SOI for “arbitrariness”); *Ungaro-Benages v. Dresdner Bank AG,* 379 F. 3d 1227, 1236 (11th Cir. 2004) (“a statement of national interest alone...does not take the present litigation outside the competence of the judiciary”); *Regan v. Wald,* 389 U.S. 429 (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).


negotiation of the amnesty or transitional justice measure in question, or even strongly endorsed the measure after its enactment. Certainly, were a court to determine that a decision of a coordinate branch of its own government encouraged another State to violate its own international duty to hold perpetrators of such offenses accountable, it would express a “lack of respect due coordinate branches of the government” and would likely “embarrass” its government rather significantly. For as long as the political question doctrine remains a valid ground for determining the justiciability of a claim, it would seem to bar the courts from considering such actions.

VI. CONCLUSION

If this paper’s survey of State practice in the areas of amnesty and extraterritorial jurisdiction reveal anything, it is that the last quarter-century has witnessed what can only be described as a paradigm shift from impunity to accountability in the wake of political transition. As the example of Afghanistan in the introduction demonstrates, the leaders of States throughout the world are often constrained in their ability to “wipe the slate clean” in the aftermath of atrocity in various ways. While this paper has also demonstrated that the perpetrators of egregious international offenses remain able, in many circumstances, to evade punishment for their actions, the tide is clearly turning in favor of accountability. The increasing willingness of third-party States to condemn those individuals and entities responsible for a limited category of deplorable offenses has a strong potential to continue this trend of increasing accountability, provided that they exercise their judicial authority in a principled manner. This paper has demonstrated that there are a host of situations in which it is perfectly legitimate for a court to decline to exercise its jurisdiction over offenses arising outside the territory of their State, particularly when the State in which they occurred has made (or is in the process of making) a legitimate effort to hold the perpetrators accountable for their actions. However, it also argues that 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 by their legislatures are in a unique position to provide such accountability in situations in which it may be utterly unavailable elsewhere. It is their duty to exercise that power responsibly, so that the
“clash of obligations” results not in a reaffirmation of the rule of men, but in a resounding confirmation of the international rule of law in the area in which its potential to promote international peace and security is the strongest.