The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law

Ronald Slye
The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law:

Is a Legitimate Amnesty Possible?

RONALD C. SLYE*

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Amnesties are a well used and, in most circumstances, relatively uncontroversial legal mechanism. The institution of amnesty is found throughout history and appears to have been used by every society of which we have extensive knowledge. From medieval China to contemporary South Africa, from the founding years of the United States to contemporary Vietnam, amnesties have been used to fulfill a variety of purposes. A quick review of amnesties across time periods, societies, and cultures reveals that amnesties are as varied as the societies and areas in which one finds them. From such disparate disciplines as tax, immigration, and library science, amnesties have been used to raise revenue, ratify settled expectations, and preserve book collections, respectively. They have been used to express public grace and forgiveness, and to further government corruption and oppression. They have been used to bring law into compliance with an accepted reality, and to exempt a contested reality from public scrutiny and moral and legal accountability. They have been granted at times of great social stability and at times of great social unrest; at the start of and during wars for the purpose of recruiting troops, and at the end of wars to foster peace and reconciliation.

* Associate Professor, Seattle University School of Law. From 1996 to 2001, I was a consultant in international law to the South African Truth and Reconciliation Commission (TRC). Needless to say, none of the views expressed in this article necessarily reflects those of the South African TRC or any other organization. I would like to thank the following research assistants who have provided invaluable help over the years: Davida Finger, Jinnah Rose-MacFadden, and Sylvia Miller. I would also like to thank our international law librarian, Robert Menanteaux, for invaluable research help and ideas, and Nora Santos for help with everything. For stimulating conversation and ideas on the issues raised in this article, I would also like to thank Janet Ainsworth, Jim Bond, Mark Chinen, Roger Clark, Sidney DeLong, Paul Dubinsky, Mark Freeman, Duffy Graham, Paul Kahn, Jennifer Llewellyn, W. Michael Reisman, Mark Reutlinger, Chris Roederer, Julie Shapiro, and Wilhelm Verwoerd. I would also like to thank the United States Institute for Peace for providing invaluable financial and other assistance to a general project on amnesties of which this is a part, and for their patience in seeing me through what has become a much longer inquiry than initially proposed. Finally, I would like to thank the Seattle University School of Law for additional financial and other support.

1. While individual amnesty proposals might be controversial, outside of the human rights context discussed below there is very little controversy associated with the general principle of amnesty.
Most recently, and more controversially, amnesties have been used to protect individuals from accountability for some of the worst human rights atrocities in the history of humankind. Despite recent heightened awareness of the problem, the protection of the powerful from the judgment of the law is not unique to contemporary society. What makes the use of amnesties today so troubling is not the failure to hold accountable those individuals responsible for systematic violations (for that has been the all too common reaction to such violations throughout human history), but rather their increased use and acceptance in a world which has universally embraced the idea of fundamental human rights from which no derogation is permitted—in particular, the absolute right to be free from torture, slavery, genocide, and other gross violations of human rights. The increased use of amnesties is thus less a reflection of our increased tolerance of impunity and more of an indicator of the growing force of the international human rights movement and international criminal law.

Historically, amnesties for war crimes and what we today call crimes against humanity were less common precisely because there was little acceptance of the notion that state officials could be held accountable for such acts. It is not that amnesties are now being used in areas where they have been unknown before, or in new or novel ways, but that a consensus has emerged in the last fifty years that certain acts by official actors are no longer beyond the reach of legal accountability. At the same time, it is the growing legitimacy of institutions whose purpose is to increase international accountability that makes amnesties so important and valuable to violators.

Opponents of the use of amnesties have focused on international law, primarily as reflected in multilateral treaties, General Assembly resolutions, official United Nations reports and studies, customary international law, and decisions by international and regional tribunals. Not much attention has been paid to state practice, and even less to general principles of law accepted by states. This is in part attributable

2. The phrase “gross violations of human rights” has been used by a variety of people and institutions to describe those core rights that are considered fundamental and not subject to derogation. I will use gross violations of human rights to refer to those specific rights designated as such in the Restatement (Third) of Foreign Relations, which identifies the following violations as “gross violations,” no matter how widespread or systematically they are committed: genocide; slavery and slave trade; murder or disappearance; torture or cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination. RESTATEMENT (THIRD) OF FOREIGN RELATIONS §702 cmt. m (1987).

3. General principles of law accepted by states is a recognized source of international law that has rarely been used and even more rarely understood. See, e.g., OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50-55 (1991).
to the overwhelming state practice of granting and enforcing amnesties. This state practice makes it more difficult to prove a state consensus around a general prohibition against such amnesties, thus raising the perennial question with respect to state practice that is contrary to an asserted principle of international law: does the contrary state practice illustrate law violation or law reform? It is generally accepted that state practice in and of itself does not constitute international law and those who argue that such amnesties are prohibited point to such practice as constituting a violation of, rather than a reflection of, international law.

My purpose here is not to contribute to the more general debate concerning the coherence of state practice and customary international law as a source of international law. Instead, my purpose here is to evaluate the legitimacy of amnesties in light of the major international law arguments used to criticize amnesties, and in light of six specific areas of law from which additional general principles to evaluate amnesties may be derived. Four of these six areas of law are found primarily in the Anglo-American legal tradition, and two are found in international law. While I am trained in the Anglo-American legal tradition, and thus most knowledgeable about this tradition, some of these principles transcend any one legal tradition. I will thus, in a much less systematic fashion, discuss some of these principles as reflected in legal systems outside of the Anglo-American tradition, including the system of international law.

In order to place these general principles in context, I first discuss in Part II the major international law arguments made with respect to amnesties for human rights violations. I break the international law arguments into three schools: the obligation to prosecute school; the fundamental rights of victims school; and the social stability school. I derive from these three schools of argument four principles we can use to evaluate the legitimacy of amnesties.

In Part III, I supplement this international law discussion with a survey of six areas of law that reflect additional applicable policies and principles applicable to amnesties. I then discuss whether each of these principles can be used to inform an evaluation of the legitimacy of such amnesties. I conclude that the principles underlying recognition and enforcement of foreign official acts, and the doctrine of non bis in idem, are not a barrier to evaluating the legitimacy of foreign amnesties.

5. See infra note 24.
6. For recent and thoughtful discussions of customary international law as a source of law, see generally the work of Jack Goldsmith, Eric Posner, Mark Chinen, and Michael Glennon.
Further, the general acceptance of denying protection to persecutors under international refugee law is far more controversial than the proposal that persecutors be ineligible for amnesty and held accountable for their acts. Extradition law suggests that while political acts of violence may be entitled to special protection, the modern trend under both extradition and international law is to deny protection to certain heinous acts even if they are politically motivated. I next conclude that the policies underlying immunities, statutes of limitation, and laches do not provide an adequate justification for amnesties, and in fact, both historic and modern trends argue for the exemption of certain gross violations of human rights from the application of such doctrines. Finally, while the general acceptance of pardons by most legal systems might provide a justification for amnesties, a closer look at the differences between amnesties and pardons, and the policies underlying the latter, argue against a liberal acceptance of amnesties.

In conclusion, in Part IV, I briefly outline a typology of amnesties, arguing that not all amnesties are alike. I divide amnesties into four general categories: amnesic, compromise, corrective, and accountable. I further suggest that in light of the general principles of law and the major international law arguments set forth in Parts II and III, we can distinguish between just and unjust amnesties. I conclude that while a just amnesty is conceptually possible, to date there is only one amnesty that comes close to qualifying: the 1995 South African amnesty.

II. AMNESTIES, INTERNATIONAL LAW, AND STATE PRACTICE

International law and the domestic legal practice of states at times permit, and even—in some cases—require, amnesties. International law explicitly encourages the use of amnesties at the end of an armed conflict, and such encouragement is codified in some of the foundational documents of international humanitarian law. Yet these amnesties can, and should, be distinguished from amnesties for human rights abuses.

One of the major innovations of the 1949 Geneva Conventions was to prohibit certain acts of violence even when committed as part of an

7. See infra notes 232-48 and accompanying text.
8. Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflicts, June 8, 1977, art. 6(5), 1125 U.N.T.S. 609, 614 [hereinafter Protocol II] ("At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained.").
armed conflict, and to enforce that prohibition through the institution of universal jurisdiction. The Geneva Conventions were drafted at a time when state compliance with the laws of armed conflict was low. The use of the institution of universal jurisdiction to increase the pressure on those engaged in armed conflict to comply with the laws of war would be undercut if the encouragement of amnesty applied to such acts. There is no evidence to suggest that the drafters of the Geneva Conventions meant to take away with one hand what they had given with the other.9

A recent statement by the International Committee of the Red Cross, the authoritative interpretative body under the Geneva Conventions, confirms that amnesties encouraged under Protocol II to the Geneva Conventions of 1949 were meant to apply only to the granting of amnesty to “those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law.”10

Properly understood, therefore, the amnesties encouraged under the Geneva Conventions are amnesties for acts that violate national, but not international, law. They permit a state to suspend accountability for actions that do not rise to the level of an international law violation. Such amnesties are not meant to apply to human rights violations; in fact, they are designed and intended to further, rather than thwart, human rights principles. They are what I will later refer to as “corrective amnesties.”11 Amnesties for gross violations of human rights are easily

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9. At best there is some ambiguity between the amnesty provisions of Protocol II and the grave breaches provision of the Geneva Conventions reflected in the vote in support of the amnesty provision (37 to 15, with 31 abstentions) and the failure of proposals explicitly to exempt crimes against humanity from the purview of Article 6(5) amnesties. See Karen Gallagher, No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone, 23 T. JEFFERSON L. REV. 149, 177 n.196 (2000) (citing result of vote from Article 6(5)); id. at 177-78 (noting the rejection by the negotiating parties of a Soviet proposal to make clear that the amnesty encouraged in Article 6(5) was not to apply to crimes against humanity).


The preparatory work for Article 6(5) indicates that the purpose of this precept is to encourage amnesty, ...as a type of liberation at the end of hostilities for those who were detained or punished merely for having participated in the hostilities. It does not seek to be an amnesty for those who have violated international humanitarian law.


11. See infra notes 238-43 and accompanying text.
distinguished from these internationally encouraged or required amnesties. The acts for which the former amnesties apply are those that international law has consistently condemned and for which the basis of proscriptive and adjudicatory jurisdiction has expanded over the last five centuries.

Governments have used international law to hold individuals accountable for their human rights violations for over 500 years. From the first recorded international war crimes trial in 1474 to the ad hoc criminal tribunals recently established for crimes committed in the former Yugoslavia and Rwanda, the ability of the powerful to act with impunity has steadily diminished. The trend towards individual accountability under international law accelerated at the end of the last century with two developments. The first was the creation of the first permanent court for investigating and prosecuting individuals accused of committing the worst crimes known to humanity, and the second was an increased willingness of states to invoke universal jurisdiction to hold individuals accountable for gross violations of human rights.

Even as the international criminal justice system expands, states continue to turn to amnesties as the mechanism of choice to address systematic violations of human rights and to facilitate their own political transitions after a period of state-sponsored terrorism. Amnesties of one form or another have been used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.

Despite the growing tension between the development of international criminal laws and institutions on the one hand, and state practice embracing amnesties on the other, there is surprisingly little international law that directly addresses the legitimacy of amnesties. There is little evidence of an international consensus among states—or even among advocates and scholars—of the law that does or should apply. There are a handful of state court decisions, and even fewer international decisions. Every international tribunal that has addressed

14. Most of the relevant international tribunal decisions are from the Inter-American Commission on Human Rights, but include a few from the Human Rights Committee under the International Convention on Civil and Political Rights. See decisions cited infra at notes 69-70. The fact that decisions concerning amnesty mostly come from the Inter-American system is not surprising given that the most contentious amnesties to date have been granted in South America. The trial chamber of the I.C.T.Y. has opined in dicta that an amnesty for torture would violate international law and would not be accorded international legal recognition. Prosecutor v.
the issue has concluded that amnesties for gross violations of human rights violate fundamental principles of international human rights law; however, with only a few exceptions, state courts that have evaluated those same amnesties have reached the opposite conclusion and upheld their legality. With one recent and notable exception, in every case in which a state judiciary has evaluated its own government’s amnesty for human rights violations, it has upheld the amnesty. In those few cases in which a state court has evaluated another state’s amnesty for human rights violations, it has refused to give the amnesty any legal effect. The United Nations General Assembly, and the Economic and Social Council (ECOSOC), and the


15. See infra note 68.


In addition, a lower court in Chile ruled in 1995 that amnesty could not be granted for acts that constitute war crimes under the Geneva Conventions. This ruling was short-lived, however, as the Chilean Supreme Court quickly overruled it a few months later. See Derechos Chile, High Court Amnesties Human Rights Case: Overturning Lower Court Ruling on Geneva Conventions, at http://derechoschile.com/english/news/19960131.htm (Jan. 31, 1996).


18. Spanish courts investigating human rights abuses in Argentina and Chile have proceeded despite the amnesties passed in both of those countries. For a brief discussion of these prosecutions, see Richard J. Wilson, Spanish Criminal Prosecutions Use International Human Rights Law to Battle Impunity in Chile and Argentina, KO’AGA ROIRE’ETA at http://www.derechos.org/koaga/iii/5/wilson.html (Jan. 1997); see also Antoni Pigrau Solé, The Pinochet Case in Spain, 6 ILSA J. INT’L & COMP. L. 653, 664 (noting that the Plenary of the Criminal Section of the National Court in Spain held that the Chilean amnesty was contrary to international law). For a dissenting opinion arguing that amnesty might be legitimately applied to acts of torture, see Regina v. Bartle and the Comm’r of Police for the Metropolis and Others, ex parte Pinochet, 38 I.L.M. 581, 605–06 (H.L. 1999) (opinion of Lord Goff of Chieveley) (“[T]orture may, for compelling political reasons, be the subject of an amnesty, or some other form of settlement, in the state where it has been, or is alleged to have been, committed.”).

While a United States court has never been confronted with the question of whether to give effect to a foreign amnesty for human rights violations, at least in the immigration field U.S. courts have been reluctant to allow a party to assert a foreign amnesty to pre-empt the court’s independent evaluation of the underlying act for which amnesty was granted. See, e.g., Marino v. I.N.S., United States Dept. of Justice 537 F.2d 686, 691 (2d Cir. 1976) (“[F]oreign amnesties, like foreign pardons, do not obliterate a foreign conviction or remove the disabilities that result from such a ‘conviction’ for purposes of the [Immigration and Naturalization] Act.”).

Human Rights Committee\textsuperscript{21} have all stated that amnesties violate international law.\textsuperscript{22} International legal scholars differ on whether amnesties are prohibited under international law.\textsuperscript{23} Human rights advocates generally oppose the use of amnesties for gross violations of human rights.\textsuperscript{24}


22. The position of the UN on amnesties, however, is ambiguous. The UN-brokered peace agreement in Sierra Leone includes a blanket amnesty, although the UN quickly distanced itself from the amnesty provisions. UN Secretary General Boutros Boutros Ghali implicitly acknowledged the legitimacy of amnesties when he criticized the El Salvadoran amnesty, not because of the impunity it provided, but because it was passed before a national consensus could emerge supporting amnesty. See Report of the Secretary General on All Aspects of ONUSAL's Operations, U.N. SCOR, 48th Sess., addendum 3, annex, at 2, U.N. Doc. S/25812 (1993) ("[I]t would have been preferable if the amnesty had been promulgated after creating a broad degree of national consensus in its favour."). See also infra note 33.


Although international jurisprudence concerning amnesties is limited, critics of amnesties for violations of human rights point to various principles of international law and policy to argue that amnesties are illegal. There are three major international law arguments made against amnesties. First, it is argued that amnesties violate well-established principles of international law that obligate a state to prosecute individuals responsible for certain gross violations of human rights. I call this the obligation to prosecute argument. Second, it is argued that amnesties violate a victim’s fundamental rights guaranteed under international law. I call this the victim’s rights argument. Third, it is argued that amnesties undercut efforts to establish a stable democracy that honors human rights and the rule of law. I call this the rule of law argument. In contrast to these three arguments, states generally claim that amnesties further peace, truth, and reconciliation. The peace claim will be addressed in the discussion of the rule of law argument; the truth claim will be addressed in the discussion of the victim’s rights argument; and the reconciliation claim will be addressed in the discussion of the obligation to prosecute argument.

A. Amnesties, Accountability, and the Obligation to Prosecute Argument

There is strong support for the argument that international law imposes an absolute obligation on states to prosecute particular crimes. For example, international treaties prohibiting torture, genocide, war

Local human rights organizations are less consistent, some supporting and some opposing amnesties for gross violations of human rights. Compare Corinna Schuler, A Wrenching Peace: Sierra Leone’s ‘See No Evil’ Pact, CHRISTIAN SCI. MONITOR, Sept. 15, 1999 at 1, (noting that 200 representatives of Sierra Leonean civil society supported amnesty for combatants); with Popkin & Bhuta, supra note 10 at 116 (finding that coalition of local non-governmental organizations and relatives of victims lobbied against Guatemalan amnesty for military).

25. States cite to other justifications for amnesties—such as the fact that prosecutions would be too expensive—but these are usually combined with one of the three other claims identified above. See generally Orentlicher, supra note 23, at 2544-49 (commenting on state justifications for not prosecuting human rights violations).

26. Others have canvassed the applicable treaties and customary international law arguments in more detail. For one of the earliest arguments concerning the obligation to prosecute, see Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 CAL. L. REV. 449 (1990); see also Orentlicher, supra note 23.


crimes,\textsuperscript{29} and terrorism,\textsuperscript{30} obligate states to prosecute individuals suspected of committing those crimes. There is substantial discussion in opinions by the Inter-American Court and Commission of Human Rights asserting some form of obligation to prosecute and punish under international law.\textsuperscript{31} The United Nations has also indicated that states have an obligation to prosecute those suspected of certain gross violations of human rights,\textsuperscript{32} and has generally opposed the granting of amnesty for gross violations of human rights.\textsuperscript{33} State practice in the area, of course, does not live up to this high expectation, although this may be due more to a failure of political will and the lack of effective enforcement machinery at the international level than a belief that such prosecutions are not required or desirable.

Arguments for an obligation to prosecute are based on the assumption that prosecution tied to punishment is the best method in all circumstances for achieving the legitimate goals of a criminal justice system. In some, mostly civil, legal systems, the state is obligated to prosecute an individual for whom there is evidence of criminal wrongdoing. In such legal systems, there is little discretion with respect

\textsuperscript{29} Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 146, 148, 6 U.S.T. 3516, 3616-618, 75 U.N.T.S. 287, 386-88 (providing that states may not absolve themselves from liability for grave breaches of the convention).

\textsuperscript{30} International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, art. 8(1), 37 I.L.M. 249 (providing that if a state does not extradite an individual suspected of an offense under the convention it is obliged "without exception whatsoever and whether or not the offense was committed within its territory" to prosecute the suspect without undue delay).

\textsuperscript{31} \textit{See infra} notes 55-56 and accompanying text.


\textsuperscript{33} \textit{See, e.g., Report of the Secretary General on the Establishment of a Special Court for Sierra Leone}, U.N. SCOR, at 5, U.N. Doc. S/2000/915 (2000) ("the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes. . . .") But the UN clearly does not take the position that amnesties are illegal in all cases. In the same report concerning the special tribunal for Sierra Leone, the Secretary General noted that the amnesty included in the earlier Lomé Accord is to be denied legal effect "to the extent of its illegality under international law. . . ." \textit{id.} at 5. The UN has not, however, consistently opposed the use of amnesties for gross violations of human rights. The UN, effectively acting on behalf of the U.S., insisted on the use of an amnesty in Haiti to protect members of the military from prosecution in return for restoring the democratically elected President, Jean Bertrand Aristide, to office. See Michael P. Scharf, \textit{Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?}, 31 TEX. INT'L L.J. 1, 6-8 (1996).
to prosecution, although there may be discretion with respect to punishment. The absolutist claim of an obligation to prosecute is hard to defend in the face of competing and compelling societal interests that may conflict with a general policy of punishment—interests that are particularly important to a society undergoing a major transition.

An obligation to prosecute in its purest form would not allow the exercise of any discretion on the part of prosecutorial authorities. Such an absolute obligation to prosecute not only poses challenges to a world with limited prosecutorial resources, but also may interfere with the legitimate goals of a criminal justice system. There are thus two major concerns raised by such an obligation. First, limited prosecutorial resources require strategic choices concerning what crimes to pursue and what defendants to prosecute. An absolute obligation to prosecute would not allow such strategic decision-making, and thus might result in a less efficient criminal justice system. The determination of the effectiveness in the U.S. of a criminal justice system with broad prosecutorial discretion, and the regulation of the use of such discretion, is made by local communities who elect prosecutors and, in many states, judges. Second, prosecution may undercut, or at least fail to advance, some legitimate goals of a criminal justice system. An absolute obligation to prosecute would exclude the use of other non-prosecutorial means to further the legitimate goals of a criminal justice system.

1. The Reality of Limited Prosecutorial Resources

First, concerning limited prosecutorial resources, there is little discussion in the emerging jurisprudence of amnesties in international law concerning the weight, if any, to be given to a state’s limited resources. All of the challenges to amnesties brought before the Inter-American Commission and Court have concerned cases where there is strong evidence that the state deliberately refused to prosecute individuals suspected of gross violations of human rights in order to shield the latter from accountability. In none of these cases does the

34. See, e.g., CÓD. PROC. PEN. art. 431 (Argentina) (giving prosecutor in some cases discretion with respect to punishment); see also Mark Osiel, Making Public Memory, Publicly, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 217, 231, n. 29 (Carla Hesse & Robert Post eds., 1999) (Argentinean law has been interpreted to obligate the state to indict individuals for whom there is sufficient evidence to suggest wrongdoing).


Commission or Court address in any meaningful way the question of prosecutorial discretion. This is not surprising since the states involved in these cases either cursorily respond, if at all, to the allegations (thus giving rise to the equivalent of a default judgment), or do not raise the question of limited resources and higher prosecutorial priorities. More importantly, many of these cases involve situations where the state’s complicity in the crimes at issue is pervasive, making a defense based on discretion less persuasive.

Yet prosecutorial discretion can, and in some societies does, provide an important mechanism for a state to balance competing legitimate interests. Prosecutors may use their discretion to forego a particular prosecution in order to elicit evidence and useful testimony from co-defendants, or to direct more efficiently limited resources. Eliciting evidence and useful testimony is made possible through plea bargaining and other similar agreements entered into between prosecutors and defendants. Such arrangements allow more lenient treatment in return for “truth,” a dynamic similar to that created by the South African amnesty. There is, however, very little international law concerning the appropriate use of prosecutorial discretion.

Allowing prosecutors to allocate limited prosecutorial resources may provide a greater overall social benefit than would otherwise be obtained if prosecutors were not given discretion to set priorities. For example, a domestic prosecutor may focus on a particular class of crimes (such as drug-related crimes, or crimes committed with weapons) or a particular class of defendants (such as members of a particular drug cartel, or all drug suppliers) with the belief that such prosecutions will more effectively diminish a prominent social ill.


39. However, in at least one of its opinions the Inter-American Commission suggests that the duty to investigate may vary according to a state’s resources. See id., ¶ 143 (noting the state’s obligation to “investigate with the means at its disposal the violations committed within its jurisdiction” (emphasis added)).

40. In addition to plea bargaining, a prosecutor may exercise discretion by choosing to indict for a “lesser offense” covered by the same facts. See, e.g., James Vorenberg, Decent Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1524-32 (1981).

41. The quality of the truth elicited from plea bargaining has been questioned in the U.S., one prominent court going so far as to equate plea bargaining with bribery. See United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rev’d en banc 165 F.3d 1297 (10th Cir. 1999).

42. See infra note 81 and accompanying text.

decision not to prosecute a particular individual may be made in return for that individual’s testimony, in response to a plea bargain that allows some punishment without the cost and risk of a trial, or because the limited resources available may be directed more beneficially at prosecuting other defendants. Decisions not to prosecute may thus lead to increased truth (when used to obtain accomplice testimony), accountability (when used to obtain a plea), and efficiency (when used to direct limited resources towards other more important social ills).

2. The Legitimate Goals of a Criminal Justice System

Second, an absolute obligation to prosecute might prevent or hinder the reconciliation and rehabilitation goals of a criminal justice system. Many states and commentators claim that amnesty furthers reconciliation in a deeply divided society. Statements by some victims provide anecdotal support for this assertion. In thinking about the role of amnesty in achieving these goals, it is useful to distinguish between three functions of the traditional prosecutorial model: investigation; adjudication; and punishment. Investigation is the process by which facts are assembled, and assessments of truth and responsibility are first made. Adjudication is the process by which we test our level of certainty concerning the responsibility of a particular individual or organization. Punishment is our response to the individual whom we have determined is responsible for the violations in question; that is, punishment is the means by which we hold a responsible party to account. It is useful to separate out these three functions in order to

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44. See, e.g., Scharf, supra note 33, at 15-6 (commenting on the use of amnesty in Haiti and noting that amnesty is “likely to reconcile the nation with itself by covering it with a lawful shield of oblivion to general political events that disrupted the life of the nation”); see also the postamble to the South African Interim Constitution of 1993. S. Afr. Interim Const. ch. 16 (1993) (tying amnesty with the goal of reconciliation and building a bridge to a better future).

45. See, e.g., Desmond Tutu, No Future Without Forgiveness 257-82 (1999) (forgiveness is necessary for true reconciliation); Adam Michnik, Why Deal with the Past, in Dealing with the Past: Truth and Reconciliation in South Africa 15-18 (Alex Boraine et al., 1994) (reconciliation is first priority, and mutual amnesty opens the road to peace); see also Carla Hesse & Robert Post, Introduction to Human Rights in Political Transitions, supra note 34, at 13, 20-21 (amnesty as sometimes necessary to reconciliation); Juan E. Méndez, In Defense of Transitional Justice, in Transitional Justice and the Rule of Law in New Democracies 1, 7 (A. James McAdams ed., 1997) (referring to advocates who recommend that a “thick line” be drawn to divide the past from the present).

46. See Gallagher, supra note 9, at 165 n.131 (quoting victims of atrocities committed by rebels in Sierra Leone to the effect that amnesty is a price they are willing to pay for peace and reconciliation). This is obviously not a view held by all victims. See id. at 190 n.269 (noting that women who were abducted and raped were adamant that rebels should be prosecuted for gross violations of human rights); see also Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others, 1996 SALR 671 (CC) (victims of human rights abuses in South Africa challenging legality of 1995 South African amnesty).
highlight the separate goals of truth, responsibility, and accountability.  
Truth, knowledge, and acknowledgment are justice goals clearly articulated in international law, and constitute some of the basic goals of a criminal trial. Linked to this truth function is the goal of individual accountability. Truth allows, and in fact provides, a minimal form of accountability through the public identification of responsibility. Punishment is often conflated with accountability (certainly most of the international law on the subject speaks more of punishment than of accountability). A growing body of scholarship, coupled with state preferences for truth commissions over trials during a period of transition, has begun to seriously address the relationship between punishment and accountability. Proponents of this “restorative justice” school argue that the prosecutorial or retributive model of criminal justice does not advance, and in many cases may hinder, the important societal interest in a stable and just social order. In particular, proponents of restorative justice argue for the need to focus more explicitly on restoring the relationships among victims, perpetrators, and society. Although states often defend their blanket amnesties by claiming that their purpose is to foster reconciliation, proponents of restorative justice do not support such blanket amnesties.

The challenge of restorative justice, then, is the focus on methods of accountability that de-emphasize punishment. International law, however, appears to conflate accountability with punishment, and at least as reflected in major treaties and decisions, leaves less room for alternative models inspired by restorative justice. Both international

47. The functions of investigation and adjudication are separated in the German civil law system. See John H. Langbein, Controlling Prosecutorial Discretion in Germany, 41 U. CHI. L. REV. 439, 448-49 (1974). As an analytical starting point, Ruti Teitel divides the criminal justice system into two primary functions—prosecution and punishment. See Ruti Teitel, From Dictatorship to Democracy: The Role of Transitional Justice, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 272 (Harold Hongju Koh & Ronald C. Slye eds., 1999).


50. Llewelyn and Howse, supra note 49.

51. See, e.g., Romero v. El Salvador, Case 11.481, Inter-Am. C.H.R. 37, OEA/serr. L/V.1106, ¶ 20 (noting state’s claim that Peace Accord was designed to stabilize the country and promote reconciliation).

52. See Jennifer Llewelyn, Just Amnesty and Private International Law in TORTURE: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 567, 577-78 (Craig Scott ed. 2001).
treaties as well as the increasing number of decisions concerning state obligations with respect to gross violations of human rights not only speak of obligations to investigate and prosecute, but also to punish.\footnote{53} For example the Genocide Convention states that “Persons committing genocide...shall be punished...”\footnote{54} Decisions of the Inter-American Commission and Court note the importance of punishment in some cases, and even suggest that punishment is required.\footnote{55} In fact, decisions of the Inter-American Commission and Court are more accurately cited in support of the more specific obligation to punish, rather than the more general obligation to prosecute.\footnote{56} Resolutions of the UN General Assembly speak of an obligation both to prosecute and punish.\footnote{57} International humanitarian law imposes a duty on military and civilian superiors to punish subordinates involved in a war crime.\footnote{58} The failure of a superior to punish a subordinate makes that superior criminally

\footnote{53}{Although the obligation to punish appears to have strong support in international law, what constitutes a sufficient punishment for gross violations of human rights under international law has not been the subject of much international law-making. The ad hoc international criminal tribunals in the Hague are an important exception, as they have recently begun to address the question of adequate and appropriate punishment. \textit{See, e.g.}, Prosecutor v. Erdemovic, Case No. IT-96-22-A (I.C.T.Y., Appeals Chamber, Oct. 7, 1997) (discussing appropriate sentences for war crimes and crimes against humanity).}

\footnote{54}{Genocide Convention, \textit{supra} note 28, at art. IV.}


\footnote{56}{The Inter-American Commission has repeatedly taken the position that the prosecution and punishment of those guilty of violations of the American Convention is the “most effective” method of ensuring and protecting the Convention’s rights. \textit{See} Lincoleo, Case 11.771, Inter-Am. C.H.R. 136 at ¶ 49; Ellacuria v. El Salvador, Case 10.488, Inter-Am. C.H.R. 136, OEA/ser. L./V./II.106, doc. 6 (1999), ¶ 200; Romero, Case 11.481, Inter-Am. C.H.R. 37 at ¶ 126.}

\footnote{57}{\textit{See}, \textit{e.g.}, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 79, U.N. Doc. A/9030 (1974), ¶ 1. (“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, punishment.”)}

liable; that is, the failure to "prosecute" becomes a criminal act for which the superior officer may be held responsible. The final report of the Chilean Truth and Reconciliation Commission notes the importance of the state exercising its full "power to punish" in furthering reconciliation and the rule of law.

There are thus strong international legal arguments supporting an obligation for a state to investigate, prosecute, and punish those responsible for gross violations of human rights. Given the different purposes behind each of the three criminal justice functions (truth, responsibility, and accountability), it is not clear that the international law focus on prosecution and punishment is adequate to achieve all that we expect from a criminal justice system. Instead, a requirement that a state not be precluded from prosecuting and, if appropriate, punishing, may provide a minimal standard that avoids the danger of the "one size fits all" solution of mandatory prosecution and punishment and the opposite danger of perpetual impunity. Such a minimum standard might take the form of a prohibition against amnesties, leaving the decision to forego criminal prosecution to the prosecutor. Such a solution may result in the postponement of prosecution in particular cases because of limited resources or concerns about social stability, but allow such actions later, particularly with the worst crimes that are not subject to a statute of limitations.

Acceptance of prosecutorial discretion, motivated by either limited resources or strategic decisions, does not, of course, preclude a prohibition against amnesty. While we might acknowledge that a state has some discretion in determining who should be prosecuted, given limited resources or other societal goals we could still assert that a state does not have the power to shield an individual from present or future accountability through a grant of amnesty. In other words, we might conclude that a state should not be required to prosecute all individuals suspected of committing gross violations of human rights, but that a


state should not be permitted to use an amnesty affirmatively to protect an individual from future prosecution or other forms of accountability. This appears to be the position of the Inter-American Commission of Human Rights, which has held that the mere existence of a general blanket amnesty violates a state's obligations under the American Convention.61 Support can also be found for this position in the statutes of the ad hoc international criminal tribunals in the Hague. In effect, the two tribunal statutes establish that a state may not protect someone from international accountability by pretending to try and punish them domestically. Specifically, these conventions provide that the tribunals may have jurisdiction over a suspect after a state has prosecuted him if the domestic prosecution was based on a lesser offense, was heard before a partial tribunal, or was designed to protect the suspect from international accountability.62

While the statutes of the international criminal courts do not directly address the issue of amnesties, it would be odd if the tribunals would allow a state to do through an amnesty what it could not do with a trial. The concurrent jurisdiction language, however, is consistent with some recognition of amnesties by such international tribunals. The provisions regarding non-recognizable domestic prosecutions concern sham prosecutions—prosecutions that are undertaken primarily for the purpose of protecting an individual from full accountability. A prosecution that results in a lenient sentence is not necessarily one that runs afoul of the sham prosecution provisions, so long as it is clear that the lenient sentence was not the result of a deliberate policy of shielding that individual from accountability.63 True accountability does not always require a harsh sentence. Applying the sham prosecution principle to

61. This violation occurs in addition to the violations of the right to know and the right to justice that occur through the application of the amnesty law to a particular case. See Romero, Case 11.481, Inter-Am. C.H.R. 37 at ¶ 136 (general amnesty violates state's obligation "to refrain from adopting laws that do away with, restrict, or render null and void the rights and freedoms, or the effectiveness thereof, set forth in the American Convention"); Lincoleo, Case 11.771, Inter-Am. C.H.R. 61 at ¶ 47 (adoption of Chilean amnesty violates Articles 1(1) and 2 of the American Convention, which obligate a state to pass legislation to give effect to the rights protected by the Convention); Ellacuria, Case 10.488, Inter-Am. C.H.R. 136 at ¶ 239 (same for El Salvadoran amnesty).


In commentary to its 1996 Draft Code of Crimes, although not reflected in the actual text of the Draft Code, the ILC includes in its discussion of suspect activity the imposition of a penalty not commensurate with the crime at issue. ILC Draft Code, art. 12, cmt. 2, p. 67. Implied in this penalty evaluation is the principle that specific crimes have a definite range of penalties associated with them, and thus that there are penalties that are inappropriately weak. Amnesties for certain crimes may thus run afoul of such a principle.

63. It is not yet clear what criteria will be used to interpret the principle of complementarity, and thus how deferential the International Criminal Court [hereinafter I.C.C.] will be to national claims of domestic accountability.
amnesties, what I call an "amnesic amnesty," should not remove the jurisdiction of an international tribunal, whereas what I call an "accountable amnesty" might.

Although there is strong textual evidence in international law imposing a duty on states to prosecute and punish gross violations of human rights, the content or interpretation of that obligation is not clear. State practice and the emerging jurisprudence of restorative justice challenge the assertion that the goals of a criminal justice system are always well served with a retributive justice model. If existing international law is vague about the specifics of a state’s obligation to prosecute or punish, there is clearly some obligation under international law to hold accountable those individuals who are responsible for gross violations of human rights. Proponents of restorative justice remind us that accountability does not necessarily require prosecution and punishment, but may be satisfied by other means. Thus, to the extent that amnesties foreclose any form of accountability for gross violations of human rights, they violate the general principle of international law that requires some response to such atrocities. An obligation to provide accountability is most evident with respect to the most serious international crimes, for it is with respect to those crimes that international treaties and decisions explicitly require prosecution and punishment.

B. Amnesties and the Fundamental Rights of Victims

Proponents of the second major argument against amnesties point to the decisions of numerous international tribunals that declare amnesties violative of a victim’s fundamental rights under international law. International tribunals that have addressed the legitimacy of amnesties—primarily the Inter-American Commission and Court of Human Rights—have identified five principles that amnesties violate: the right to justice; the right to truth, oftentimes referred to as an obligation to investigate; the right to judicial protection, also referred

64. See infra notes 232-34 and accompanying text.
65. See infra notes 244-48 and accompanying text.
66. See American Convention on Human Rights, Articles 1(1) and 2, as interpreted by the Inter-American Commission of Human Rights in Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R. 36, OEA/ser. L./V./II.95, doc. 7, rev. at 156 (1997), ¶¶ 59-61; see also Ellacuria, Case 10.488, Inter-Am. C.H.R. 136 at ¶ 198 (Amnesty laws "leave the victims of serious human rights violations unprotected, since they deprive them of the right to seek justice.").
67. See infra note 74.
to as the right to an effective remedy; and the right to judicial guarantees, also referred to as the right to a fair trial or hearing. Central to the effectiveness of a right is a mechanism by which that right can be recognized, protected, and vindicated. These five principles all concern a state’s obligation to ascertain and protect an individual’s rights—in particular, the obligation to provide some remedy if a violation has occurred. They are thus often discussed in connection with the more general obligation of a state to ensure the effective enjoyment and protection of fundamental human rights.

1. The Right to Justice

Among the five principles that amnesties are said to violate, the most general is the right to justice. The other four principles all derive from this right. The right to justice has been interpreted to include the following: the right to an investigation that identifies those responsible for the violation; the right to prosecution of those identified as responsible; the right to punishment of those responsible; and the right to compensation for the wrong suffered. Justice Richard Goldstone, the former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda has said that “full justice” consists of the “trial of the perpetrator and, if found guilty, adequate punishment.” Similarly, the Inter-American Commission has stated


that an amnesty that shields an individual from criminal liability violates the right to justice of the victim, as it prevents the state from fulfilling its obligation to investigate and take “punitive action.”\footnote{Espinoza, Case 11.725, Inter-Am. C.H.R. 133 at ¶ 82, 155 (amnesty violates victim’s right to justice by preventing the identification of perpetrators, establishing their responsibility, imposing the corresponding punishment, and providing judicial reparations); Hermosilla, Case 10.843, Inter-Am. C.H.R. 36 at ¶ 111.}

The right of the victim to have her perpetrator prosecuted or punished is the corollary to the state’s obligation to prosecute and punish discussed above.

2. The Right to Truth

The state’s obligation to investigate, also referred to as the victim’s and society’s right to “truth,” is the clearest and most widely accepted right that is implicated by most amnesties.\footnote{See, e.g., Barios Altos, supra note 55, ¶ 42; Lincoleo v. Chile, Case 11.711, Inter-Am. C.H.R. 61, OEA/ser. L./V./II.111, doc. 20 (2001), ¶ 62 (noting that a State may not renounce its obligation to investigate a public crime); Ellacuria v. El Salvador, Case 10.488, Inter-Am. C.H.R. 136, OEA/ser. L./V./II.106, doc. 6 (1999), ¶ 223 (“the right to know the truth arises as a basic and indispensable consequence for every State party to [the American Convention]....”) (internal quotation marks omitted); Romero v. El Salvador, ¶ 144 (“The right to the truth is a collective right that enables society to have access to information essential to the development of democracies”); see also Yasa v. Turkey, Eur. Ct. H.R., No. 63/1997/847/1054, ¶ 100, reprinted in 20 HUM. RTS. L.J. 24, 34 (1999) (finding the obligation of a state under the European Convention on Human Rights to carry out an effective investigation after learning of murder).}

States have paradoxically justified amnesties as legitimate vehicles for blocking truth and for enhancing truth. In commenting on his country’s amnesty, for example, the President of El Salvador emphasized that amnesty is important for “erasing, eliminating, and forgetting the past in its entirety.”\footnote{Parada Cea y Otros v. El Salvador, Case 10.480, Inter-Am. C.H.R. 1, OEA/ser. L./V./II.102, doc. 6 (1999), ¶ 5.}

The name amnesty, in fact, comes from the same Greek root as amnesia, and is often equated with forgetting or ignoring the past. None of the amnesties that have been the subject of international adjudication incorporate any form of investigation or truth telling,\footnote{Some amnesties, because of their limited application, are often accompanied by judicial or other governmental determinations that may provide some form of investigation. The Honduran Supreme Court, for example, interpreted the Honduran amnesty language to require that a criminal court judge investigate allegations of military involvement in human rights abuses before ruling whether the defendants were entitled to amnesty. Vladimir Recinos, Honduran Supreme Court Rules Against Military Officers’ Petition, F.B.I.S. LAT 96-015 (Jan. 23, 1996); see Honduras, Corte Suprema de Justicia, Recurso de Amparo en Revision, No. 60-96, case Hernandez Santos y otros (Tegucigalpa Jan. 18, 1996).

The Guatemalan amnesty is administered by the judiciary. See Popkin & Bhuta, supra note 10 at 116. Cases that may fall under the amnesty law are transferred to a special appeals chamber where an expedited procedure is used to determine if the amnesty applies. Margaret Popkin, Guatemala’s National Reconciliation Law: Combating Impunity or Continuing It? 24 REVISTA IIDH173 (1996).}

73. Espinoza, Case 11.725, Inter-Am. C.H.R. 133 at ¶ 82, 155 (amnesty violates victim’s right to justice by preventing the identification of perpetrators, establishing their responsibility, imposing the corresponding punishment, and providing judicial reparations); Hermosilla, Case 10.843, Inter-Am. C.H.R. 36 at ¶ 111.

74. See, e.g., Barios Altos, supra note 55, ¶ 42; Lincoleo v. Chile, Case 11.711, Inter-Am. C.H.R. 61, OEA/ser. L./V./II.111, doc. 20 (2001), ¶ 62 (noting that a State may not renounce its obligation to investigate a public crime); Ellacuria v. El Salvador, Case 10.488, Inter-Am. C.H.R. 136, OEA/ser. L./V./II.106, doc. 6 (1999), ¶ 223 (“the right to know the truth arises as a basic and indispensable consequence for every State party to [the American Convention]....”) (internal quotation marks omitted); Romero v. El Salvador, ¶ 144 (“The right to the truth is a collective right that enables society to have access to information essential to the development of democracies”); see also Yasa v. Turkey, Eur. Ct. H.R., No. 63/1997/847/1054, ¶ 100, reprinted in 20 HUM. RTS. L.J. 24, 34 (1999) (finding the obligation of a state under the European Convention on Human Rights to carry out an effective investigation after learning of murder).


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have been accompanied by other investigatory processes, such as a truth commission.\textsuperscript{77} Amnesties passed in Honduras and Guatemala were designed to hide the truth, but have been interpreted by their state’s courts to require that the investigative phase of a prosecution be completed before the determination of whether or not an amnesty may be granted.\textsuperscript{78} President Alwyn of Chile similarly interpreted the amnesic 1978 Chilean amnesty to require a full judicial investigation before it could be applied.\textsuperscript{79} The Chilean courts have varied in their adherence to this interpretation known as the “Alwyn Doctrine.”\textsuperscript{80}

States have also justified their enactment of amnesties as a vehicle to enhance truth. Such a claim is based either on the type of amnesty used, or the combination of an otherwise amnesic amnesty with a truth commission. The claim to a truth-enhancing amnesty is strongest in the case of the 1995 South African amnesty (and to some extent with the Honduran and Guatemalan amnesties as interpreted by their respective state’s courts). The South African amnesty provides the strongest claim since it creates a direct correspondence between grants of amnesty and the revelation of truth. An individual \textit{must} come forward and reveal information about those human rights violations of which she was a part. Without such revelations, a perpetrator will not receive amnesty, and thus may be subject to either civil or criminal accountability.\textsuperscript{81} In those countries in which the courts have interpreted an amnesty to require some amount of fact finding when raised as a defense to a claim (such as Honduras and Guatemala), the truth telling will only take place if an amnesty is challenged by the filing of a prosecution or civil claim. Thus, in the latter case, an individual might be granted amnesty and never have to reveal anything about her past.

States sometimes combine amnesties with a truth commission in

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\textsuperscript{77} See examples of Chile, Argentina, and El Salvador.

\textsuperscript{78} See supra note 76.

\textsuperscript{79} PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS 98 (Routledge 2001).

\textsuperscript{80} Id. at 98, n. 29; see also supra note 16.

\textsuperscript{81} The South African constitutional court, in declaring its country’s amnesty legitimate against a constitutional and international law challenge, found it significant that the amnesty affirmatively contributed to the search for truth. Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others, 1996 SALR 671 (CC). As John Dugard has rightly noted, the Constitutional Court in Azapo did not adequately address the international law issues raised by the amnesty. John Dugard, \textit{Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question}, 13 S. AFR. J. HUM. RTS. 258, 266-67 (1997).
order to compensate for the failure of most amnesties to address the right to truth. States defend such amnesties by arguing that the ability to increase truth through a commission is dependent on a peaceful change of government, which is in turn dependent on enacting a general amnesty. This argument has been rejected by the few international tribunals that have addressed it. The Inter-American Commission, for example, has stated that the quality of truth that comes from a trial is to be preferred to that derived from a truth commission, and that a truth commission combined with an amnesty does not fulfill the obligations of the state under the American Convention.

3. The Right to Judicial Protection

By precluding access to normal civil and criminal judicial procedures, amnesties also have been found to violate the right to judicial protection, also referred to as the right to an effective remedy. The right to adequate reparations as a remedy (which as noted above is also a part of the right to justice) is fundamental to any fulfillment of the more general right to justice. Reparations most often come in the form

82. See the Ellacuria case, in which the Inter-American Commission on Human Rights stated:
The IACHR considers that, despite the important contribution that the [El Salvadoran]
Truth Commission made in establishing the facts surrounding the most serious violations, and in promoting national reconciliation, the role that it played, although highly relevant, cannot be considered as a suitable substitute for proper judicial procedures as a method for arriving at the truth.
83. See Lincoleo, Case 11.711, Inter-Am. C.H.R. 61, OEA/serv. L./V./II.111, doc. 20 (2001), ch. 6 (truth commission is inadequate when combined with an amnesty that precludes investigation of criminal acts committed by the state, identification and publication of those responsible, and punishment of those responsible); Espinoza v. Chile, Case 11.725, Inter-Am. C.H.R. 133, OEA/serv. L./V./II.106, doc. 6 (1999), ¶ 102 (truth commission combined with amnesty violated rights of victims "to know the true facts."). Even if a state fulfills its obligations concerning truth this is not enough to meet all of its obligations under the American Convention. See Romero, Case 11.481, Inter-Am. C.H.R. 37 at ¶ 144 ("Nonetheless, the state's obligation to guarantee the Right to Truth does not replace nor is it an alternative to all other obligations it has in the context of its duty to guarantee, to wit, the duty to investigate and impart justice.") (quoting with approval from amicus brief of Amnesty International).
84. The right to judicial protection and the right to remedy are often discussed together. See Parada Cea, Case 10.480, Inter-Am. C.H.R. 1 at ¶¶ 124-29 (discussing right to effective remedy and judicial protection in the context of El Salvadoran amnesty); see also Espinoza, Case 11.725, Inter-Am C.H.R. 133 at ¶ 79 ("amnesties...cannot deprive victims of...the right to obtain, at a minimum, adequate reparations for human rights violations enshrined [sic] in the American Convention").
of compensation, but may also take the form of truth\textsuperscript{86} (that is letting the truth be known), accountability,\textsuperscript{87} or punishment.\textsuperscript{88} Punishment as a form of reparations is tied to the more retributive justifications for penal law: the idea that a victim and society derive some benefit from the knowledge that a wrongdoer is not only identified but also punished for his crime.

4. \textit{The Right to Reparations}

The right to compensatory reparations is especially violated by an amnesty that protects an individual from civil liability, and thus access to damages provided by a civil judgment. The right to reparations may also be violated by an amnesty that only provides protection against criminal liability. The Inter-American Commission has found that amnesties that bar criminal prosecutions may infringe the right to reparations in those countries where the information gleaned from criminal proceedings would be crucial for bringing a civil claim.\textsuperscript{89}

\textsuperscript{86} The Inter-American Commission has stated that truth can itself be a form of compensation, although not finding that truth is itself sufficient to satisfy the right to judicial protection. \textit{See, e.g.}, \textit{Ellacuria}, Case 10.488, Inter-Am. C.H.R. 136 at ¶ 224; \textit{Romero}, Case 11.481, Inter-Am. C.H.R. 37 at ¶ 148; \textit{Parada Cea}, Case 10.480, Inter-Am. C.H.R. 1 at ¶ 155 ("The right possessed by all persons...of knowing the full, complete, and public truth on incidents which have occurred, their specific circumstances, and who participated in them, are part of the right to reparation for violations of human rights.") Truth is also a pre-requisite for reparations, for without strong evidence remedial mechanisms are less likely to be effective. \textit{Id.} at ¶ 152.

\textsuperscript{87} The "primary, substantial, and essential reparation" sought by the petitioners in \textit{Espinoza} was the holding to account of those responsible by the lifting of the amnesty rather than any monetary compensation. \textit{Espinoza}, Case 11.725, Inter-Am C.H.R. 133 at ¶ 153. The Inter-American Court has interpreted the American Convention as imposing on a state the duty to investigate and prosecute a case of disappearance and death, as well as the right of the victim and his relatives "to have the relevant punishment, where appropriate, meted out...." \textit{Blake} v. \textit{Guatemala}, Case, Inter-Am. C.H.R. (ser. C) No. 36 (1998), \textit{reprinted in} 19 HUM. RTS. L.J. 393, 405 (1998) (interpreting Article 8(1) of the American Convention on Human Rights).

\textsuperscript{88} The Inter-American Commission and Court have tied the punishment of an offender to the right of a victim to have access to the legal system for the vindication of his rights. \textit{See Blake} v. \textit{Guatemala}, \textit{reprinted in} 19 HUM. RTS. L.J., supra note 87 at ¶ 97 (the right to a trial for the determination of human rights enshrined in Article 8(1) includes the right to a prosecution and the right "to have the relevant punishment, where appropriate, meted out"); \textit{Ellacuria}, Case 10.488, Inter-Am. C.H.R. 136 at ¶ 195 (the right to an effective recourse for protection of fundamental rights enshrined in Article 25 obligates a state to prosecute those responsible for a crime, to "apply to them the corresponding legal penalties," and to pursue the prosecution to its "ultimate conclusion").

\textsuperscript{89} \textit{See Espinoza}, Case 11.725, Inter-Am C.H.R. 133 at ¶ 84 ("the manner in which the amnesty was applied by the courts affected the right to obtain reparations within the civil courts, given the impossibility of individualizing or identifying those responsible for the disappearance, torture, and extrajudicial execution of Carmelo Soria").
Although compensation provides an important remedy to the violations created by an amnesty, it may not be sufficient. While there are few decisions that directly address the issue, there is some suggestion that more than reparations are required in response to gross violations of human rights.  

5. The Right to Access to a Court  

Finally, amnesties have been found to violate an individual’s right to a fair trial. The right to a fair trial is most often associated, at least in the United States, with the rights of a criminal defendant in the context of a state prosecution. The language of the American Convention, and its interpretation by the Inter-American Commission and Court, include within such a right the right of “[e]very person... to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the... determination of his rights and obligations of a civil... nature.” The argument is that by foreclosing access to the civil courts, amnesties violate the right of a human rights victim to have her rights established by a tribunal previously established by law. Victims are thus entitled to some participatory role in the determination of their rights, and thus some role in determining whether an amnesty should be granted or not.

C. Amnesties, Social Stability, Deterrence, and the Rule of Law  

Third, it is argued that, even assuming amnesties contribute to short-term social stability, in the long-term they undercut efforts to establish a stable democracy that honors human rights and the rule of law. The argument is that such amnesties send a signal to would-be violators that if they are powerful enough to create enough uncertainty or instability, they may escape accountability. Amnesties therefore violate the general obligation of states to protect and ensure the fundamental rights of its citizens, including the enjoyment of a safe and secure existence. Aryeh Neier argues eloquently against “giving in” to amnesties, noting that they create a culture of impunity that only encourages further human

90. See Parada Cea, Case 10.480, Inter-Am. C.H.R. 1 at ¶ 122 (“the Commission has established that amnesties and their effects may not interfere with the right of the victims or their survivors to obtain, at least, due compensation for violations of the human rights enshrined in the American Convention”) (emphasis added).  
This is fundamentally an argument about the importance of preserving the perception, if not the reality, of a coherent and just social order.94

States that have enacted amnesties, as well as some commentators, argue that social stability and peace are indeed made possible by such amnesties.95 Amnesties have been justified at the end of an armed conflict or the change of a regime as the realistic price one has to pay for ending a destructive war or removing a government that has committed gross violations of human rights in the past. Such a trade-off is defended as a necessary condition to ensure contemporary peace and social stability, and to prevent further human rights violations.96 In other words, the argument is that if amnesty is not granted, the regime that has perpetrated gross violations of human rights will remain in power and engage in further violations. The trade-off, then, is not between victims of past abuses and accountability for perpetrators, but between victims of past abuses and yet to be identified victims of future abuses.

Alexander Hamilton argued for the use of amnesties to further peace: “In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may

93. NEIER, supra note 12, at 103-07.


95. See Hesse & Post, supra note 34, at 20-21 (amnesty in some situations may be best path to reconciliation and the creation of a legitimate legal order). Some commentators who lean toward the social stability justification for amnesties are reluctant to allow amnesties for the worst crimes, such as crimes against humanity. See Naomi Roht-Arriaza, The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with Jose Zalaquett, in HUMAN RIGHTS IN POLITICAL TRANSITIONS, supra note 34, at 195, 199 (Zalaquett stating that although forgiveness and magnanimity may serve society better in some circumstances, crimes against humanity cannot be the subject of such forgiveness).

96. See, e.g., Statement of the Government of El Salvador in response to the Inter-American Commission of Human Rights’ demand that El Salvador repeal its 1993 amnesty law. Ellacuria, Case 10.488, Inter-Am. C.H.R. 136 at ¶ 244 (noting that the amnesty law “constituted a necessary measure for overcoming the state of violence and acute confrontation experienced by Salvadorans during the armed conflict...”); see also statement by President Clinton that granting amnesty to the military regime in Haiti was necessary to avoid “massive bloodshed...” Remarks at White House Press Conference (Sept. 19, 1994), quoted in Michael P. Scharf, Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?, 31 TEX. INT'L L.J. 1, 9 (1996); and statements by President Kabbah defending the Sierra Leonean amnesty as furthering peace, in Gallagher, supra note 9, at 183 n.241.
restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall." Although Hamilton refers to pardon, he is clearly talking about amnesties properly defined.) In justifying the use of its general amnesty law to release the killers of the Archbishop of San Salvador, Oscar Arulfo Romero y Galdamez, the government of El Salvador described amnesty as a "measure aimed at ensuring the existence of a new democratic State at peace [and] as the only way to safeguard human rights."

The causal relationships among amnesties, social stability, deterrence, and the rule of law are unclear. We do have some anecdotal evidence, although such evidence does not clearly support any particular argument concerning causation. For example, in both Chile and Argentina, individual accountability was foreclosed in the name of facilitating a peaceful transition. In Chile, General Pinochet passed a sweeping blanket amnesty in 1978 protecting all members of the government from accountability for past crimes committed in connection with the General's regime. While Argentina initiated some important prosecutions, they quickly gave way to a series of statutes that provided an effective amnesty to those involved in that country's "Dirty War." It is difficult to say whether such protections for human rights violators were necessary to facilitate a transition to democracy in each case, or whether the transitions would have occurred anyway but with a higher level of violence. It is easier to observe today, however, that the effort to place a permanent lid on the desire for accountability failed.

The amnesty laws in both Chile and Argentina (as well as in other countries) have been challenged and either partially or completely lifted. On the one hand, the examples of Chile and Argentina suggest that amnesties are ill-advised and will not last; moreover, they suggest that attempts to prevent accountability in the name of social stability will not work. This argument is supported by the fact that the cries for

97. THE FEDERALIST NO. 74 (Alexander Hamilton). Hamilton is quoted by the court in the Nixon pardon case of Murphy v. Ford 390 F.Supp 1372, 1373 (W.D. Mich. 1975), and in turn by the court in Phillip v. Director of Public Prosecutions of Trinidad, 1 All ER 665, at 668 (1992), quoting Murphy, 390 F.Supp at 1373.


99. Michael Scharf concedes that the amnesty granted to the Haitian military regime at the insistence of the U.S. and the UN "[i]n the short run...achieved far more for the restoration of human rights in Haiti than what would have resulted by insisting on punishment and risking political instability and continued social divisiveness." Scharf, supra note 96, at 11.

100. In contrast, some commentators point to Mozambique as an example of an amnesty that successfully ended a conflict and resulted in the creation of a stable democracy. Gallagher, supra note 9, at 188.
accountability in both of these cases ultimately appear to have triumphed over the cries for caution and stability. On the other hand, the examples of Chile and Argentina may in fact point to a third way between immediate individual accountability and permanent impunity. The cases of Chile and Argentina illustrate the use of a short-term amnesty, in which claims for social stability, reconciliation, and building the rule of law take precedence over individual accountability and retribution. Argentina and Chile demonstrate, however, that short-term amnesty eventually gives way to individual accountability. It would appear from these two examples that while accountability may be an unattractive option in the immediate aftermath of a change in regime, it becomes a viable option after the passage of a period of time sufficient to stabilize the new regime and societal norms. One might therefore conclude that the preferred transitional policy would be to offer short-term protection from accountability for violative regimes that agree to transfer power peacefully, with the expectation that once the new regime is established and stable, such individuals may be held accountable. Of course, as a proposal to guide future transitions this appears very impractical. If we accept the argument that the Pinochets of the world will not give up power without protection against accountability for their past wrongful acts, it is not clear why they would agree merely to postpone accountability as a condition for giving up power.

What is clear is that the forward-looking argument that amnesties ensure peaceful transitions and the creation of a human rights protective society is limited to a particular historical period. As amnesties that were intended to last in perpetuity unravel in the face of domestic and international pressures for accountability, the utility of using such amnesties to entice violative regimes to give up power peacefully diminishes. Even if we accept the hypothesis that such amnesties were necessary for facilitating earlier transitions, and that impunity was the price to be paid for future stability and protection of human rights in countries like Argentina, Chile, El Salvador, and Guatemala, it is not clear that as a matter of practice such a dynamic will work in the future. The reality appears to be that societies will only tolerate such impunity for a limited period of time, and that eventually those who perpetrated

101. In contrast, the Uruguayan public rejected by a comfortable margin of fifty-three to forty percent a referendum to overturn an amnesty passed four years earlier. See The World, LOS ANGELES TIMES, Apr. 18, 1989.

102. Not a third way in the sense that the supporters of the South African Truth and Reconciliation Commission mean. The South African supporters refer to that country's commission as a third way between criminal trials and amnesty; a third way that consists of what I call an accountable amnesty.
gross violations of human rights in the past will be held to account. As a principle that might be used to support the legitimacy of amnesties generally, the social stability argument appears to be losing its power as existing amnesties yield to both domestic and international pressures for accountability.

International law, however, provides some clear principles that can be used to evaluate amnesties. First, authoritative statements concerning a state’s obligation to prosecute and punish those responsible for gross violations of human rights clearly establish a minimal requirement of accountability. The limited jurisprudence on the question and contradictory state practice make it difficult to assert with any confidence a more specific obligation. Second, victims of gross violations of human rights are entitled to some form of truth, reparations, and participation. Amnesties that significantly advance these four principles (accountability, truth, reparations, and participation) are more likely to be considered legitimate, and thus deserve support, recognition, and enforcement.

III. GENERAL PRINCIPLES OF ANALOGOUS LAW

Having derived four guiding principles from international law to evaluate amnesties for gross violations of human rights, I now turn to a discussion of six analogous areas of developed legal practice in the Anglo-American tradition. I look to these six areas of law to place amnesties in the context of other less controversial legal principles that justify not enforcing otherwise applicable legal rules. The six areas of law include: the recognition and enforcement of a foreign state’s official acts and judgments; non bis in idem (more generally referred to in the U.S. as the prohibition against “double jeopardy”); the treatment of human rights violators under international refugee and asylum law; the political offense exception in extradition law; systemic barriers to claims—immunities, statutes of limitation, and laches; and pardons. Each of these areas of law provides justifications for not enforcing an otherwise applicable rule of law, and thus is relevant to an evaluation of the legitimacy of amnesties.
A. Recognition and Enforcement of Foreign Official Acts

How a legal system treats foreign official acts—and why a legal system chooses a particular approach to the recognition of such acts—provides some insight into how a foreign amnesty should be treated. One possible response to a foreign amnesty, in fact, is to treat it like any other foreign official act. Amnesties for gross violations of human rights, however, raise particular legal, political, and moral concerns not present with most other official acts. It should be noted at the outset, however, that recognition by a state of a foreign official act does not necessarily imply a judgment that the act in question is just. Recognition of a foreign government’s official act involves a balancing between the forces of global integration (and the desire to create a stable international legal and political regime through the mutual recognition of official acts), and substantive values of public policy and fundamental rights that may not be shared by the two states in

103. There is a difference between recognition and enforcement. The Sabbatino Court was quite clear that the issue there was recognition of an act performed by a duly recognized foreign government within its own territory, and not an issue of enforcing such an act extraterritorially. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In the United States Steel Corp. case, Judge Learned Hand noted that the act of state doctrine concerned recognition of a foreign act insofar as it affected the rights of third parties, and not the enforcement of the act itself: “Of necessity no court can enforce the law of another place. It is, however, the general law of all civilized peoples that, in adjusting the rights of suitors, courts will impute to them rights and duties similar to those which arose in the place where the relevant transactions occurred.” Direction Der Disconto-Gesellschaft v. United States Steel Corp., 300 F. 741, 744 (S.D.N.Y. 1924) (internal citations omitted).

In the case of amnesties granted for acts in violation of international law, the important question raised here is whether the forum jurisdiction will recognize such an amnesty in response to a claim brought under municipal or international law, and thus dismiss the claim.

104. See, e.g., Bi v. Union Carbide, 984 F.2d. 582, 586 (2d Cir. 1993) (“were we to pass judgment on the validity of India’s response to a disaster that occurred within its borders, it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future”) (emphasis added). Anne-Marie Slaughter, in an important article analyzing the U.S. act of state doctrine, made a similar point regarding the recognition of foreign laws among “liberal” states. Anne-Marie Burley Slaughter, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 COLUM. L. REV. 1907, 1919 (1992) (“This core of common values and institutions [among liberal states] ensures that in most cases states can disagree with the specific policy choices embedded in each other’s national laws but nevertheless respect those laws as legitimate means to the same ultimate ends.”).

105. For example, in United States v. Belmont the Second Circuit Court of Appeals, hearing an appeal from a New York federal district court, refused to give effect to the expropriation of private property by the Soviet Union because such acts were contrary to the public policy of the New York forum. United States v. Belmont, 85 F.2d 542, 543 (2d Cir. 1936).

106. Such fundamental rights may, of course, include those that have risen to a high level of international consensus, and thus less clearly illustrate a clash between different policies of competing sovereigns. See, e.g., John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co., 369 F.2d 696, 697 (1st Cir. 1978) (foreign judgments should not be recognized if in violation of international law). The application of those internationally recognized rights through the refusal
question. Generally, the recognition of a foreign legislative or executive act, or a judgment of a foreign court, presumes that the foreign act or judgment is not manifestly unjust or does not violate a strongly held principle of public policy of the forum state. It is not an inquiry, therefore, as to whether the recognizing state would itself have granted amnesty in such a case.107 Instead, it is whether the granting of amnesty by the requesting state is so abhorrent to the requested state’s notions of justice as to make its recognition untenable. Justice Cardozo, before joining the U.S. Supreme Court, articulated this tension between the legal culture of the forum state and that of the foreign state: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” 108

The law of foreign recognition suggests three basic approaches a foreign state or international institution may take with regard to an amnesty granted for gross violations of human rights. The first approach is to recognize and defer absolutely to the amnesty granted by the perpetrator’s state without inquiring into its substance, procedure or context (the “absolute deference” approach). The second is to examine the substance of the amnesty and judge its legitimacy, and thus its enforceability (the “selective deference” approach). The question raised by this second approach is what criteria should such a decision-maker use to judge an amnesty’s legitimacy. The third approach is to give no effect to the amnesty and insist that the individual claiming its protection be held accountable (the “anti-deference” approach). Each of these three approaches to amnesties is currently adopted by different institutional actors internationally.

Generally, a court’s willingness to recognize a foreign official act turns in part on whether the act is civil or criminal in nature. Foreign criminal and tax laws, and their corresponding judgments, are generally not recognized and enforced by another state’s courts. Foreign official acts that do not fit within the criminal or tax area may be recognized and enforced if certain minimal conditions are met.

to recognize a foreign official act that violates them contributes to, rather than detracts from, global integration.

107. See, e.g., Union Carbide, 984 F.2d at 586 (“It is not relevant to our determination whether, under our constitutional standards, our Government could pass an act similar to the Bhopal Act.”) The case arose out of the thousands of deaths and injury caused by the leakage of deadly gas from a Union Carbide plant in Bhopal, India. The Indian Parliament passed a statute granting to the Indian Government the exclusive right to represent the victims of the disaster both in India and throughout the rest of the world.

1. Recognition of Foreign Penal Acts

Early U.S. and English case law establish that a state should not enforce the penal laws and sentences of another state; that at least regarding the application of foreign criminal law, a state generally defers to the territorial jurisdiction. Most states follow this rule of criminal abstention. An exception to this general rule can be found among states that are closely aligned politically, economically, militarily, and culturally. Leaving aside this exception, penal sanctions traditionally have had no extra-territorial effect. One might extend this prohibitory rule to criminal law amnesties, reasoning that an amnesty is like any other criminal judgment or sentence, and thus should not be given extra-territorial effect.

The traditional policy arguments against recognizing foreign penal judgments do not apply with equal force to the recognition of amnesties today. At the time the doctrine of non-recognition of foreign penal judgments developed in the common law, it was generally accepted that states only had an interest in criminal acts committed within their own territory. Consequently states had no jurisdiction or authority to enforce a penal law or judgment arising from a foreign jurisdiction. In his


Crimes and offences against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive, or judicial, of other states take no action with regard to them, except by way of extradition, to surrender offenders to the state whose laws they have violated, and whose peace they have broken.

Id.

110. See, e.g., Matthew Goode, The Tortured Tale of Criminal Jurisdiction, 21 MELB. U. L. REV. 411, 453 (1997) ("The general rule is that the courts will not recognise or enforce the criminal or penal judgment of another forum."). For a U.S. statement to this effect, see The Antelope, 23 U.S. (10 Wheat.) 66 (1825).


112. By "criminal law amnesty" I mean an amnesty that provides protection from criminal law liability; thus a "civil law amnesty" means an amnesty that provides protection from civil law liability. Unless I otherwise specify, I will use the term "amnesty" by itself to refer collectively to amnesties that provide protection from either or both criminal and civil law liability.

113. In the 1888 case Wisconsin v. Pelican Insurance Co., Justice Gray, writing for the Supreme Court, expounded upon the policies and implications underlying the reluctance of a state to engage with a foreign penal judgment, expanding the rule of forbearance to include any judgment in favor of a State:

The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.

Lord Kames, in his Principles of Equity, cited and approved by Mr. Justice Story in
famous *Commentaries on the Conflict of Laws*, Story writes:

The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed. No other nation therefore has any right to punish them, or is under any obligation to take notice of or to enforce any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed.  

The global legal environment today is markedly different from when these rules concerning foreign judgments developed. We have witnessed a radical evolution of international criminal law in the last half century, an evolution that has further accelerated in the last decade. The provincial concern with only local wrongs has given way to a growing acceptance of universal jurisdiction over certain gross violations, as well as a dramatic increase in states asserting extra-territorial jurisdiction over criminal activity.

The non-recognition and non-enforcement of foreign penal judgments, however, acquires a new justification when viewed in light of one of the fundamental concerns that gave rise to the modern international human rights movement: the protection of the individual against the power of the state. The reluctance to enforce a foreign penal judgment can be justified on the theory that one state should not assist another state in the criminal punishment of an individual. This is a concern animated by the ideal of individual human rights and the protection of the individual from the power and violence of the state. This is particularly so in the case of a state asserting the right to punish a foreign citizen based on a conviction in a foreign jurisdiction. The protection of a national of one state against the power of another state

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his Commentaries on the Conflict of Laws, after having said, “The proper place for punishment is where the crime is committed, and no society takes concern in any crime but what is hurtful to itself,” and recognizing the duty to enforce foreign judgments or decrees for civil debts or damages, adds, “[b]ut this includes not a decree decerning for a penalty; because no court reckons itself bound to punish, or to concur in punishing, any delict committed extra territorium.”


116. One commentator has wryly noted the arrogant version of this concern adopted by the United States. See Gerhard O.W. Mueller, *International Judicial Assistance in Criminal Matters*, 7 VILL. L. REV. 193, 220 (1961) (“Unfortunately, American courts have excelled in unfriendly attitudes toward all questions relating to foreign criminal proceedings, in the erroneous belief that ours alone is a system which guarantees fairness to a criminal defendant.”).
was a legitimate concern of international law and international relations long before the development of the current belief that a state's treatment of its own citizens is an area of legitimate international concern.

Unlike a foreign penal judgment, recognizing and enforcing an amnesty does not involve the application of force by a state against an individual. On the contrary, it involves the explicit refusal to exert such power over an individual. The human rights concerns raised by the recognition and enforcement of a foreign penal sanction differ from those raised by the recognition or enforcement of a foreign amnesty. In the case of a foreign penal judgment, the concern is with the human rights of the foreign citizen—his protection as a criminal defendant against the power of the foreign state.

In the case of a foreign amnesty, while the concern for the right of the foreign citizen as a criminal defendant is relevant, there is another human rights concern: the rights of those harmed by the person granted amnesty. The rights of the criminal defendant are less central in the case of a foreign amnesty than a foreign penal judgment. In particular, the concern with a foreign penal judgment centers on the compatibility of the two states' criminal justice systems. Different substantive and procedural provisions, including what acts constitute a criminal offense, and what is the standard of proof required to convict a suspect, may make one state less willing to enforce what in its own system might be considered an unjust law or a judgment arrived at using unjust procedures. In the case of the recognition of a foreign amnesty, however, it is more likely that the substantive law to be applied will be international.\textsuperscript{117} This is not to say that neither international law nor its application may be controversial, but that the tension is not between two states' legal systems. Instead, it is between one state's legal system and the international legal system.\textsuperscript{118}

In addition to these concerns of the states involved, both foreign penal judgments and amnesties raise a more general concern shared by the international community in enforcing criminal justice. With respect to a foreign penal judgment, the concern is that a convicted criminal not escape accountability by fleeing to a foreign jurisdiction. This is generally addressed by extraditing the individual back to the original

\textsuperscript{117} The relevant law could be domestic in the case of an amnesty for an act that does not violate international law but violates the law of the foreign state in which an amnesty recipient is located. I am unaware of any cases involving such a situation and am concerned here more with the legitimacy of amnesties granted for acts that violate international law.

\textsuperscript{118} Of course, the procedural rules to be applied in applying international law are generally those of the forum state, and thus may raise serious concerns by the amnesty-granting state and the amnesty recipient.
With respect to a foreign amnesty, the concern is that those who violate international criminal law do not escape accountability through the illegitimate act of their own state. While transferring the individual back to the original jurisdiction satisfies the shared criminal justice interests of states in the case of a foreign penal judgment, there is no such easy solution in the case of amnesties. If the amnesty is in violation of international law, sending the recipient back to the original jurisdiction that granted the amnesty does not satisfy the requirement of accountability, other than imposing on the recipient violator the sanction of being confined to the territory of the amnesty-granting state. The alternative then is for the state to either prosecute or otherwise hold the recipient accountable itself, or transfer the individual to another state or international entity that will hold the individual accountable.

In fact, the general reluctance to at least recognize, if not enforce, foreign penal judgments has never been absolute. U.S. courts have routinely recognized foreign convictions as past offenses in determining the appropriate sentence for a crime committed in the U.S. In those cases, however, the courts have looked beyond the mere fact of the foreign conviction itself to determine whether the process by which the conviction was awarded met the minimal due process requirements that would have applied if the prosecution occurred in the United States. Immigration courts have also recognized foreign convictions for the purpose of determining whether an alien should be deported from the United States.

The reluctance of a state to enforce or recognize the penal judgments of another state and the parochial justifications for that reluctance have also declined with the increase in international law and cooperation. In


120. Such situations arise in states with multiple offender statutes that do not limit themselves to prior convictions in the U.S. See A. Kenneth Pye, The Effect of Foreign Criminal Judgments within the United States, in INTERNATIONAL CRIMINAL LAW 479, 493 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965).

121. Id.

122. See, e.g., Squires v. INS, 689 F.2d 1276 (6th Cir. 1982) (use of Canadian conviction to find alien deportable); and Brice v. Pickett, 515 F.2d 153 (9th Cir. 1975) (use of Japanese conviction to find alien deportable).
the European community, for example, the penal judgments of one state may, by treaty, be enforced in another state. In addition, the idea that crimes are of purely local concern has given way to laws of international criminal responsibility and universal jurisdiction. The United States, for example, has agreed to recognize the criminal judgments of most states in which the U.S. stations troops.

Both traditional and modern justifications for the non-recognition and non-enforcement of foreign penal judgments do not apply to foreign amnesties. If anything, the human rights-related concerns that justify the non-recognition of penal judgments also justify the non-recognition of a foreign amnesty. Legal doctrines and principles concerning foreign penal judgments that might argue for deference to a foreign amnesty thus have limited applicability to amnesties for gross violations of human rights.

2. Recognition of Non-Penal Acts

Recognition of official acts outside of the criminal and tax areas is governed by judicially-created doctrines (such as the Anglo-American act of state doctrine), comity (in the case of the recognition and enforcement of foreign judgments), and international treaties.

a. Act of State Doctrine

The act of state doctrine provides that a court will not pass judgment on an official act of a foreign sovereign committed within its own territory. It is a doctrine frequently used in the United Kingdom and the United States, the origins of which are traced to an 1848 House of Lords

123. See, e.g., European Convention on the International Validity of Criminal Judgments, supra note 111.


125. See supra note 103.

126. The enforcement of foreign judgments is primarily governed by municipal, and not international, law, with the exception of judgments governed by bilateral or multilateral treaties. Enforcement of a foreign judgment is generally resisted if there is evidence of fraud, if the foreign judgment is contrary to the public policy of the forum, or if the foreign judgment is based on a government claim. See RESTATEMENT (SECOND) CONFLICT OF LAWS, § 98, cmt. h (1989).

decision in the U.K.\textsuperscript{128} and an 1897 Supreme Court case in the U.S.\textsuperscript{129} While mostly present in jurisdictions associated with the Anglo-American legal tradition, the act of state doctrine has been adopted in one form or another by a few other foreign jurisdictions.\textsuperscript{130} Within the United States, its most classic formulation is found in the first two sentences of the Supreme Court's 1897 opinion in \textit{Underhill v. Hernandez}:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.\textsuperscript{131}

The act of state doctrine precludes a claim or defense that relies upon an assertion that a foreign official act was illegal under foreign law.\textsuperscript{132} The doctrine is most often applied in cases involving executive acts, although it has also been raised in cases involving foreign legislation.\textsuperscript{133}


\textsuperscript{131} Underhill, 168 U.S. at 252 (1897); see also Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"). For a British articulation of the sovereign equality justification of the act of state doctrine, see \textit{Salaman v. Secretary of State in Council of India}, 1 K.B. 613, 639 (Eng. C.A. 1906) (Fletcher Moulton, L.J.) ("An act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled or interfered with by municipal courts.").

\textsuperscript{132} See, e.g. Oetjen, 246 U.S. at 303-04 (rejecting on act of state grounds claim that title to property acquired from Mexican government was invalid because the government illegally confiscated the property from its previous owner).

A search of U.S. court decisions yields no cases involving a foreign amnesty in which the act of state doctrine was applied. This result may have more to do with the paucity of decisions regarding foreign amnesties than any concern about the applicability of the act of state doctrine. If applied, the act of state doctrine would result in the recognition and effective enforcement of the foreign amnesty. The important question here, however, is the appropriateness of applying the act of state doctrine to a foreign amnesty. In other words, is the application of the doctrine to a foreign amnesty consistent with the policies underlying the doctrine?  

While there are numerous justifications for the act of state doctrine—and some debate among scholars about which is the most cogent and accurate—there are three justifications that are relevant to the question of foreign amnesties: 1) the inherent powers of sovereign equality and comity among sovereigns; 2) the political, in particular foreign policy, ramifications of such a judgment; and 3) particularly in the United States, domestic separation of power concerns (also known as the political question doctrine, and focused on the political, rather than legal, nature of the judgment at issue). The second and third justifications are often melded together, but they represent two very distinct concerns. The second focuses on what I would call “external” institutional competence: the competence of a court to address disputes in a particular subject matter area, in this case foreign policy. The third focuses on what I would call “internal” institutional competence—the competence of a court to address a particular type of dispute irrespective of the substantive matter at issue—in this case judgments that are essentially political, as opposed to legal, in nature. For example, a court might decline to pass judgment on a foreign act because such a decision would have serious ramifications for the country’s foreign relations, even though there is a clear answer under applicable law. Such a court might reasonably conclude that the political branches are in a better position to assess the risk of such ramifications. On the other hand, a court might decline to pass judgment on a foreign act not because of any foreign policy concerns, but because there are no clear rules of decision that the court can apply to resolve the dispute, making the decision a predominantly political rather than legal one.

The classic statement of the first justification mentioned above for the

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134. The U.S. Supreme Court has explicitly adopted this policy-oriented approach to the application of the act of state doctrine, in effect holding that even if the act of state doctrine by its terms applies to a dispute, if the policies underlying the doctrine are not furthered the court should refrain from its application. See W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990), citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).
act of state doctrine—sovereign equality and comity—is found in the first two sentences from Underhill quoted above. The political ramification concern is reflected in the opinions of numerous federal circuits. The Ninth Circuit, for example, in De Blake v. Republic of Argentina noted that the act of state doctrine “reflects the prudential concern that the courts, if they question the validity of sovereign acts taken by foreign states, may be interfering with the conduct of American foreign policy by the Executive and Congress.” The separation of powers concern is also reflected in the opinions of numerous federal courts, most notably the U.S. Supreme Court in Banco Nacional de Cuba v. Sabbatino. The Court in Sabbatino noted that absent a clear rule of controlling international law, the determination of the validity of a foreign official act is a political, rather than a legal, inquiry for which courts are ill-suited.

Each of these justifications provides some insight into how we might treat the special case of a foreign amnesty. To the extent that principles of sovereign equality and comity are embraced as the primary justifications for the application of the act of state doctrine, and to the extent that such principles are interpreted to require near absolute deference to the official acts of a foreign government, foreign amnesties should be regularly recognized. Even those who identify sovereign equality and comity as the underlying principles of the act of state doctrine recognize that such absolute deference is neither required nor desired. First, such an absolutist position is in tension with other prudential doctrines regarding foreign official acts. As noted above, it is

135. See De Blake v. Argentina, 965 F.2d 699, 707 (9th Cir. 1992); see also Bigio v. Coca-Cola Co., 239 F.3d 440, 452 (2d Cir. 2000) (“[T]he policy concerns underlying the doctrine require that the political branches be preeminent in the realm of foreign relations.”); Grupo Protexa S.A. v. All Am. Marine Slip, 20 F.3d 1224, 1237 (3d Cir. 1994) (act of state doctrine is concerned with “potential institutional conflict between the judiciary and political branches such that a judicial inquiry...could embarrass the political branches in their conduct of foreign affairs.”); Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992) (“The act of state doctrine serves to enhance the ability of the executive branch to engage in the conduct of foreign relations....”); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520 (2d Cir. 1985) (“The policy concerns underlying the [act of state] doctrine focus on the preeminence of the political branches, and particularly the executive, in the conduct of foreign policy.”); United States v. Bank of Nova Scotia, 740 F.2d 817, 831 (11th Cir. 1984) (“The act of state doctrine is primarily designed to avoid impingement by the judiciary upon the conduct of foreign policy by the Executive Branch.”); and Timberlane Lumber Co. v. Bank of America, 549 F.2d 397, 605 (9th Cir. 1976) (act of state doctrine “derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government”).

136. See Sabbatino, 376 U.S. at 432-33 (noting that the act of state doctrine appropriately restricts courts to their traditional role as law interpreters rather than law makers, the latter being appropriately reserved to the executive and legislative branches).
widely accepted that foreign penal and revenue laws, for example, are regularly not enforced. Second, the doctrine has never been applied in the United States to support such an absolutely deferential interpretation. One can see this rejection in 1) dicta in Sabbatino suggesting that deference may be overcome in the face of a clear and applicable rule of international law, 2) the "Sabbatino" Amendment to the Foreign Assistance Act of 1961 directing the courts to abstain from applying the act of state doctrine in most cases involving property expropriation,137 and 3) judicial decisions holding that the doctrine does not apply to official acts that constitute a gross violation of human rights.138

In contrast to the Anglo-American tradition, civil law systems are less reluctant to pass judgment on the official acts of a foreign sovereign, and do so by applying the public policy exception developed in private international law.139 French courts, for example, have held that foreign laws that do not violate international law but are contrary to French public policy will not be given effect.140 This is particularly so in the case of foreign expropriation laws. An important exception to this general rule in France concerns legislation designed to remedy a past illegal act. While French courts generally will not recognize or give effect to foreign acts of expropriation, legislation invalidating title to property granted under a belligerent occupant (and thus granted illegally) has been given effect by a French court.141 Corrective legislation like that recognized by the French court is similar to a corrective amnesty, suggesting that a French court might have little trouble in recognizing at least a corrective amnesty.

b. International Comity

International comity, in addition to providing a justification for the

139. This is the case in France, Germany, Italy, Belgium, and the Netherlands. See OPPENHEIM, supra note 130, at 372 n.6 (citing relevant cases refusing to recognize foreign expropriation laws). All of the cases referred to in Oppenheim applied to foreign legislation that expropriated property within its own territory. The public policy test in private international law is usually reserved for the recognition of foreign judgments.
140. See OPPENHEIM, supra note 130, at 372 n.6, citing, inter alia, Union des Republiques Socialistes Sovietiques v. Intendant Generally, reprinted in 4 ANN. DIG. OF PUB. INT'L L. cases, no. 43, at 67; see also Sabbatino, 376 U.S. at 421 n.21 (noting civil law approach to act of state doctrine in France, Germany, the Netherlands, Greece, Italy, and Japan).
act of state doctrine, is also its own discretionary doctrine used by courts to abstain in cases involving conflicts with foreign official acts. International comity is a doctrine with an elusive pedigree. One commentator has described international comity as "an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."\(^{142}\) It is at base a doctrine for resolving conflicts among multiple assertions of jurisdiction. The classic, if unwieldy, expression of international comity by the U.S. Supreme Court is found in *Hilton v. Guyot*:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is 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.\(^{143}\)

Notwithstanding the court's reference to "legislative, executive, or judicial acts of another nation," comity has generally been applied by U.S. courts in cases involving competing rules of decision (i.e., competing legislative assertions, which is the subject internationally of private international law and domestically of conflicts of law),\(^{144}\) competing assertion of adjudicatory jurisdiction (i.e., competing judicial assertions of competence),\(^{145}\) or a pre-existing foreign judgment (i.e., competing judicial acts).\(^{146}\) A foreign amnesty could be interpreted as fitting within any of these three categories. An amnesty involving a gross violation of human rights, however, might be treated quite differently than other foreign acts. In fact, some U.S. courts have been reluctant in recent years to use the doctrine of international comity to foreclose judicial review of cases that implicate important policies of the domestic, U.S., forum.\(^{147}\) Certainly providing accountability for

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143. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); see also Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555 (1987) ("comity... is a principle under which judicial decisions reflect the systematic value of reciprocal tolerance and goodwill") (Blackmun, J., concurring in part and dissenting in part).

144. See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 582 (1953).


gross violations of human rights would qualify as such an important policy.\textsuperscript{148}

U.S. courts have consistently chipped away at the broad application of international comity. In one of its most recent statements regarding the applicability of comity, the U.S. Supreme Court in \textit{Hartford Fire Insurance Co. v. California} narrowed the application of the doctrine to cases presenting a "true conflict" between domestic and foreign law. The Court found that "true conflict" exists where a person subject to domestic and foreign law cannot comply with both.\textsuperscript{149} In such a case the domestic law gives way to the foreign law. \textit{Hartford Fire} involved both U.K. and U.S. insurance regulatory schemes, and the Court found that U.K. law did not require (although it may have allowed) conduct that violates U.S. law, and thus comity did not require deference to the U.K. law.\textsuperscript{150}

It is hard to see how the analysis of \textit{Hartford Fire} would apply to a foreign amnesty. An amnesty compels a non-action—\emph{not} asserting or enforcing a victim's or society's right to redress for gross violations of human rights. It is not clear under \textit{Hartford Fire} whether this command not to assert a right conflicts with the opportunity to assert such a right in an international or other state's forum. As a matter of policy, given the strong international consensus for some form of accountability for gross violations of human rights and the reluctance of courts to domestically apply comity in cases involving gross violations of human rights, the doctrine of comity should not be used to defer to a foreign amnesty.

What guidance does the practice of recognizing and enforcing foreign judgments provide to our efforts to construct a theory of the legitimacy of amnesties? The law of recognition provides two rules depending on whether the foreign act at issue is criminal or civil. The general reluctance of most states to recognize or enforce foreign penal judgments suggests that foreign amnesties that provide immunity from creditor sued to enforce the obligation of a Costa Rican bank. The bank defended by citing to a Costa Rican law prohibiting Costa Ricans from repaying any external (i.e. foreign) obligations. The Costa Rican law was in response to the country's external debt crisis. While the Second Circuit Court of Appeals initially deferred to the Costa Rican government act and affirmed the dismissal of the suit, on rehearing the court reversed itself, stating that U.S. public policy in enforcing the obligation outweighed international comity. For a brief discussion of the case, see Ramsey, \textit{supra} note 142, at 938.

\textsuperscript{148} See \textit{Wiwa v. Royal Dutch Petroleum}, 226 F.3d 88, 103-06 (2d Cir. 2000) (stating that it is in the interest of the U.S. to provide a forum for holding individuals accountable for violations of the law of nations).


\textsuperscript{150} \textit{Id.} Justice Scalia, writing in dissent in \textit{Hartford Fire}, takes a much less strict view of what constitutes a conflict, as well as a different view of the application of comity analysis to the U.S. antitrust laws at issue in that case. \textit{Id.} at 817-22.
criminal liability should never be recognized. I have, however, noted two developments that undercut this argument. First, the general reluctance to recognize foreign penal judgments has begun to break down among states with strong common interests. While this is still an exception to the general rule, it does suggest that the general rule is under some pressure to change. Second, the policy concerns that support the general rule against recognizing foreign penal judgments do not apply in the case of foreign amnesties. The concern for the rights of the defendant that underlie the policy of not recognizing foreign penal judgments is much less compelling in the case of a foreign amnesty.

The doctrines of act of state and international comity at first blush appear to suggest that foreign amnesties that provide immunity from civil liability should be recognized and given deference. The policies underlying these doctrines, however, and the application of these doctrines in related cases in the U.S., suggest their inapplicability to foreign amnesties. International human rights law is in tension with both doctrines as historically interpreted. If we are to take international human rights law seriously, as I argue we should, individuals should not be able to take advantage of the act of state doctrine and international comity to escape accountability for gross violations of human rights.

B. Recognition of Foreign Judgments and the Doctrine of Non Bis in Idem

The question of whether to recognize a foreign court judgment, touched upon in the general discussion of recognition above, is raised as well under the doctrine of non bis in idem. Although the doctrine of non bis in idem (also referred to as the prohibition against double jeopardy in the U.S.) arises out of municipal and international criminal law, the policies that underlie it are relevant to the question of the legitimacy of foreign amnesties. A question raised by a foreign conviction or acquittal, and by extension a foreign pardon, is whether another state may prosecute an individual for an act that has already been "heard" by another state's courts. The doctrine of non bis in idem is thus most relevant to an assessment of amnesties that are granted through a judicial or quasi-judicial process, such as the South African and Honduran amnesties.

Can a state prosecute an individual for an act even if another state has already prosecuted, convicted, and punished the individual for the same act? This was exactly the issue posed in People v. Papaccio. In upholding the seemingly duplicative New York prosecution of a crime for which the defendant had been convicted and incarcerated for over
eight years in Italy, the court noted that a single act may be a violation of the laws of two governments. In the court’s words, the violation of each law “must be considered as separate and distinct crimes.”

The rule articulated by the New York court in Papaccio is consistent with the doctrine of “dual sovereignty” articulated by the U.S. Supreme Court nine years earlier, which allows subsequent federal, state, and Indian tribe prosecution of the same criminal act in the United States. The U.S. domestic doctrine of dual sovereignty applies only when the sovereigns are in a hierarchical relationship; that is, between the federal and state sovereign. In cases involving concurrent jurisdiction by two equal sovereigns—as is the case when two states are involved—the dual sovereignty rule is less widely used. Thus, in the U.S., states that share a river as a border have concurrent jurisdiction over acts that occur in the river. Rather than resulting in two different prosecutions, however, a state will defer to the other state that first gains custody of the accused.

U.S. practice rejects the dual sovereignty exception to double jeopardy when co-equal sovereigns within a single federal system are involved. Both common law and civil law legal systems have recognized foreign acquittals and convictions of a co-equal foreign sovereign as decisive of an issue.

Contemporary U.S. practice follows Papaccio, and does not treat a prior foreign conviction as a bar to U.S. prosecution for the same criminal act. This would suggest that a foreign amnesty—if equated

151. People v. Papaccio, 251 N.Y.S. 717, 720 (Ct. Gen. Sess. N.Y. County, 1931). Mr. Papaccio was initially prosecuted in Italy for a crime of murder committed in the U.S. Thus the basis for the U.S. court jurisdiction was particularly strong, based as it was on the territoriality principle. Thomas Franck interpreted the U.S. prosecution of Papaccio as an indication of displeasure at the Italian assertion of jurisdiction based on nationality, rather than territory. Thomas Franck, An International Lawyer Looks at the Bartkus Rule, 34 N.Y.U. L. REV. 1096, 1098 (1959).

152. The “separate crimes” theory was first articulated in U.S. v. Lanza, 260 U.S. 377 (1922). For the application of the dual sovereignty rule to Indian tribes, see U.S. v. Wheeler, 435 U.S. 313, 330-32 (1978) (holding that a federal indictment may follow Navajo conviction).

153. See Nielson v. Oregon, 212 U.S. 315, 320 (1909) ("the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of one state cannot be prosecuted for the same offense in the courts of the other.")

154. See Franck, supra note 151, at 1099-1101 (citing to British, Canadian, French, and German examples of courts deferring to foreign prosecutions).

155. See United States v. Benitez, 28 F. Supp. 2d 1361 (S.D. Fla. 1998), aff’d 208 F.3d 1282 (11th Cir. 2000) (previous conviction by a Colombian court for assault against two U.S. DEA agents did not preclude U.S. prosecution); United States v. Rashed, 83 F. Supp. 2d 96 (D.D.C. 1999) (Greek prosecution does not preclude U.S. prosecution on related charges as Greece is a separate sovereign); United States v. Richardson, 580 F.2d 946 (9th Cir. 1978) (Guatemalan charges did not bar U.S. charges); United States v. Martin, 574 F.2d 1359 (5th Cir. 1978) (Bahamian trial is not a bar to U.S. prosecution).
with a foreign penal judgment—would not be a bar to prosecution in the U.S.

In principle, the U.S. does not apply the dual sovereignty exception to cases involving extradition to a foreign jurisdiction. Most extradition treaties include a clause that bars the extradition of an individual for an act that has been the subject of a criminal prosecution in the requested state. In other words, if country A has prosecuted an individual for a criminal offense, country A is barred from extraditing the individual to country B for prosecution of the same offense. In practice, however, extradition usually does occur in such cases as the test used to determine whether an offense is the same is a strict one. Absent such a treaty provision, U.S. courts tend to dismiss claims of double jeopardy or *non bis in idem*, relying on the dual sovereignty doctrine developed under the U.S. Constitution.

The U.S. is not alone in the application of the dual sovereignty exception to the international principle of *non bis in idem*. The European Convention on Human Rights, for example, explicitly adopts the dual sovereignty exception. Moreover, the double jeopardy clause

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156. See, e.g., Sindona v. Grant, 619 F.2d 167, 177 (2d Cir. 1980) (listing extradition treaties of the U.S. that contain a "double jeopardy" clause, and noting that such clauses have become common).

157. See, e.g., *id.* at 177-180 (discussing different tests for determining similarity of domestic and foreign criminal offense); United States v. Rezaq, 899 F. Supp. 697, 702-04 (1995) (finding that Maltese prosecution for murder in connection with an airplane hijacking does not preclude U.S. prosecution for air piracy based on the same events); *Rashed*, 83 F. Supp. 2d at 103-05 (finding that Greek prosecution for terrorist acts concerned different crimes than those of U.S. prosecution). For an example in which a U.S. prosecution was precluded because of an earlier foreign prosecution, see United States v. Jurado-Rodriguez, 907 F. Supp. 568, 571 (E.D.N.Y. 1995) (U.S. indictment for money laundering dismissed where same acts had already been prosecuted in Luxembourg "under a rule of substantive law almost identical to the one the United States relies on.

158. See, e.g., United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996) (prior trial in the Netherlands does not bar U.S. prosecution); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1362 (11th Cir. 1994) (Bahamian prosecution does not preclude U.S. prosecution); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984) (prosecution by a foreign sovereign does not preclude U.S. prosecution); United States v. McRary, 616 F.2d 181, 184 (5th Cir. 1980) (Malaysian conviction does not preclude U.S. prosecution); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (Guatemalan prosecution does not preclude U.S. prosecution); United States v. Martin, 574 F. 2d 1359, 1360 (5th Cir. 1978) (U.S. has rejected doctrine of international double jeopardy); *Rashed*, 83 F. Supp. 2d at 100-01 (dual sovereignty doctrine applies to foreign sovereigns); *Benitez*, 28 F. Supp 2d, at 1364-65 (S.D. Fla. 1998) (absent treaty, the international principle of *non bis in idem* does not apply to U.S. prosecution), *aff'd sub nom.* United States v. Duarte-Acero, 208 F.3d 1282 (11th Cir. 2000); Chukwurah v. United States, 813 F. Supp. 161, 167 (E.D.N.Y. 1993) (double jeopardy only applies where the same sovereign is responsible for successive prosecutions).

of the International Covenant on Civil and Political Rights has been interpreted by its Human Rights Committee as applying only to successive prosecutions by the same sovereign and thus allowing subsequent prosecution of the same crime by different sovereigns.

Despite the general acceptance of the dual sovereignty exception, the two ad hoc international criminal tribunals and the proposed International Criminal Court generally reject its application. The International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.), International Criminal Tribunal for the Territory of Rwanda (I.C.T.R.), and International Criminal Court apply the non bis in idem prohibition unless the prior national prosecution was designed to protect the defendant from accountability.

There are very few cases in the United States concerning the treatment of foreign pardons, and those cases involve the interpretation

liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."


160. International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, art. 14(7), 999 U.N.T.S. 171 (1967) (entered into force Mar. 23, 1976) ("No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.").


162. The I.C.T.Y. statute actually forbids any subsequent prosecution by a national court if the prior I.C.T.Y. prosecution involved an act that constitutes a serious violation of international law, but allows subsequent prosecutions by the I.C.T.Y. if the prior national prosecution 1) characterized the act as an ordinary crime, or 2) was not impartial or independent, or 3) was designed to shield the defendant from international accountability, or 4) was not diligently prosecuted. I.C.T.Y. statute, supra note 59, at art. 10.


164. While the non bis in idem provision in the International Criminal Court statute is worded differently than that found in the I.C.T.Y. and I.C.T.R. statutes, it similarly provides that subsequent prosecutions by the I.C.C. may be allowed if the prior state prosecution was inadequate. See I.C.C. statute, supra note 94 art. 20; see also art. 17 of the I.C.C. statute (covering admissibility, and providing that the I.C.C. will not have jurisdiction if a state has investigated the case and in good faith either prosecuted or declined to prosecute). In the negotiations for the creation of the I.C.C., both amnesty and pardon were rejected as providing a non bis in idem defense. Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. 1, Proceedings of the Preparatory Committee during March-April, and August, 1996, U.N. GAOR, 51st Sess., Supp. No. 22, para. 174, at 40, U.N. Doc. A/51/22 (noting proposal that non bis in idem should include amnesty); cf. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, art. 19, U.N. Doc. A/CONF/183/2/Add.1 (1988) (unadopted draft article providing that non bis in idem would not apply in cases of pardon and other suspension of legal enforcement).
of U.S. immigration law concerning deportation and exclusion. The issue is whether a foreign pardon issued with respect to a foreign conviction for a crime of moral turpitude is a bar to entry or basis for deportation. Under U.S. immigration law, individuals who have been convicted of a crime of moral turpitude are deportable and excludable. The overwhelming authority is that foreign pardons are not recognized for purposes of U.S. immigration law, and thus an individual who was convicted of a crime of moral turpitude in a foreign country for which a foreign pardon has been granted is still deportable.\textsuperscript{165} In contrast, U.S. courts, including immigration courts, have recognized and given effect to domestic pardons and found individuals not deportable even though they had previously been convicted of a crime of moral turpitude.\textsuperscript{166} In one of the more interesting fact patterns involving a pardon, the Board of Immigration Appeals gave effect to a general pardon and amnesty issued by the U.S. High Commissioner for Germany in 1955 as it applied to the conviction of a native of the Soviet Union, then stateless and resident in the U.S., for a conviction under the German Criminal Code of the crime of abortion in occupied Germany.\textsuperscript{167}

Questions arise as to how amnesties fit within the prohibition against double jeopardy and the dual sovereignty exception. Should a foreign

\textsuperscript{165} See Kent v. INS, 28 F.3d 113 (10th Cir. 1994) (unpublished table decision) (interpreting immigration law to give effect only to pardons issued by the President of the United States or a state governor, and thus denying foreign pardon for drug conviction); Mullen-Cofee v. INS, 976 F.2d 1375, 1377 (11th Cir. 1992) (denying effect of Canadian pardon for narcotics-related conviction); Sohaiby v. Savoretti, 195 F. 2d 139 (5th Cir. 1952) (denying effect of Cuban pardon for conviction of prostitution); Weedin v. Hempel, 28 F.2d 603 (9th Cir. 1928) (denying effect of German pardon for embezzlement); Palermo v. Smith, 17 F.2d 534 (2d Cir. 1927) (denying effect of Italian pardon for murder); Zgodka v. Holland, 184 F. Supp. 847 (E.D. Pa. 1960) (denying effect of German pardon, or expunction, of German conviction of simple larceny); Matter of B\textsuperscript{7} I. & N. 166 (B.I.A. 1956) (denying effect of Italian pardon for adultery); Matter of G\textsuperscript{7}, 5 I. & N. Dec. 129 (B.I.A. 1953) (denying effect of Italian pardon for Italian theft conviction). There is at least one case in which the Board of Immigration Appeals did give effect to a foreign pardon for purposes of annulling the immigration effect of a foreign conviction of a crime of moral turpitude, but the holding of that opinion was subsequently rejected. See In re Matter of C\textsuperscript{8}, A-7279638 (B.I.A. 1950) (recognizing automatic Italian pardon for adultery conviction and thus finding alien not deportable), modified by In re Matter of G\textsuperscript{8}, 5 I. & N. Dec. 129 (B.I.A. 1953) (rejecting recognition of Italian pardon for Italian theft conviction).

\textsuperscript{166} See United States ex rel. Forino v. Garfinkel, 166 F.2d 887 (3d Cir. 1948) (stating that a pardon, if issued by the State of Pennsylvania, would be effective in a deportation proceeding to annul a conviction for a crime involving moral turpitude); Perkins v. U.S. ex rel. Malesevic, 99 F.2d 255 (3d Cir. 1938) (recognizing pardon issued by State of Pennsylvania as effective in a deportation proceeding to annul a conviction for a crime involving moral turpitude).

\textsuperscript{167} Matter of K\textsuperscript{9}, 9 I & N Dec. 336 (B.I.A. 1961). The general pardon and amnesty applied to all persons convicted prior to January 1, 1950 for offenses other than war crimes in a U.S. military court, provided the sentence was for less than six months in prison or a fine of less than 1,000 Deutsche marks.
amnesty be treated like a foreign conviction, acquittal or pardon? It is only recently that courts have been confronted with the question of what legal effect to give to a foreign amnesty. The Spanish cases concerning the prosecution of Pinochet provide one of the few examples in which the recognition of a foreign amnesty has been raised. While Spanish law appears to prohibit the prosecution of an individual who is the beneficiary of certain foreign pardons, the Spanish courts interpreted the Chilean amnesty as the equivalent of a “standard acquittal for reason of political convenience,” and thus not a bar to Spanish prosecution.\(^{168}\)

If one were to adopt the dual sovereignty exception to the prohibition against double jeopardy, then a foreign amnesty should not provide any more of a barrier to subsequent prosecution than a foreign conviction or acquittal.\(^{169}\) Assuming the act for which amnesty is granted is also considered an offense against the forum sovereign (as is likely with gross violations of human rights), the doctrine of dual sovereignty provides a justification for a foreign prosecution. It is thus unimportant whether a foreign amnesty is considered similar to a foreign conviction or acquittal, since in either case a subsequent prosecution is allowed.

If one were to adopt the emerging international law rule that is more deferential to foreign proceedings, the same question arises concerning whether a foreign amnesty is similar to a foreign conviction or acquittal. In this case, however, the answer to this question takes on great importance. If we adopt the international rule as articulated by the statute of the International Criminal Court, a foreign amnesty should be considered legitimate and thus enforced so long as it is not designed to shield the individual from accountability.

Under the dual sovereignty exception, all types of amnesties fail to protect an individual from subsequent prosecution. Under the emerging international rule, accountable and possibly compromise amnesties would provide such protection.

C. Refugee Law, Asylum, and Persecuted Persecutors

The third category of analogous law highlights the conflict between different strands of international human rights law: the principles of accountability under international criminal law, and protection from discriminatory persecution under international refugee, asylum, and


\(^{169}\) This is particularly so in the case of an amnesic amnesty, where the truth and accountability benefits of a conviction or acquittal are completely absent.
extradition law. Under international refugee law, an individual is entitled to protection from being returned to a country where she has a well-founded fear of being persecuted on account of her race, gender, or other status, or on account of her beliefs or opinions. There is an important, and surprisingly non-controversial, exception to this general rule. If there are "serious reasons for considering" that an individual has been involved with, among other things, war crimes or crimes against humanity, that individual may not be protected under the International Refugee Convention. In other words, even if the individual has demonstrated a well-founded fear of persecution if returned to his country of origin, that individual may not take advantage of the protection provided by refugee law. Furthermore, under most domestic laws, the individual will not be eligible for the protective status of asylum. Under U.S. law, for example, an alien who the Attorney General determines participated in the persecution of other persons may be returned to a country even if the Attorney General believes the alien's life or freedom in that country would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

From the point of view of an individual state, denying refugee status to such individuals is justified on two grounds: first, such an individual may prove to be socially destructive if allowed to remain within the country; and second, a state may not wish to provide a safe haven to, and thus in any way condone, the violations of an international criminal. The first justification is premised on the assumption that past wrongful


171. U.S. law prohibits the benefits of refugee status and political asylum to persons involved in the persecution of others. See 8 U.S.C. § 1101(a)(42) (2000) (excluding from refugee protection under U.S. law "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion"); 8 U.S.C. § 1158(b)(2)(A)(i) (2000) (excluding from eligibility for asylum in the U.S. those who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion").


173. For a discussion of asylum state safety as the purpose of these provisions, see GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 101-04 (2d ed. 1996).
activity is a strong predictor of future wrongful behavior.\textsuperscript{174} From the international point of view, it is hard to discern a principled reason for collapsing past wrongful activity with current legitimate fears. The likely justification is one of expediency. Ideally, one would want to provide some protection for such an individual from the threatened persecution, while at the same time prosecuting or otherwise holding him accountable for the alleged crimes. With the permanent establishment of the International Criminal Court, the options for addressing this problem at the international level will change, but at present, the only alternatives open to a state are to prosecute or extradite to a third state that will prosecute and not persecute.\textsuperscript{175}

There are thus limits to the otherwise general protections afforded under international refugee law. Denying refugee status based on one of these exceptions is a conscious decision not to protect an individual from persecution. In other words, under international refugee law, the principle of holding accountable perpetrators of severe and gross violations of human rights outweighs the normally strong principle of protection.\textsuperscript{176} Yet this punishment does not take the form of a criminal trial, with all the minimal due process protections required by international law; instead, the punishment is to return an individual to a place where he is likely to be persecuted in violation of international law. The return of an individual to a place where he is likely to be persecuted in violation of international law is a far more serious consequence than any restriction, including denial, we might put on a state's ability to grant amnesty.

If we do not feel strongly enough—morally, ethically, or legally—to protect such international criminals from illegal persecution,\textsuperscript{177} it should be no surprise if we decide not to protect such individuals from legal

\textsuperscript{174} Under U.S. law, the current threat posed by an alien is sufficient to justify deportation regardless of whether the alien was previously involved in a war crime or crime against humanity, 8 U.S.C. § 1231(b)(3)(B)(ii)(2002). The Refugee Convention provides separately for a state's ability to deport dangerous refugees. See Refugee Convention, supra note 170, at arts. 32 and 33(2).

\textsuperscript{175} Neither the Refugee Convention nor U.S. implementing law require that an individual excluded under article 1(F) be prosecuted by the deporting state or extradited for prosecution to a state willing to prosecute or to an international criminal court. Refugee Convention, supra note 170, at art. 1(F); 8 U.S.C. 1158(b)(2).


\textsuperscript{177} But see Implementation of the Torture Convention in Extradition Cases, 64 Fed. Reg. 9435 (Department of State, Feb. 26, 1999) (allowing withholding of extradition if there is a risk of torture).
processes of accountability. Limiting, or denying, amnesties will only have the effect of exposing an individual to legally appropriate mechanisms of accountability with all of the applicable due process and other protections provided by international law—a far less severe result than failing to protect an individual from persecution allowed by Article 1(F) of the Refugee Convention.

D. Extradition Law: The Political Offense Exception

Extradition law provides a mechanism by which one state (the “requesting state”) may request another state (the “requested state”) to transfer a suspect for prosecution in the requesting state. While extradition law is governed almost exclusively by bilateral treaties between states, there are two basic principles that are found in almost all extradition treaties: the requirement of dual criminality, and the political offense exception. Both doctrines provide safeguards to protect a state from participating in an illegitimate prosecution. The dual criminality requirement ensures that a state will not be required to extradite an individual for an act which, if committed in the requested state, would not constitute a crime. The political offense exception allows a state to refuse extradition if the act upon which the request is based is political.

Each of these requirements provides a possible approach to the question of a foreign amnesty. Using the dual criminality requirement as an analogy, one might argue that an amnesty will be recognized and enforced only if such an amnesty would be legal under the law of the forum. To the extent the municipal legal system of the forum looks to international law, principles of international law regarding amnesties would apply to such an inquiry. Such an approach, however, would rely more heavily on municipal than international law, and would create an international system where the same amnesty might provide protection in one state but not in another.

The political offense exception provides useful principles to

178. Treaties of extradition between the Soviet Union and Eastern European states did not make provision for a political offense exception; nor did extradition between members of the Commonwealth under the Fugitive Offenders Act of 1881. See OPPENHEIM, supra note 130, at 963 n.4.

179. The problems raised by such a municipal law-based approach are no different than those raised by a system of extradition law based primarily on a bilateral treaty regime. Such an approach is politically more acceptable where there is a lack of consensus on, in the case of extradition law, what constitutes a legitimate criminal offense, and in amnesty law, what constitutes a legitimate amnesty. While Europe and the Americas have a regional extradition treaty, both recognize the importance of the double criminality requirement to the extradition regime.
determine the legitimacy of amnesties.° Most amnesties—and certainly the most controversial ones that apply to gross violations of human rights—are justified, sometimes explicitly, as applying only to political, and not "commonly criminal," acts. Assuming that we accept the distinction between political and common criminal violence, one might use the definition of political offense from the more developed jurisprudence of extradition law to judge the legitimacy of a particular amnesty. In other words, if we can discern a generally accepted and defensible definition of political offense in extradition law, we might conclude that an amnesty is legitimate only if the acts it covers would qualify as a political offense under such a definition.

The political offense exception was developed after the French Revolution in response to the support of liberal democratic revolutions and revolutionaries by, among others, the United Kingdom, Switzerland, Belgium, France, and the United States.° The policies behind the political offense exception in extradition law are closely tied to those supporting asylum under refugee law. Both provide protection to individuals involved in foreign political activities. The political offense exception provides such an individual with a defense against a foreign state seeking his prosecution; asylum, if granted, provides such an individual with the right not to be deported from a host country (in effect, a defense against an expulsion demand by the host country). In addition to this protective function, the political offense exception is justified as shielding from criminal liability individuals who may have committed acts without the mens rea required by criminal law.

In trying to determine whether an offense qualifies as political or not, there are three basic approaches. The first focuses on the nature of the act itself; that is, identifying certain acts as purely political regardless of the context or motivation of the actor (an objective act approach). The second focuses on the context in which the act was committed; that is, identifying any act committed in the context of a political uprising or conflict as political (an objective context approach). Finally, the third

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180. It is not clear whether the political offense exception has garnered enough state support and clear uniformity of definition to rise to the level of customary international law. As recently as 1992 the editors of Oppenheim's International Law continued to assert that there was "probably no rule of customary international law" which prohibits the extradition of individuals accused of a political offense. OPPENHEIM, supra note 130, at 963, §422.


182. Both the protective and mens rea or scienter justifications for the political offense exception have been cited in U.S. courts. See, e.g., In re Gonzalez, 217 F. Supp. 717, 720 n.4 (S.D.N.Y. 1963).
approach focuses on the motivation of the actor; that is, identifying any act committed with a political conviction as political (a subjective motive approach). The first two objective tests are found mostly in common law systems, while the third subjective test is commonly found in civil law systems. 183

These three approaches to defining a political offense are stated in the extreme, and there is no court or institution that accepts any of them in its pure form. Instead, courts have developed three general tests to determine if an offense qualifies for the exception: the “pure” political act test; the “predominance” test; and the “incidence” test. Only acts that are defined as crimes against the state—such as sedition and treason—qualify as a political offense under the pure political test. 184 The predominance test identifies both the political and common criminal aspects of an offense, and asks whether the political aspect outweighs the common criminal. 185 To weigh the balance, the predominance test looks at the accused’s motivation, the circumstances surrounding the commission of the crime, and the proportionality between the political objectives pursued and the means employed. 186 The incidence test looks at the relationship between the act in question and an ongoing conflict. 187 The narrowest version of the test requires that the act be part of a power struggle to gain control of the state. Thus, the mere fact that an act is committed with a motive to further some political cause is not enough to make it political for purposes of the exception. The British courts have adopted this narrow approach. 188

183. See van den Wijngaert, supra note 181, at 109.
184. The pure political test is sometimes referred to as the French test. For an example of the French test in practice, see In re Giovanni Gatti, Ct. of App, Grenoble, [1947] ANN. DIG. 145. Actual French practice has in fact moved away from the pure political test. See, e.g., Thomas E. Carbonneau, The Political Offense Exception as Applied in French Cases Dealing with the Extradition of Terrorists: The Quest for an Appropriate Doctrinal Analysis Revisited, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 209 (MICH. Y.B. OF INT’L LEGAL STUD. 1983).
185. This test is sometimes referred to as the Swiss test. For an example of its use, see In re Vogt, Fed. Ct. Switz., [1923–24] ANN. DIG. 285 (Case No. 165). See also Federal Law on Extradition to Foreign States, 29 AM. J. INT’L L. 420, 423 (includes unofficial translation of In re Vogt).
186. Under the proportionality part of the test, the more extreme the means used the stronger the political justification must be. Thus in Ktir v. Ministere Public Federal, Fed. Tribunal Switz., 34 I.L.R. 143, 145 (1961), Switzerland agreed to extradite an Algerian to France for murder even though the accused clearly had a political motive, noting that for murder to qualify under the political offense exception it must be “the sole means of attaining the political aim.” Id.
187. This test is sometimes referred to as the Anglo-American test, and is based on a British extradition case, In re Castioni, 1 Q.B. 149 (1891).
188. The incidence test was announced in In re Castioni, the first case in the UK addressing the political offense exception. Id. Under the British interpretation of this definition an anarchist was denied protection from extradition. Even though the act was clearly committed with a
The U.S. courts have interpreted the incidence test to provide protection for any act committed in connection with a political uprising or disturbance. In its most extreme form, the U.S. incidence test defers to the political and strategic judgments of the political party, concluding that an act or offense will qualify as political so long as a political organization endorses it. This definition “solves” the problem of determining whether an act is inherently political by looking solely at the existence or not of a broader uprising or disturbance. This approach has been criticized as being both under- and over-inclusive. The U.S. approach is over-inclusive in that it applies to acts that otherwise would be considered purely criminal but are labeled political solely because their occurrence coincided with a political uprising. The most controversial case of this nature involved the refusal to extradite a Nazi war criminal because he killed civilians during a political conflict, World War II. The U.S. approach is under-inclusive in that it does not apply to clearly political acts that do not arise out of or are not accompanied by a larger political disturbance or conflict.

The policies underlying the political offense exception are substantively similar to those underlying some amnesties. In fact, the criteria used in South Africa to determine whether to grant amnesty are based primarily on a survey of extradition law undertaken by the former political motive, the British court reasoned that anarchists were against all governments and thus were not trying to replace one government with another. See In re Meunier, 2 Q.B. 415 (1894). In an exhaustive study of the political offense exception, Christine van den Wijngaert identifies the “cleanest" articulation of the incidence approach in an opinion by Viscount Radcliffe in the House of Lords: “In my opinion the idea that lies behind the phrase ‘offense of a political character’ is that the fugitive is at odds with the State that applies for his extradition on some issue connected with the political control or government of the country.” Regina v. Governor of Brixton Prison, ex parte Schtraks, 33 I.L.R. 319 (1967), quoted in VAN DEN WJNGAERT, supra note 181, at 113.

189. See, e.g., Garcia-Guillen v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971) (“A political offense...must involve an ‘uprising’ or some other violent political disturbance.”).
190. See Quinn v. Robinson, 783 F. 2d 776, 810 (9th Cir. 1986) (“It is for the revolutionaries, not the courts, to determine what tactics may help further their chances of bringing down or changing the government. All that the courts should do is determine whether the conduct is related to or connected with the insurgent activity.”).
192. Karadzole v. Artukovic, 247 F. 2d 198 (9th Cir. 1957), vacated, 355 U.S. 393 (1958), surrender denied on remand sub nom., U.S. v. Artukovic, 170 F. Supp. 383 (S.D. Cal. 1959). The over-inclusiveness of the U.S. incidence is tempered by the fact that it does not apply to “commonly criminal” crimes that have no political motive or character. As one court has said, the political offense exception does not apply “to common crimes connected but tenuously to a political disturbance, as distinguished from criminal acts 'casually or ideologically related to [an] uprising.'” Koskotas v. Roche, 931 F.2d 169, 171-72 (1st Cir. 1991) (quoting Quinn v. Robinson, 783 F.2d 776, 809 (9th Cir. 1986)).
President of the European Commission of Human Rights for the United Nations. For example, under the South African amnesty of 1995, an applicant for amnesty must establish that he was a member of a "publicly known" political organization and that he had authority from that organization to commit the act for which he is seeking amnesty. The South African parliament thus adopted a more objective definition of "political" that focuses on the existence and authority of established political organizations.

None of these definitions of the political offense exception directly addresses the question of whether certain acts are so heinous that they cannot qualify as a political offense. An emerging international consensus suggests, however, that there is a class of offenses to which the political offense exception cannot apply regardless of the political context. The few courts that have prosecuted individuals accused of violations of international criminal law have suggested, sometimes quite explicitly, that the acts for which the accused is charged are beyond the scope of doctrines like the political offense exception. The I.C.T.Y. provides that states are to surrender an accused person to its

193. In fact the Norgaard Principles, developed by and named for Carl Aage Norgaard, were developed to facilitate the release of political prisoners in Namibia during that country's transition to independence.

194. The South African amnesty in fact does not speak of political acts, but of acts associated with a political objective. See Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa) § 20(1)(b).

195. In fact the court in Artukovic suggests that as long as there is a political context, any act may be considered a political offense no matter how heinous. 170 F. Supp. at 393. But see In re Doherty, 599 F. Supp. 270, 274 (S.D.N.Y. 1984):

[N]o act [should] be regarded as political where the nature of the act is such as to be violative of international law, and inconsistent with international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the Treaty.

Id. Ahmad v. Wigen, 726 F. Supp. 389, 407 (E.D.N.Y. 1989) ("Were a civilian to detonate a bomb in a peaceful marketplace or rake peaceful shoppers with a machine gun to make a political point, this and most civilized countries would not consider such indiscriminate violence an unpunishable political act.").

196. See, e.g., the statement of the Chambre d'accusation regarding the claim that it did not have jurisdiction over Klaus Barbie since the latter had been kidnapped and brought to France for trial:

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


jurisdiction regardless of "any legal impediment to the surrender or transfer of the accused to the Tribunal which may exist under the national law or extradition treaties of the [s]tate concerned." Most states have cooperated, passing legislation for the surrender of suspects to the Tribunals that do not include provisions for double criminality, political offenses, prescription, or other limitations that may be found in an extradition treaty. The provisions in the statute for the International Criminal Court providing for surrender also do not include a political offense exception.

Extradition law appears to suggest that we should look to the political nature of the act for which amnesty is granted to determine whether the amnesty is legitimate. The rejection within the U.S. of the Artukovic rule that even a crime against humanity can qualify as a political offense and thus be exempt from extradition, along with recent codifications of international criminal law reflecting the same sentiment, suggest, however, that certain heinous acts should not be eligible for amnesty even if they would otherwise qualify as a political act.

E. Procedural and Jurisdictional Barriers to Accountability: Immunities, Statutes of Limitation, and Laches

Amnesties are not the only legal mechanism for pausing or extinguishing rights; rather, they are one of many such mechanisms found in every recorded legal system. This is, at some level, not surprising. All human institutions are governed by principles that are subject to exceptions. We can distinguish between unprincipled exceptions—ad hoc application of favoritism, for example—and principled exceptions. The killing of an individual in self-defense is not considered murder; that is, self-defense is a principled exception to the general prohibition against killing. Needless to say, such principled exceptions are not immune from controversy, nor are they always accepted as legitimate. State-authorized killing—through armed conflict or capital punishment, for example—is one such area where principled exceptions are contested. Principled exceptions are found in international human rights law as well. For example, some important rights recognized under international law may be "derogated from" in cases of extreme social stress.

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199. See Committee on Extradition and Human Rights, supra note 197, at 150.
200. See ICCPR, supra note 160, art. 4 (noting provisions from which derogation is not permitted even in cases of national emergency).
The challenge presented by amnesties is not whether principled rules regarding justice and accountability may give way to principled exceptions delaying or preventing accountability, but whether amnesties are consistent with such exceptions, or are an illegitimate extension of such exceptions.

While amnesties are the most contentious exception to individual accountability, they are by no means the only such exception. Some of these exceptions are not only uncontroversial, but also considered central to a legitimate legal system (e.g., statutes of limitation and the equitable doctrine of laches). Some are becoming more controversial, particularly immunities provided to sovereigns, heads of state, and, to a lesser extent, diplomats.

A more detailed discussion of amnesties within the context of these other barriers to accountability may lead us to one of three conclusions. First, amnesties are not significantly different than these other barriers, and the legitimacy of the latter satisfies us as to the legitimacy of the former. Second, amnesties are radically different than these other barriers, and the legitimacy of the latter emphasizes the illegitimacy of the former. Third, amnesties differ in degree, but not in kind, to these other barriers, and the extreme nature of the former highlights the fundamental illegitimacy of both. I will not attempt a discussion here sufficient to do justice to these three possibilities. Instead, I briefly explore the justifications of these other barriers to accountability and test these justifications against the application of amnesties.

Impediments to legal accountability can be broken down into two categories: 1) those that provide protection to certain individuals because of the office they occupy (status immunities); and 2) those that are central to the functioning of a fair and efficient judicial system (prudential barriers).

The first category of barriers—immunity that attaches to particular individuals because of the office they occupy—is based on the principle of sovereignty. The principle that one state shall not sit in judgment over the acts of another state is still a persistent characteristic of sovereignty. Thus, states and their instrumentalities generally enjoy immunity from legal process and accountability within the jurisdiction of a foreign state. Separate from this general sovereign immunity, and more relevant to the question of amnesties, is the more particular

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immunity provided to a head of state. This head of state immunity is historically based on the assumption that the head of state and sovereign are one.\textsuperscript{202} Such immunity has been justified on a number of grounds, including the nature and dignity of the office, comity, mutual respect among nations, and the stability of international relations and diplomacy.\textsuperscript{203}

While the principle of sovereign immunity is still strong today, the extent of the immunity has become increasingly contentious. The application of sovereign protection to the person holding the position of head of state—as opposed to the state itself—has contributed to this controversy. The Allied Powers at Nuremberg and Tokyo asserted that an individual responsible for certain crimes could be held accountable for such crimes regardless of the official status of the person responsible. While this assertion was clearly applied in cases of inferior government and military officers, it was not applied to the relevant heads of state. In the case of Germany, this was not a principled decision concerning authority and immunity, but determined by Hitler’s suicide. The Japanese Emperor was not prosecuted at the Tokyo tribunal because General McArthur concluded that the emperor was necessary to ensure the rehabilitation of Japanese society. The first major human rights convention drafted after World War II, the Genocide Convention, explicitly does not provide immunity to a head of state.\textsuperscript{204} State courts in the U.S. and U.K. have denied such immunity to former heads of

\begin{itemize}
  \item \textsuperscript{202} "Head of state immunity, like foreign sovereign immunity, is premised on the concept that a state and its ruler are one for purposes of immunity." Lafontant v. Aristide, 844 F. Supp. 128, 132 (E.D.N.Y. 1994).
  \item \textsuperscript{203} See, e.g., Lafontant, 844 F. Supp. at 132 (mentioning each of these justifications); The Schooner Exchange v. M’Faddon, 11 U.S. 116, 137-38 (1812) (head of state immunity based on the dignity of the office and nation, and on the common interest in mutual intercourse among nations); In re Doe, 860 F.2d 40, 45 (2d Cir. 1988) (head of state immunity based on mutual respect and comity).

  \item \textsuperscript{204} Genocide Convention, supra note 28, at art. IV ("Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.") (emphasis added).
\end{itemize}
and the prosecutor for the ad hoc international criminal tribunal for the former Yugoslavia indicted a sitting head of state, indicating the prosecutor's belief that such immunity does not apply to a sitting head of state accused of certain international criminal violations. Finally, the recently drafted statute of the International Criminal Court also removes the immunity traditionally afforded to a head of state. The International Court of Justice, however, seems to have missed this trend in a recent decision reinforcing the traditional absolute immunities that attach to a foreign state official. The I.C.J. held that a foreign minister enjoys full immunity from criminal prosecution by the courts of a foreign state while he holds that office, even for acts that constitute an international criminal violation.

The presence of sovereign and head of state immunity is compatible with a strict prohibition against amnesties. These special immunities can be justified as a limited exception to the general rule that certain crimes should not go unpunished. Such an exception can be justified as follows: if such immunity is not recognized, dictators and other human rights violators will not peacefully give up power, thus increasing the incidence of human rights violations. Yet, while the effect of holding heads of state accountable may in the short run result in an increased reluctance of some human rights abusers to give up power willfully, the effect of not holding such leaders accountable creates an incentive for human rights abusers to aspire to become head of state so as to be immune from legal accountability for their worst acts. The justification for such an immunity is thus open to serious question because, as an


207. I.C.C. statute, supra note 94, at art. 27(1) (“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.”) (emphasis added).

208. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), para. 54, available at http://www.icj-cij.org (last visited Aug. 25, 2002). The Court does note that its decision is limited to those cases in which the courts of one state are attempting to hold the official of another state accountable for violations of international criminal law, and not cases involving the courts of the official’s own state, nor cases involving an international tribunal. Id. at ¶ 61.
empirical matter, it may serve to increase rather than diminish human rights abuses. The emerging trend illustrated by the international criminal tribunals suggests that the important policies justifying state immunities are giving way to those that support increased accountability.

Arguments similar to those made with respect to state immunities are made with respect to amnesties. Some argue that amnesties encourage, and in some cases are crucial to, peaceful transitions ending human rights violative regimes. Others argue that amnesties foster impunity and encourage future human rights violations. The contentious nature of head of state immunity and its growing disfavor suggests that the policies underlying its creation do not provide an adequate justification for the use of amnesties.

The second category of barriers to legal accountability is less troubling than the first, and consists of statutes of limitation and the equitable doctrine of laches. Statutes of limitation, which protect an individual from liability if a sufficient period of time has passed, have been justified on numerous grounds, including the importance of "quieting title" or settling expectations, and minimizing distortion of facts due to the passage of time. One early commentator delineated the following additional justifications for criminal statutes of limitation:

(1) the deepseated desire to spare the innocent from the ordeal and ignominy of prosecution and possibly conviction at a time when the presentation of the facts is inevitably less than full, and perhaps distorted; (2) a realization of the extreme inconvenience and cost of impelling the accumulation of records over extended periods of time; (3) the degree to which the secondary deterrence factor decreases when a prosecution is instituted long after the commission of an offense; (4) the reduced need for institutional reformation of persons whose only provable crime occurred in the distant past; and (5) the diminished public clamor for retribution when an offender is not apprehended until long after the crime.

210. See Note, Conspiracy, Concealment and the Statute of Limitations, 70 YALE L.J. 1311, 1334 (1961) (noting these two justifications for civil and criminal statutes of limitation); see also WILLIAM D. FERGUSON, THE STATUTES OF LIMITATION SAVINGS STATUTES 7-47 (1978) (concluding after detailed historical discussion that purposes of statutes of limitations include the protection of defendants against loss of witnesses and evidence, and defendant's acts taken in reasonable reliance on plaintiff's inaction).
211. See Conspiracy, Concealment, and the Statute of Limitations, supra note 210, at 1335.
Amnesties are quite different from statutes of limitation. First, amnesties generally take effect immediately after an offense has been committed, rather than after a set period of time.212 Thus, justifications based upon stale evidence, protection of innocent defendants, cost of record keeping, secondary deterrence, rehabilitation, and retribution, do not apply.213 All of these justifications are premised on effects that are assumed to occur with the passage of time. In fact, for crimes that constitute gross violations of human rights there is ample anecdotal evidence that the passage of time does not have the effect predicted by these justifications. Certainly the public clamor for retribution appears to be strong in cases involving violations that occurred as long as fifty years ago, as the contemporary criminal and civil litigation surrounding violations at the time of World War II demonstrates.

The equitable doctrine of laches is similar to the legal doctrine of statutes of limitation. Both prevent a party from asserting his or her rights after a sufficient amount of time has passed. Laches precludes the assertion of an equitable right if the delay in asserting that right works a disadvantage on another.214 Statutes of limitation are concerned with the fact of delay, while laches is concerned with the effect of delay. The former is thus a bright line rule: if the limitations period has passed, the right has extinguished regardless of the consequences. In practice, however, laches only serves to extinguish a right earlier than the comparable limitations period. Thus, laches effectively shortens a limitations period if the general conditions that provide the rationale for

This list expands upon one of the few early official statements on the purposes of statutes of limitation promulgated by the American Law Institutes. See MODEL PENAL CODE (Tentative Draft No. 5, 1956) § 1.07 (noting the following rationales for criminal statutes of limitation: desirability of basing prosecution upon fresh evidence; likelihood that with passage of time offender has reformed, diminishing need for criminal sanction; likelihood that with passage of time the retributive impulse of the community has diminished; and “to lessen the possibility of blackmail based on a threat to prosecute or disclose evidence to enforcement officials”). The same reasoning is incorporated in the more recent MODEL PENAL CODE § 1.06 (1985).

212. But see Argentina’s “Full Stop Law”, Law No. 23492 (Dec. 23, 1986), reprinted in 3 TRANSITIONAL JUSTICE, supra note 17, at 505, providing an effective amnesty after an admittedly short period of time.

213. This is exactly the argument the Supreme Court of Argentina made in striking down the Argentinean Full Stop Law. The Full Stop Law provided a small window of opportunity in which prosecutions for violations could be brought. The Argentinean court discussed the purposes and policies underlying statutes of limitation to conclude that the Full Stop Law was effectively an amnesty and not a statute of limitations. See Resolución del Cavallo, supra note 16, at § v(A).

214. See HENRY L. McCLOY, HANDBOOK ON THE PRINCIPLE OF EQUITY 71 (2d ed. 1948) (“Where a party has unreasonably delayed the assertion of an equitable claim until the other party has acted, or the circumstances have changed...result[ing] in prejudice because of the delay, equity will hold the party claiming the right to be guilty of laches, and will deny relief to him.”).
statutes of limitation manifest themselves prior to the end of the
limitations period. In other words, if the justifications for the use of
statutes of limitation generally—such as stale evidence, fairness to
others, settled expectations—manifest themselves prior to the passage
of the limitations period, then the assertion of the rights are barred. The
doctrine of laches thus provides no additional justification that might
assist us in evaluating amnesties.

Amnesties in practice appear to accomplish the opposite of statutes of
limitation and laches. The latter provide a window of opportunity for
parties to assert their rights, and then foreclose those rights if they are
not timely asserted. Amnesties preclude the assertion of rights
immediately. While their intention is to forever preclude such an
assertion, in practice, many amnesties appear to only postpone the
assertion of rights. The Argentinean and Chilean amnesties, for
example, which in their immediate aftermath effectively foreclosed any
assertion of rights against their beneficiaries, have recently given way to
the assertion of such rights. Contrary to the policy rationales supporting
statutes of limitation and laches, the rationale supporting these
amnesties appears to be that the immediate assertion of rights may be
fraught with dangers, which recede with the passage of time. These
amnesties thus become the equivalent of reverse statutes of limitation;
that is, they delay the right to bring a claim until an appropriate period
of time has passed.

There is one last important point about statutes of limitation that is
relevant to the particular types of amnesties with which I am concerned.
Almost every jurisdiction that adopts statutes of limitation precludes
their application to the crime of murder. The early justification for this
exception was two-fold: acts of murder are assumed to present obstacles
to prompt discovery of evidence, and are assumed to have “long
continued impact on the sense of general security of the community.”215
Both of these phenomena exist in the case of gross violations of human
rights as well: evidentiary obstacles are high since the perpetrator is
often a government official with the power to cover up his crime and
thwart any attempt at an investigation. Further, the impact of such
violations on the general security of the community is high, especially
in the standard case involving state officials as perpetrators. In fact,
many states statutorily provide that no limitation applies to crimes
against humanity and war crimes,216 reflecting a similar sentiment in

215. Model Penal Code § 1.07 (Tentative Draft No. 5, 1956); see also Model Penal
Code § 1.06, cmt 2(a) (noting that murder, treason, and other crimes of comparable magnitude
often have no limitation period).
216. See, e.g., Law Concerning Responsibility for Genocide of the People of Lithuania, No.
international law. The international consensus to exempt such crimes from any statute of limitations is great. At the drafting of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, only Greece publicly raised any concern about such unlimited prosecutions.

F. Pardons

Pardons are similar to, yet quite distinct from, amnesties. Pardons are issued after an individual has been found liable for a wrongful act. In some cases, pardons are issued after an individual has begun to serve a criminal sentence. Unlike amnesties, pardons are not ambiguous about the guilt of the recipient. A pardon lifts or reduces the sentence or other consequences attendant upon a finding of liability, but does not nullify the finding of liability. Pardons thus remove punishment, but unlike


219. UN General Assembly, Third Committee, 1515th Meeting, Nov. 15, 1967, U.N. Doc. A/C.3/SR.1515, 265, ¶ 17. In fact, in 1967 Greece declared that it was time to decree an amnesty for crimes committed during World War II. Of course, this policy in support of amnesty and against prosecutions was promulgated by the recently installed military dictatorship that was to rule Greece until 1974. See 2 TRANSNATIONAL JUSTICE, supra note 17, at 241-42.

220. In the U.S., the historic writ of coram nobis (replaced today with Fed. R. Civ. P. 60(b)) provides a mechanism by which a prior wrongful conviction is expunged. For an example of its use as a form of corrective justice, see, e.g., Korematsu v. U.S., 584 F. Supp. 1406 (N.D. Cal. 1984); see also RACE, RIGHTS AND REPARATION: LAW OF THE JAPANESE AMERICAN INTERNMENT (E. Yamamoto and M. Chon et al., eds. 2001). I am indebted to Margaret Chon for bringing the writ of coram nobis to my attention.
amnesties, do not disturb the accountability and truth functions of justice. Yet they obviously raise many of the same issues as amnesties, and are often (usually incorrectly) discussed interchangeably with amnesties.

While pardons in general are not nearly as controversial today as amnesties (although specific pardons can still generate a good deal of controversy), this was not always the case. Kant, Bentham, and Hegel, among others, were critical of the use of pardons by the monarchs and leaders of their time. In fact, the legitimacy of pardons became more problematic as nations moved from monarchies to democracies. The logic of a kingly pardon was tied to the fiction that a criminal act was an offense against the person of the king; thus, it was the king’s prerogative to decide whether to pardon an offense for which he was the victim. In a democracy a criminal act is considered an offense against “the people,” and thus it is the people who have the authority to pardon. Montesquieu and Blackstone felt strongly that while pardons in principle might be defended, they had no place in a republic because a pardon would negate the will of the people as reflected in the criminal law. Of course the concerns of Montesquieu and Blackstone are more easily satisfied in a representative democracy where an elected executive exercises the pardon power and where a law authorizing a pardon is drafted by an elected legislature. The idealism of Montesquieu and Blackstone was put into practice with the French Revolution, which along with the French monarchy, wiped out the power of pardon. Significantly, this historic development lasted only a decade, and appears to have been the only time in recorded history that a society was governed without some form of clemency or pardon.

Unlike amnesties, there is a developed and sophisticated literature concerning pardons and their justification. There are four justifications for pardons that are relevant to amnesties. Pardons are justified as: an expression of the official grace and wisdom of a leader or government; an expression of societal forgiveness for a transgression; a recognition of rehabilitation; and as a contribution towards social stability. All of these justifications are relevant to the question of amnesties and, except for the rehabilitation justification, have been explicitly cited to support the use of amnesties. The justification of amnesty as an expression of the grace or wisdom of a leader is most prominent in the rhetoric

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222. See id. at 24-25 (citing L. Sebba, Clemency in Perspective, in CRIMINOLOGY IN PERSPECTIVE: ESSAYS IN HONOR OF ISRAEL DRAPKIN (Simha F. Landau & Leslie Sebba eds., 1977).
surrounding the annual "amnesties" issued by many Asian countries to commemorate an important national event. The rhetoric surrounding the more modern and sophisticated South African amnesty reflects the justification of amnesty as a reflection of societal forgiveness. The utilitarian justification of contributing to social stability is raised with respect to amnesties issued in transitional contexts, from the amnesties issued at the end of the U.S. Civil War to those issued more recently in Chile, Argentina, and South Africa.

The rehabilitation justification for pardons highlights the significant difference between pardons and amnesties. Pardons are issued after a public trial and conviction, and in some cases, after all or a portion of an incarceration sentence has been served. The pardoning authority thus often has an opportunity to assess the rehabilitative progress of the beneficiary over a substantial period of time. Such assessment is not possible in the case of amnesties generally, except those that rise to the level of accountable amnesties. The only amnesty that might qualify as an accountable amnesty, the 1995 South African amnesty, by its terms does not take into account rehabilitation.

Although pardons in general are not as controversial as amnesties, and although they are generally compatible with the truth and accountability provisions of justice, one need only look to certain pardons issues by various U.S. presidents to realize that specific pardons can be quite controversial. Upon closer examination, these controversial pardons all entail some of the defining characteristics of amnesties. President Ford’s pardon of Richard Nixon, President Bush’s pardon of Casper Weinberger, and President Clinton’s pardon of Marc

223. In ancient and medieval China amnesties were promulgated upon the accession of a new emperor as a signal of rebirth and renewal. See BRIAN MCKNIGHT, THE QUALITY OF MERCY: AMNESTIES AND TRADITIONAL CHINESE JUSTICE (1981). More recently Vietnam released close to 2,000 prisoners and reduced the sentences of more than 4,000 others to celebrate the 54th anniversary of its independence. BBC World News Online (Sept. 1, 1999) (on file with author).

224. See TUTU, supra note 45.

225. See generally, JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON (1953).

226. See America’s Watch, Human Rights and the 'Politics of Agreements': Chile During President Aylwin’s First Year, in 2 TRANSNATIONAL JUSTICE, supra note 17 at 500 (reprinting Article 1 of the 1978 Chilean amnesty).

227. See supra note 212.

228. Promotion of National Unity and Reconciliation Act 34 of 1995 (South Africa).


Rich were all controversial at the time, and all were issued prior to any trial and conviction. There is, however, a significant difference between these pardons and most amnesties. In each of these three examples of presidential pardon, the individual wrongdoer was publicly identified along with his crime, and each “case” was given substantial public exposure. While the type of publicity generated by such pardons is significantly different than that generated by an accountable amnesty’s official hearing (the quality of truth and the possibility of acknowledgment being much greater in the former than in the latter), the general acceptance of the one may provide some insight into the legitimacy of the other.

While pardons appear to be the most closely analogous area of law to amnesties, and thus a fruitful place for exploring the legitimacy of amnesties, the significant difference between these two regarding truth and accountability limits the applicability of the justifications for the one to the other. While it is true that amnesties, like pardons, can play an important role in reflecting important social values such as grace, forgiveness, and even wisdom, the fact that most amnesties differ from pardons in barring any form of truth and accountability weakens the comparison.

What should we conclude from the discussion of these six general principles of law? Each principle provides some insight into the acceptability and legitimacy of amnesties. First, the discussion of the law concerning the recognition and enforcement of foreign official acts leads us to conclude that the general reluctance to recognize foreign penal acts fails to provide a justification for recognizing and enforcing a foreign amnesty; and that the act of state doctrine and international comity as interpreted by the U.S. courts also fail to provide strong support for the argument that foreign amnesties should be recognized and enforced.

Second, the discussion of the law concerning the recognition of foreign judgments and the doctrine of non bis in idem leads us to conclude that the application of the dual sovereignty exception to the prohibition against double jeopardy would allow a domestic prosecution despite a foreign amnesty; and that emerging principles of international law concerning non bis in idem suggest that, excepting accountable amnesties, amnesties should not be a bar to an international prosecution.

Third, the discussion of international refugee law leads us to conclude that the non-recognition of an amnesty is less problematic than the severe sanction that international refugee law allows in the case of

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individuals for whom there is "serious evidence" of involvement with war crimes and crimes against humanity.

Fourth, the discussion of the political offense exception in extradition law leads us to conclude that while amnesties for acts that qualify as political may generally be legitimate, certain heinous acts, such as those that qualify as a crime against humanity, may not be a legitimate subject of an amnesty even if they would otherwise qualify as a political act.

Fifth, the discussion of immunities, statutes of limitation and the equitable doctrine of laches leads us to conclude that the evolving law of official immunities, including head of state immunity, suggests that such individuals should not be protected from accountability for certain violations of international criminal law. That discussion also suggests that the prudential concerns underlying statutes of limitation and laches are not applicable to amnesties and, in fact, suggest that amnesties might be illegitimate to the extent they preclude accountability immediately after the commission of an offense. Finally, the policy concerns underlying the general consensus that murder should not be subject to any limitations, and the evidence of a similar sentiment concerning the most serious war crimes and crimes against humanity reflected in international treaties, suggest that amnesties should not apply to violations of international criminal law.

Sixth, the discussion of pardons leads us to conclude that the differences between pardons and amnesties in their effect on the truth and accountability functions of justice make the policies underlying the justification of the former less applicable to the latter.

IV. CONCLUSION: IS A LEGITIMATE AMNESTY POSSIBLE?

Drawing upon the existing international law jurisprudence concerning amnesties for gross violations of human rights and the six general principles of law discussed above, one can identify the following basic principles that should guide decisions concerning the legitimacy of amnesties granted for gross violations of human rights. They are accountability, truth, reparations, and participation. The survey of general principles of analogous law illustrates that although established legal doctrines appear to provide exceptions to these four principles, none of these exceptions should apply to the special case of amnesties for gross violations of human rights.

Both international law and the six general principles of law surveyed suggest that some form of accountability is required for the most serious international crimes. This is reflected in the sources cited to support the
obligation to prosecute and punish, the rights of victims, the importance
of deterrence and social stability, the recognition of foreign official acts
and foreign judgments, the lack of protection afforded under
international refugee law to those responsible for serious international
crimes, the exceptions to the political offense doctrine in extradition
law, the emerging law of state immunities, the doctrine and policies
underlying statutes of limitation and laches, and the closely analogous
area of pardons.

The question thus arises as to whether an amnesty can meet the
minimum requirements of accountability, truth, reparations, and
participation derived from international law and the six analogous areas
of law discussed. To answer this question, we need to distinguish
among different types of amnesties. A survey of amnesties used
throughout history quickly demonstrates that amnesties vary
tremendously in their structure, purpose, and effect. This is true even for
amnesties created in the last few decades in response to gross violations
of human rights. Such amnesties can be divided into four main
categories: amnesic amnesties; compromise amnesties; corrective
amnesties; and accountable amnesties. To develop these categories I
looked at three general characteristics of amnesties. First I looked at the
substantive content of the amnesty (what acts are covered; who is
eligible; what if any procedural requirements are there; what type of
relief, if any, is given to victims; what type of burden, if any, is placed
on recipients). Second, I looked at the creation and implementation of
the amnesty (how close to the time of the violations is the amnesty
granted; is the amnesty combined with other programs to address the
needs of victims or the accountability of recipients; what is the political
context of the amnesty; was the amnesty democratically approved or
unilaterally decreed by its beneficiaries). Third, I looked at the purpose
of the amnesty (was it to facilitate a transition; to reveal information
about the past; to promote reconciliation; to diminish or end an armed
conflict).

1. Amnesic Amnesties. Amnesic amnesties typically are granted by a
regime that has been involved in human rights abuses. Examples of
amnesic amnesties are the 1978 Chilean amnesty,232 the 1986
Argentinean Full Stop Law,233 and the 1993 El Salvadoran amnesty.234
They tend to be blanket self-amnesties, although they may also be the
result of an agreement among all sides to a political and military

232. See supra note 226.
233. See Law No. 23492, supra note 212.
234. Decree No. 486, Mar. 20, 1993, reprinted in 3 TRANSNATIONAL JUSTICE, supra note 17,
at 546.
conflict. Their defining characteristics are concealment and anonymity. Beneficiaries are identified, if at all, through group characteristics rather than individually. Amnesic amnesties provide little or no information concerning past abuses.

Specifically, with respect to the first set of criteria, amnesic amnesties have few if any act restrictions. They apply to their beneficiaries regardless of their specific motive or objective and identify eligible persons through group characteristics. Further, amnesic amnesties have no procedural requirements, nor do they provide recipients with immunity from both civil and criminal liability or place burdens on recipients. Finally, amnesic amnesties provide no relief to victims, and correspondingly impose burdens on victims.

With respect to the second set of criteria, amnesic amnesties may be promulgated at any time, and are not combined with any other official initiatives to address the consequences of the violations at issue. Amnesic amnesties may be promulgated by any form of government, and may have some support from a small minority of the public. Such amnesties may be either self-dealing or arms length.

With respect to the third set of criteria, amnesic amnesties may be designed to facilitate a social transition, but are not designed to further inquiry or revelation. They are not a genuine expression of societal grace or forgiveness. Further, amnesic amnesties may claim to further reconciliation (although they rarely succeed), are not remedial, and may be designed to diminish an armed conflict or civil unrest.

2. Compromise amnesties. Compromise amnesties are in the middle of the continuum between amnesic and accountable amnesties. They are compromises primarily because of their substantive terms, and not because of how they were created. Both amnesic and compromise amnesties may be the result of a political compromise in ending a conflict or replacing a repressive regime.

Unlike amnesic amnesties, compromise amnesties partially conceal and partially reveal. Revelation comes either through the amnesty itself or through contemporaneous processes like a truth commission or legal action. There is more acknowledgment than in the case of amnesic amnesties, but unlike accountable amnesties the acknowledgment is often institutional and not individual. Such amnesties are compromises because they provide some benefit in the form of knowledge and acknowledgment, but not enough to satisfy comfortably the minimum requirements of justice.

A compromise amnesty is usually restricted in some way—restricted in the acts to which it applies, to the people for whom it is applicable, or
to the motives or objectives of eligible persons. A compromise amnesty may apply only to a group of people defined by their status, to a class of acts regardless of the status of the perpetrator, or to those individuals or acts exhibiting a particular motive or objective. The existence of such qualitative requirements means that compromise amnesties may result in some form of truth or accountability. For example, take the family of an individual who has disappeared. If the amnesty applies to all acts committed by members of the military, family members may pursue an investigation through some official government process until and unless it is determined that the act was committed by a member of the military. If the investigation reveals the involvement of non-military personnel, then a legal remedy may be available. Even if the investigation reveals military involvement and the investigation is immediately halted, the identity of the person or organization responsible will have been established, although legal accountability will be barred. This is in fact the procedure of the Guatemalan and Honduran amnesties, where judicial investigations are undertaken to determine whether the amnesty applies. Amnesties that apply to classes of acts are less open to, but not immune from, such investigatory manipulation. If the amnesty applies to all acts of disappearances, for example, our family of a disappeared individual will be unable to push for an official investigation of the disappearance. On the other hand, if the family knows who is responsible for the disappearance, they may attempt to hold that individual accountable for a crime other than the disappearance.

An amnesty that only applies to a class of individuals or to a class of acts may thus not qualify as an amnesic amnesty. There is a difference in the type of compromised relief provided between an amnesty restricted by the individuals to whom it applies, and one restricted by the acts to which it applies. In the first, information or "truth" may be revealed, as an investigation may proceed until it is determined whether the responsible individual is a member of the protected class or not. In the second, punishment may be imposed, as claims may be brought against a responsible individual for acts not covered by the amnesty.

With respect to the first set of criteria, therefore, compromise amnesties may have act restrictions, and may be restricted to acts

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235. See Popkin, supra note 76 (Guatemalan amnesty); Recinos, supra note 76 (Honduran amnesty).

236. This is the case in Argentina, where members of the past military regime have been prosecuted for embezzlement and child kidnapping, two crimes that are not covered by the amnesty. For example General Antonio Bussi was the object of a corruption investigation after Judge Garzon in Spain discovered that he had three Swiss bank accounts. See Jack Epstein, Legacies of Terror, HOUS. CHRON., May 10, 1998 at A1.
committed with, or individuals inspired by, a particular motive or objective. Further, they may identify eligible persons by group or individual characteristics, and have procedural requirements. They may also provide recipients with immunity from civil or criminal liability, or both. Moreover, compromise amnesties may place some burdens on recipients, provide minimal relief to victims, and may impose some burdens on victims.

With respect to the second set of criteria, compromise amnesties may be promulgated at any time. They are combined with other official initiatives to address the consequences of the violations for which amnesty is granted—such as a truth commission or reparations program. Compromise amnesties may be promulgated by any form or branch of government, but must have some support from the general public, and may be either self-dealing or arms-length.

With respect to the third set of criteria, compromise amnesties are designed to facilitate a social transition, and also to further inquiry or revelation, either on their own or in combination with other government initiatives. Compromise amnesties may be a genuine expression of societal grace or forgiveness, and may further reconciliation. They may also be partially remedial. Finally, they may be designed to diminish an armed conflict or civil unrest.

There are three fundamental differences between compromise and amnesic amnesties. First, compromise amnesties are combined with other official initiatives to address past violations; amnesic amnesties are not. Second, compromise amnesties contribute, however minimally, to inquiry or revelation; amnesic amnesties do not. Third, compromise amnesties further reconciliation, while amnesic amnesties do not.

3. Corrective amnesties. Two general types of amnesties fall under the category of corrective amnesties. One is correctly labeled an amnesty as it is used to stay the enforcement or application of a law that, while still considered legitimate, is no longer considered useful. The other uses the institution of amnesty to accomplish something that amnesties are not designed to do: reverse an injustice. The first type usually occurs after a dramatic change in the social and political environment; for example, the lifting of a state of emergency, or the end of an internal or international armed conflict. Such amnesties apply to acts of treason, sedition, rebellion, or other offenses against the state.

237. In other words, an amnesty that provides protection from both legitimate past laws and for gross violations of human rights. Purely remedial amnesties are by definition legitimate, and are what I call here corrective amnesties.
They are encouraged at the end of armed conflicts.\textsuperscript{238}

The second type is not strictly an amnesty, but the reversal of an injustice—an injustice created by an illegitimate law, or by mistaken or fabricated facts. For example, the Brazilian Constitution of 1988 grants an amnesty to those unjustly removed from office under previous regimes.\textsuperscript{239} Amnesty International was founded on the idea that amnesty should apply to such political crimes.\textsuperscript{240} The UN expert Joinet criticizes the use of amnesties to remedy injustice:

> On strict grounds of principle, granting amnesty to a prisoner of opinion is tantamount to an implicit acknowledgment that his conduct was criminal, whereas it is really the authority responsible for the penalty, being guilty of unlawful detention, [that] might be granted amnesty.\textsuperscript{241}

The proper remedy for such an injustice is the reversing of a judgment or retroactively repealing an illegitimate law. Amnesties are poor substitutes; they fail to acknowledge that the law was either wrong or wrongly applied, and thus are less effective in erasing the stigma of wrongdoing that attaches to an individual accused of violation.\textsuperscript{242} Bulgaria, Hungary, and Russia passed laws after the fall of communism granting “amnesty” to those convicted under laws that are no longer considered legitimate, or who were targeted for prosecution because of their political beliefs or activities.\textsuperscript{243}

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  \item \textsuperscript{238} See Protocol II, Art. 6(5), supra note 8; Commentary to Additional Protocol II to the Geneva Conventions of 1949 at 1402 ¶ 4618 (the purpose of amnesty “is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided”); see also supra note 10 and accompanying text.
  \item \textsuperscript{239} BRAZIL CONST. [CONSTIUTIÇÃO FEDERAL], art. 8, reprinted in 3 TRANSNATIONAL JUSTICE, supra note 17, at 670-71.
  \item \textsuperscript{240} However, Amnesty International will not support amnesty for a prisoner of conscience who advocates or has been involved in acts of violence against the state, a position that is somewhat controversial among some of its supporters.
  \item \textsuperscript{242} A UN report that looked at the legitimacy of amnesties and their use recommended that amnesties not be used in cases involving prisoners of opinion since “this would signify acknowledgment of the criminal nature of their actions, when in fact all they have done is to exercise a legitimate right....” U.N. ESCOR, 45th Sess., Agenda Item 10(a) at 35, U.N. Doc. E/CN.4/sub.2/1993/6 (1993). Instead, proceedings against such individuals should be discontinued and the individuals released immediately. Id.
  \item \textsuperscript{243} Bulgaria’s Law on Amnesty and Restoration of Confiscated Property grants amnesty for acts that were unjustly criminalized under the communist regime. Law No. 167 (Dec. 20, 1990), reprinted in 3 TRANSNATIONAL JUSTICE, supra note 17, at 797-805. Hungary’s Law Voiding Certain Convictions 1963–89 declared null and void certain convictions between April 5, 1963 and October 15, 1989 for conspiracy, insurrection, incitement, and offending the community. Law No. 11 (Feb. 19, 1992), reprinted in 3 TRANSNATIONAL JUSTICE, supra note 17, at 797. Russia passed an amnesty for those convicted of crimes against the state. Law on Rehabilitation of
4. Accountable amnesties. Accountable amnesties are amnesties that provide some accountability and more than minimal relief to victims. To qualify as accountable, an amnesty must have the following characteristics. First, it must be democratic in its creation.\textsuperscript{244} Self-dealing amnesties, in which the legal authority of the amnesty derives only from its beneficiaries, do not qualify as accountable amnesties. The general involvement of the public and the involvement of more than one branch of a democratic government in the drafting process are two important indicators of the democratic nature of an amnesty.\textsuperscript{245} Second, it must not apply to those most responsible for war crimes, crimes against humanity, and other serious violations of international criminal law.\textsuperscript{246} Third, it must impose some form of public procedure or accountability on its recipients. Thus amnesties that require a public hearing in which the potential recipient is open to examination, or that require that an amnesty recipient publicly acknowledge his or her offense, would qualify as an accountable amnesty. Fourth, it must provide an opportunity for victims to question and challenge an individual’s claim to amnesty. Such an opportunity could be, but need not be, in a public forum. Fifth, it must provide some concrete benefit, usually in the form of reparations, to victims. Such a benefit could come either from the beneficiary or from the state. Sixth, and finally, it must

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\textsuperscript{244} Jose Zalaquett, a Chilean human rights lawyer who was a member of that country’s Truth and Reconciliation Commission, argues that to be legitimate an amnesty must be approved in a way that expresses the will of the people. Majority approval is not sufficient; an accountable amnesty must also take into account the desires of the victims, “the people who are going to live with the consequences.” Roht-Arriaza, supra note 95, at 202.

\textsuperscript{245} The Egyptian constitution institutionalizes a multi-branch requirement by providing that an amnesty initially created by presidential decree is subject to subsequent ratification by Parliament. See U.N. ESCOR, 38th Sess., Agenda Item 9(a) at 7, U.N. Doc. E/CN.4/sub.2/1985/6 (1985).

\textsuperscript{246} By most responsible I mean those leaders, both political and military, who were the effective architects and commanders of the atrocities at issue. They are, in Agnes Heller’s words, the “evil” people, as distinct from the merely “bad.” Agnes Heller, \textit{The Natural Limits to Natural Law and the Paradox of Evil}, in \textsc{On Human Rights} 149 (Stephen Shute & Susan Hurley eds., 1993). That is, the evil people are the ones at the top of the chain of command who created the environment that facilitated the atrocities, and who had the power, but not the will, to stop them. \textit{Id.} The UN Security Council suggested that the proposed court for international crimes committed in Sierra Leone focus only on those “who bear the greatest responsibility for the commission of crimes.” Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, ¶ 29 (Oct. 4, 2000). The Secretary General also indicated that amnesty should not apply to the “international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.” See S.C. Res. 1315 (Aug. 14, 2000), \textit{reprinted in} 40 I.L.M. 248 (2001) (resolution describing the Secretary General’s disclaimer to Lome Peace Accords regarding amnesty).
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be designed to facilitate a transition to a more human rights friendly regime, or as part of a comprehensive program of reconciliation aimed at addressing long-standing and serious societal tensions and injustices.

With respect to the first set of criteria, accountable amnesties must not apply to those most responsible for serious war crimes, crimes against humanity, or other serious violations of international criminal law. Accountable amnesties may be restricted to acts committed with, or individuals inspired by, a particular motive or objective. Accountable amnesties apply to individuals and not groups, and have a formal procedure for determining eligibility. Further, accountable amnesties may provide recipients with immunity from civil or criminal liability, or both. Moreover, this category of amnesties imposes burdens on recipients, provides relief to victims, and imposes minimal burdens on victims.

With respect to the second set of criteria, accountable amnesties may be promulgated at any time and are combined with other official initiatives to address the consequences of the violations for which amnesty is granted—such as a truth commission or a reparations program. Accountable amnesties are promulgated by a democratic government, with public participation, and must be arm’s length.

Finally, with respect to the third set of criteria, accountable amnesties are designed to, and in fact do, facilitate a peaceful transition to a human rights protective regime. Accountable amnesties further inquiry and revelation, and reflect a genuine expression of societal grace or forgiveness. Further, accountable amnesties substantially further reconciliation, may be remedial, and may be designed to diminish an armed conflict or pressing civil unrest.

The South African amnesty is the only one to date that comes close to qualifying as an accountable amnesty. Unlike compromise amnesties, accountable amnesties are not perceived as compromised justice, but provide a form of justice that is as legitimate, and some argue more legitimate, than accountability traditionally achieved through criminal prosecutions or civil suits. While accountable amnesties do not formally punish their recipients, they are more likely to provide an admission and acknowledgment from a perpetrator than a traditional trial. By offering an alternative to traditional trials as a mechanism for justice, accountable amnesties are a possible institutional response to growing calls for restorative—as distinct from retributive—justice.

It is of course no surprise that the amnesty I have labeled accountable

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247. See Llewellyn and Howse, supra note 49; Llewellyn, supra note 52.
248. This does not mean that there is no personal cost to a recipient of an accountable amnesty.
amnesty is the one that holds the promise of a legitimate amnesty eligible for recognition and respect by foreign states and international tribunals. It is only slightly less surprising that there is only one amnesty to date that even comes close to satisfying the requirements of an accountable amnesty. The overwhelming majority of amnesties clearly fall into the amnesic or compromise categories, with a smaller number falling into the category of legitimate amnesties I have labeled corrective. Even with the model of the South African amnesty firmly established in the historical record, subsequent amnesties are still designed to further impunity and amnesia.

With the establishment of the permanent International Criminal Court and the increased willingness to use transnational legal processes to hold the worst human rights violators accountable for their crimes, judgments concerning the legitimacy of an amnesty will become increasingly important. The increased effectiveness of mechanisms for holding individuals accountable for violations of international criminal law may result in fewer amnesic amnesties and more accountable amnesties, or may result in the abolition of amnesties as a common response to violative pasts. Either would be preferred to the short-term trend of the last few decades, where amnesic and compromise amnesties have become the mechanism of choice for states in dealing with their pasts. International law clearly places restrictions on the types of amnesties that may be considered legitimate. The discussion of the six analogous areas of law illustrates the uniqueness of amnesties, and the illegitimacy of using such doctrines to justify amnesties for gross violations of human rights.
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