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Protecting the Minority: A Place for Impunity?
An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation

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Protecting the Minority: A Place for Impunity?

An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation

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I. Introduction

Over the past two decades the twin aims of peaceful political transitions and accountability for past abuses have come into conflict. Dictatorships have given way to democracies across the globe. Violent conflicts have led to death and destruction on all corners of the planet. Individual states and the international community as a whole have had to address the almost unavoidable policy paradox of holding former regimes liable

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for human rights abuses while facilitating transitions of power and social reconciliation. On the one hand, former regimes are understandably loath to leave office if they fear prosecution and imprisonment for their actions.[1] On the other, national and international interest groups have good reason to demand the resignation and accountability of former dictators and war criminals.

This paradox has been especially problematic where ethnic and political boundaries overlap in post-conflict regions, such as the former Yugoslavia.[2] In the wake of ethnically targeted violent conflict, minorities and refugees are often unwilling or unable to return home and engage in social reconciliation because they fear both arbitrary prosecution for their own acts and further violations by the majority oppressors. Minorities are particularly susceptible to arbitrary or retaliatory prosecutions for, unlike the majority, they often lack the representative power in government to ensure that their low level crimes will not be prosecuted. Likewise, however, minorities were often the most seriously oppressed and, therefore, the strongest supporters holding massive violators accountable.

The mutual demands of reconciliation and accountability at fist appear incompatible. Legislation that guards against arbitrary prosecution may well deny accountability and justice. Likewise legislation that facilitates accountability may well heighten fears of arbitrary prosecution. Successful reconciliation in these cases seems to depend on simultaneously forgiving the vast majority of low-level offences that occurred

[1] *See, e.g.*, Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti*, 31 TEX. INT'L L. J. 1, 4-9 (1996).
[2] *See generally* ROBERT DONIA & JOHN FINE, JR., BOSNIA & HERCEGOIVINA: A TRADITION BETRAYED (1994).

during the war, thus preventing arbitrary prosecution, while ensuring accountability for serious and systematic crimes against human life. By granting amnesty for some crimes, refuges and minorities can feel safe from arbitrary prosecution. If that amnesty is framed too widely, however, accountability is denied. If it is framed too narrowly the sense of security needed for reconciliation disappears.

Amnesty legislation thus appear a crude tool for reconciliation and accountability as it can simultaneously exacerbate and mitigate the tension between these two policy goals. Through a variety of mechanisms, amnesty legislation immunizes a dictator, his/her regime, and/or ordinary citizens from criminal and/or civil liability for some or all crimes. Amnesty legislation offers attractive transitional expediency as it facilitates non-violent surrender of power by former dictators who feel assured in their immunity from prosecution or a more rapid end to armed conflict. Thus amnesty legislation has been properly credited for recent power transitions, which avoid further domestic violence[3] or international political muscle[4] to bring about a cease-fire or to force a regime from power. However, amnesty legislation rests on a precarious and problematic foundation. By granting immunity from prosecution to alleged and even confessed perpetrators, amnesty laws may be seen as a violation of fundamental international obligations to prosecute serious and systematic crimes against human life as well as in violation of victim's rights to seek redress. As such, amnesty legislation can hinder, rather than

[3] While it can never be known just how much violence was avoided in South Africa by means of the amnesty program enshrined in the Interim Constitution, it was likely significant. *See generally*, Judith Bello & Daniel Wilhelm, *South Africa—Promotion of National Unity and Reconciliation Act of 1995*, 91 AM. J. INT'L LAW 360 (1997).

[4] The US was quite eager to avoid a military invasion of Haiti and therefore found the Carter-Jonassaint Agreement of 18 September 1994, which, *inter alia*, called for a general amnesty, politically expedient. *See* Scharf, *supra* note 1, at 6-9.

facilitate post-conflict reconciliation and the reassimilation of minority groups into the larger polity.

This Article draws lessons from the growing body of amnesty legislation and practice – in countries ranging from Chile to Croatia, South Africa to Sri Lanka – in order to question the legitimate scope of amnesty as a tool for reconciliation and accountability, especially in the wake of massive, minority-targeted ethnic conflict. The Article first considers three different forms of immunity decrees and legislation. First it considers Illegitimate and Inclusive Immunities – often referred to as blanket amnesties. Next, the Article reviews Locally Legitimised Limited Immunities, also referred to as Political Amnesty. Third, the Article addresses Internationally Legitimized Immunity. Case studies are included to demonstrate how each of these three forms of amnesty has been applied in attempts to address the tension between the two opposing perspectives. Next recent challenges to amnesty legislation in both domestic and international forums are addressed. In conclusion, the Article argues the appropriate shape of amnesty legislation as a tool for minority-majority reconciliation within the emerging international constitutional order.

II. Forms of Amnesty

Since the mid-1970s at least fourteen states have declared amnesties and/or enacted laws immunizing past regimes from accountability and liability.[5] Such acts of

[5] *See* Steven Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L. J. 707, 723 (1999).

intended immunity can be classified under three broad labels: 1) Illegitimate, Inclusive Amnesty (Blanket Amnesty); 2) Locally Legitimized, Limited Amnesty (Political Amnesty); 3) Internationally Legitimized Immunity. Though these categories are not firmly bounded, the distinctions often depend on both the form and scope of the legislation. In form, amnesty laws range from dictatorial decrees[6] to legitimate acts of parliament.[7] In scope they vary from encompassing all anti-humanitarian acts of previous regimes to covering only a particular and internationally limited subset of crimes. Blanket Amnesties have the widest scope and the least legitimacy. Political Amnesties vary widely in their legitimacy but in their application tend to have a far narrower scope than do blanket amnesties. Internationally Legitimated Amnesties usually have significant domestic and international legitimacy and carefully tailored, narrowly targeted scopes. A more detailed exploration of each of these categories follows.

A. Illegitimate, Inclusive Immunity (Blanket Amnesty)

Illegitimate, Inclusive Immunity (Blanket Amnesty) was the first type of amnesty decree to appear. It has the widest scope, generally seeking to immunize all agents of the state for any and all crimes they may have committed during a specified period. Blanket amnesties usually do not differentiate between common crimes, political crimes, and international crimes nor do they consider the motives of the crime. They are, therefore broad and sweeping, effectively erasing a decade or more of abuse, repression, and violations with the stroke of a pen. Such legislation is particularly common in Latin America, where dictators often enacted it long before a negotiated transfer of power, thus

[6] *See, e.g.*, Amnesty Decree of Jean Bertrand Aristide, 11 October 1994, on file with author.
[7] *See, e.g.,* Promotion of National Unity and Reconciliation Act, No. 95-34 (1995) (South Africa).

avoiding the need to placate the most violated domestic interest groups, which might eventually come to call for accountability. These all-encompassing immunity laws appeared in the late 1970s and early 1980s, before the international community had developed a significant practice of enforcing international criminal law obligations. Due to their precedence, the international community applied little or no pressure on out-going dictators to limit the scope of blanket amnesty legislation.

The first and foremost example of a blanket amnesty is the Chilean law of 18 April 1978.[8] After a five year reign marked by severe and recurrent violations of human rights and international norms, the Chilean Junta, under the leadership of General Augusto Pinochet Ugarte,[9] issued this self serving amnesty decree, covering all acts committed since the overthrow of the democratic government of Salvador Allende on 11 September 1973.[10] During this period, studies suggest that more than 2,115 civilians were killed and countless more became the victims of torture, detention, relocation and other serious crimes.[11] Many of these crimes were committed by the National Intelligence Directorate (the DINA) to "eliminate . . . the ultra-left."[12] Most victims were members of the Socialist or Communist Parties and were targeted for their political views.[13]

After the dissolution of the Chilean DINA in 1977, the Pinochet Government

[8] Law of Amnesty, No. 2.191 (18 April 1978) (Chile), reprinted from *Diario Oficial, No.30,042.*
[9] For a detailed discussion of the prosecution and extradition of General Pinochet, see William Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT'L L. J. 129 (2000).
[10] For a discussion of the history of the rule of law in Chile and the crimes under General Pinochet see Robert Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*, 62 FORDHAM L. REV. 905, 910-17 (1994).
[11] Report of the National Commission on Truth and Reconciliation 74 note j (South Africa), cited in Quinn, *supra* note 10, at n.5.
[12] Id. at 62.
[13] *See* Quinn, *supra* note 10, at 915.

issued the amnesty law. The legal basis of the law rests in the Junta's *de facto* authority. The law has no effective link to the Chilean people; it was neither passed by a democratically chosen parliament nor signed by a democratically elected head-of state. In fact, the Inter-American Commission on Human Rights has deemed it an "arbitrary act taken by the military regime . . . it is the act, therefore of authorities who lacked any legitimacy or right, since they were not elected or appointed in any manner."[14] Nonetheless, the Junta's *de facto* control over Chile was such that the amnesty decree was given legal effect and enforced by the Chilean courts.[15]

The law begins by invoking the "tranquillity, peace, and order" that has recently emerged in the country.[16] The preamble seeks to establish the validity of the law in relation to the policy goals of preventing further "internal commotion" that prosecutions might cause. The law then proceeds to grant amnesty to "all persons who committed, as perpetrators, accomplices or conspirators, criminal offences … between 11 September 1973 and 10 March 1978."[17] The language of the amnesty declaration is thus extremely broad. It applies both to actual perpetrators and accomplices before and after the fact. Nor does the law discriminate based on the motives for the crime; the amnesty applies equally if the crimes were committed out of personal animosity or state policy.

Articles 3 and 4 do establish a very narrow range of exceptions to the amnesty.

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[14] Garay Hermosilla et. al. v. Chile, Case No. 10.843, Inter-Am C.H.R. 156, OEA/Ser/L/V/II.95, doc. 7 rev. 15 (1997).
[15] In one noteworthy case, relatives of some victims with the assistance of the Archbishop of Santiago brought a case in August 1978 against General Manuel Sepulveda, Director of the DINA, alleging violations of Article 141 of the Penal Code of Chile, relating to illegal arrests and disappearances. The court declined jurisdiction, noting that the accused was subject to military law, a decision affirmed by the Court of Appals of Santiago. In December 1989, the Second Military Tribunal ordered dismissal of the case, pursuant to the Amnesty Law. *Id.* at para. 2-5.
[16] Amnesty Law, *supra* note 8.
[17] Id.

First, Article 3 exempts some common crimes, such as robbery, drug trafficking, and arson from the amnesty. Likewise, Article 3 exempts many crimes against the state, such as tax fraud, embezzlement of public securities, and smuggling. The exemptions here are highly ironic for amnesty is expressly avoided for crimes against the state, the very crimes that a state likely has standing to forgive. The only international crime arguably excluded from the amnesty is plunder as a Crime Against Humanity, described in the Article 3 exemption as "theft." The most serious international crimes, such as Genocide, Torture, and Crimes Against Humanity are not included in the exemption and thus are subject to the amnesty grant.[18]

The Chilean amnesty law is noteworthy in that, on its face, it does not differentiate between perpetrators acting with state sanction and those members of the resistance who may have committed similar crimes. Rather, it applies equally to "all persons who … committed criminal offences," both the majority and the minority.[19] One commentator points out, however, that many government opponents were unable to benefit from this law as they "had already been killed, disappeared, or in exile."[20] Moreover, the law was applied by military tribunals, which had jurisdiction over most cases during this period, and were likely to favour government, military, and police in its application and enforcement. Despite the release of several hundred persons imprisoned without trial after the law's entry into force,[21] it fair to say that the blanket amnesty applied predominantly to government and military forces.

[18] *See supra* note 8.
[19] *Id.*
[20] Quinn, *supra* note 10, at 918.
[21] America's Watch, *Human Rights and the Politics of Agreements: Chile During President Aylwin's First Year* 43 (1992).

The Chilean example is further characteristic of blanket amnesties in that it does not establish any alternate means of redress for victims. It has no provisions for an investigatory body to consider the allegations in a non-criminal context. Nor does it provide a means of civil redress for victims to seek pecuniary compensation either from the perpetrator or from the state. Instead the law fulfils the true etymological root of amnesty, which, like amnesia derives from the Greek "amnestia" or forgetfulness and oblivion.[22] The goal of a blanket amnesty and that of the Chilean Junta was thus to totally forget the crimes of the past.

More recently, in 1995, Peru followed Chile's example, providing a blanket amnesty, which facilitated a general "forgetfulness" of past atrocities. In response to escalating attacks by guerrilla groups such as the Shinning Path and the Tupac Amaru Revolutionary Movement, the Peruvian government in early 1983 transferred the counter-insurgency operations from the police to the military. Thereafter, Amnesty International and other human rights organizations began to receive numerous complaints of torture, disappearances, and extrajudicial executions. Between 1983 and 1992, Amnesty International documented over 4,000 disappearances and 500 extrajudicial executions.[23]

In order to prevent the prosecution of the perpetrators of these abuses, the Peruvian Congress passed the first of two amnesty laws, Law No. 26479, on 15 June 1995.[24] The first Peruvian law, like that of Chile, grants a blanket amnesty. It is however, even more

[22] *See* Diane Orentlicher, *Settling Accounts, the Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2543 n.14 (1991).
[23] *Amnesty Laws Consolidate Impunity for Human Rights Violations*, Amnesty International Report 46/03/96, 23 Feb. 1996 at 1, *available in* http://www.amnesty.org/ailib/aipub/AMR/24600396.htm.

[24] First Amnesty Law of 14 June 1995, No. 26479 (1995) (Peru).

far reaching that its Chilean counterpart in that it applies both "to common or military crimes, whether under the jurisdiction of civil or military courts." All crimes ranging from murder and rape to robbery and fraud are thus included. The law is specifically formulated to exempt members of the resistance from the amnesty, granting immunity only to "the Military, Police, or Civilian personnel, whatever their Military, Police, or Official Status." As such, the amnesty applies only to the members of the government (and their subordinates) who enacted the law. For those members of the military, police, and government included in the legislation, the scope of their amnesty is extremely broad. The only limitation is that the crime "derived, originated from, or [was] a consequence of the fight against terrorism … between May 1980" and June 1995.[25] As applied, the only significant restriction on the amnesty is temporal. Article 4 of the law further extended the amnesty retroactively, ordering the "annul[ment] of all police, judicial, and criminal records … [and the] release of those pardoned who are currently under arrest…" Like its Chilean counterpart, the Peruvian law provided for no alternate means of recourse or investigation. In fact, Article 6 guaranteed absolute impunity by ensuring that acts covered by the law were "not subject to investigation [or] inquiry."

The application of the amnesty law in Peru proved somewhat problematic for a government set on total amnesia and a second amnesty law was eventually required. Immediately following the entry of the law into force, Judge Antonia Saquiciray, investigating the 1991 Barrios Altos massacre, held the law inapplicable to her case. While her ruling was making its way to the High Court, Congress passed a second

[25] Id. at Art. 1.

amnesty law, extending the scope and ensuring the enforcement of the original order.[26] This second law removed the first amnesty law from the scope of judicial review, declaring the law "not subject to review by a judicial authority."[27] Whether such a non-reviewable law was permissible within the Peruvian Constitution was a debatable proposition,[28] but the second law sought constitutional legitimacy, invoking Article 102, section 6 of the Constitution, according to which "amnesty … is a right of grace . . . which can only be granted exclusively by Congress." The second law effectively overturned Judge Saquiciray's ruling and extended the Amnesty to that case. In addition, the new law expanded the temporal scope of the Amnesty to cover crimes committed between May 1980 and 15 June 1995, but not reported until after 15 June 1995.[29]

The second amnesty law of 28 June 1995 further attempted to legislate the first law of 14 June 1995 into accord with Peru's international obligations, declaring that the initial law "does not undermine the duty of the state to respect and guarantee those human rights as recognized by … the Constitution … and human rights treaties." While this second law had no meaningful capacity to bring the first decree into compliance with international norms, it may provide guidance as to the interpretation of the first law in relation to those international obligations. Although the intent of the drafters was likely to avoid any international obligations Peru may have been under, a plain reading of the text of the second law suggests that the first should be interpreted where possible to comply with international obligations.

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[26] *See supra* note 23, at 2.
[27] Second Amnesty Law of 28 June 1995, No. 26.492 (1995) (Peru).
[28] *See* supra note 23, at 2.
[29] Second Amnesty Law, *supra* note 27, at Art. 3.

Many other states in Latin America and elsewhere have followed the model of blanket amnesties set by Chile and utilized by Peru. Argentina,[30] El Salvador,[31] Honduras[32], Nicaragua,[33] Uruguay,[34] and Sri Lanka,[35] have all passed blanket amnesties immunizing at the least political, military, and police officials for all significant crimes committed during a set period. While these laws have differed slightly in form and scope, they have all had the goal of inducing total amnesia and the effect of baring prosecutions of government authorities for serious crimes.

The Argentine law, while still a blanket amnesty, has a few noteworthy differences. The amnesty consists of two separate laws – the Full Stop Law of 24 December 1986[36] and the Due Obedience Law of 4 June 1987.[37] The first law set a sixty day statute of limitations for the prosecution of any crimes committed as part of the "dirty war,"[38] effectively baring prosecutions after the expiration of that period. The second law set an irrebutable presumption that any members of the state services, with the exception of the highest-level commanders, acted in furtherance of command-orders and were not therefore independently liable. The Argentine laws differs from the Peruvian and Chilean legislation in that Article 5 of the Full Stop Law specifically excludes crimes of kidnapping and disappearance of minors from the amnesty. While this is a limited

[30] Final Act, No. 23.492 (1986) (Argentina); Law of Due Obedience, No. 23.521 (1987) (Argentina). On file with author.
[31] Law of Amnesty and Community Rehabilitation, Decreto No. 210 (El Salvador). On file with author.
[32] Amnesty Law (Hunduras). On file with author.
[33] Law of General Amnesty and National Reconciliation, No. 81 (1990) (Nicaragua). On file with author.
[34] Law Nullifying the State's Claim to Punish Certain Crimes, No. 15.848 (1986) (Uruguay). On file with author.
[35] Indemnity Law, No. 20 (1982) (Sri Lanka). On file with author.
[36] Full Stop Law, *supra* note 30.
[37] Law of Due Obedience, *supra* note 30.
[38] Consuelo et. al., v. Argentina, Case No. 10.147, Inter-Am. C.H.R. 41, OEA/Ser.L/V/II.83, doc. 14 (1993).

exception, it is significant as many of the crimes in Argentina related to disappearances. Furthermore, Article 6 of the Full Stop Law clearly indicates that the amnesty does not preclude civil means of redress. The broad scope of the Argentine legislation and its forgiving embrace of the entire chain-of-command place these laws distinctly in the category of blanket amnesty. However, the two limitations (excluding kidnappings and disappearances of minors from the amnesty) give the Argentine law some similarities with the next category and provide a segue for the discussion of political amnesty.

B. Locally Legitimatized, Limited Immunity (Political Amnesties)

Locally Legitimatized, Limited Immunity (also referenced herein as Political Amnesty) is characterized by more limited scope and more legitimate form. (Though the boundaries between these categories are not fixed and political amnesties may share some aspects of the blanket amnesties described above.) In their function, however, political amnesties are generally limited to crimes committed in furtherance of political objectives. Common crimes and crimes committed for personal motives are specifically excluded from these amnesties. While some blanket amnesties often include a form of political limitation,[39] political amnesties always have the further element of an effective adjudicatory mechanism for the determination of which crimes are political within the definition of the statute. In their form, political amnesties have some legitimate connection to the popular will. In the case studies that follow, the political amnesty laws were decreed by democratically elected governments, rather than by outgoing dictatorial regimes. The two

[39] *See, e.g.*, First Amnesty Law (Peru), *supra* note 24, (granting amnesty for crimes in "the fight against terrorism").

most significant examples of countries following the political amnesty model are Haiti and South Africa.

The form and political background of the Haitian amnesty demonstrate both strong international support and at least quasi-domestic legitimacy for the measure. In December 1990 Jean-Bertrand Aristide became Haiti's first democratically elected president. In August 1991, however, he was deposed in a military coup, which was followed by massive human rights violations, including the murder of at least 3,000 civilians,[40] extensive deportations, arrests, and disappearances.[41] While President Aristide remained in exile, the military Junta of Lieutenant General Raoul Cedras consolidated power and extended the reign of terror. The international community, under the leadership of the United Nations and the Organization of American States, responded by applying significant pressure on the *de facto* Haitian government, including a freeze on all assets and an oil and arms embargo.[42] From 27 June until 3 July 1993 the Haitian Junta and Aristide engaged in direct negotiations at Governor's Island, New York, for a power transfer based on a US agreement, which called, *inter alia* for an "amnesty granted by the President of the Republic."[43] In addition to receiving direct support in the negotiations from the United States, the UN Security Council further endorsed the Governor's Island framework, including the amnesty clause.[44]

After the Haitian Junta refused the landing of peacekeeping forces and the return

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[40] John Shattuck, Assistant Secretary for Democracy, Human Rights, and Labor, Address at a State Department Press Briefing (Sept. 13, 1994).
[41] *See generally*, *The Crisis in Haiti*, U.S. Department of State, Sept. 19, 1994, *available* in LEXIS, News Library, CURNWS File.
[42] *See* Scharf, *supra* note 1, at 7.
[43] *See The Situation of Democracy and Human Rights in Haiti*: *Report of the Secretary General*, U.N. Doc. A/47/975-S/26063 (1993) (including the text of the Governor's Island Agreement).
[44] U.N. SCOR, 48th Session, 3238th mtg. at 120, U.N. Doc. S/INF/49 (1993).

of President Aristide, the Security Council authorized a multilateral invasion of Haiti on 31 July 1994.[45] On 18 September 1994, the day prior to the planned invasion, a delegation led by President Carter met with the Haitian military Junta, eventually reaching the Carter-Jonassaint Agreement, confirming the plans for a "general amnesty" and averting the invasion.[46] US Secretary of State Warren Christopher provided an interpretation of this amnesty clause at a 19 September news briefing, praising it as "a broad amnesty for all the members of the military."[47] Thus, even before the Haitian amnesty was issued, it had received the support of the United States and the United Nations. While such support does not necessarily legitimate the amnesty or relieve Haiti of any international obligations it may have faced, it does differentiate the Haitian experience from that of the countries which passed blanket amnesties.[48]

The Haitian amnesty legislation also had greater domestic legitimacy than did its Chilean or Peruvian counterparts. The law authorizing the amnesty was passed by the Haitian Parliament on 6 October 1994.[49] Its origins can thereby be traced back to a democratically-elected body. The text of the amnesty was drafted by President Aristide, Haiti's first democratic president.[50] While the legislators may not have fully understood or analysed the text of the law,[51] the fact that it came forth from these two bodies, rather than from the outgoing regime, does give the legislation a sense of domestic legitimacy.

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[45] *See* S.C. Res. 940, 49th Session, 3413th mtg., U.N. Doc. S/RES/940 (1994).
[46] Carter-Jonassaint Agreement, 18 Sept, 1994, Art 3. Onf ile with author.
[47] Secretary of State Warren Christopher, White House Press Briefing on Haiti (Sept. 19, 1994), U.S. Newswire, Sept. 19, 1994, available in LEXIS, News Library, CURNWS File, *cited in* Scharf, *supra* note 1 at 7.
[48] See *infra* Section II A.
[49] The Chamber of Deputies voted 50-2 in favour of the legislation which had been drafted by President Aristide. See Scharf, *supra* note 1, at 16.
[50] *See* Scharf, *supra* note 1 at 16.
[51] *See* Scharf, 16 (noting the legislator's ambivalence and even confusion about the text of the amnesty).

The Haitian amnesty is carefully tailored to restrict the grant of immunity to certain political crimes and associated acts. The law limits any grant of amnesty to "crimes and misdemeanours against the state, internal and external security, crimes and misdemeanours affecting public order, and accessory crimes and misdemeanours."[52] The first three clauses of this amnesty are relatively straight-forward. Amnesty is conferred in relation to political crimes against the state, such as treason, of which the former Junta was likely guilty. As these crimes were directed against the state, rather than against particular individuals, the state likely has appropriate standing to grant amnesty in relation thereto without infringing on the rights of individuals. These first clauses are drafted so as to avoid a grant of amnesty for non-political criminal acts, such as serious crimes against human life—rape, torture, murder, etc. The final clause, however, leaves more room for problematic interpretation. It extends the amnesty to "accessory crimes and misdemeanours," without providing specific guidance as to which crimes should be deemed "accessory." A leading commentator on the Haitian legislation notes that the question a court would ask in such a case "is whether the nexus between the crime and the political act is sufficiently close for the crime to be deemed political."[53] While this nexus test may allow for certain serious crimes against human life to be included in the amnesty, it does provide the judiciary with a margin of appreciation to be exercised in the future to determine which crimes are political. As such, it seeks to balance the immediate need to ensure the military regime leaves power without sacrificing the accountability of

[52] Law Relative to Amnesty (1994) (Haiti), *published in The Monitor, Official Journal of the Republic of Haiti*, 10 Oct. 1994.
[53] Scharf, s*upra* note 1, at 16.

those who committed non-political crimes.[54] The end result of the clause is to remove from the political debate and leave to the judiciary the future determination of liability for quasi-political and accessory crimes. The independence and effectiveness of the judiciary in this task is still an open question, given the dearth of case law related to the amnesty decree.

Political amnesties, as a category, are further characterized by the provision of alternate means of recourse for victims of crimes covered by the amnesty legislation. In Haiti this alternate recourse took two distinct forms. First, President Aristide established a truth commission, whose mandate was to "investigate and document" crimes committed during his exile.[55] This commission was empowered to gather evidence in relation to alleged crimes and then issue reports, indicating particular perpetrators and violations.[56] The Commission, while no where near as influential as its South African counterpart,[57] ensured that, while some political criminals were forgiven, political amnesty would not become blanket amnesia. In addition, Aristide created a fund for the compensation of victims.[58] Though under-resourced and poorly coordinated, this fund did provide a means of civil redress.[59]

South Africa's Truth and Reconciliation Commission represents a second model of political amnesty, showcasing an amnesty program limited to political crimes as

[54] The most grievous offenders were, of course, insulated from prosecution in Haiti as they were given asylum in Panama.
[55] Scharf, *supra* note 1, at 18.
[56] Claudio R. Santorum & Antonio Maldonado, *Political Reconciliation or Forgiveness for Murder -- Amnesty and its Application in Selected Cases*, 2 HUMAN RIGHTS BRIEF 15, 15 (1995).
[57] See *infa* text accompanying notes 60-76.
[58] *See* Scharf, *supra* note 1, at 18.
[59] Santorum & Maldano, *supra* note 56, at 15.

determined by an independent quasi-judiciary body.[60] In short, the South African Interim Constitution of 1993 requires that "an amnesty [be] granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past."[61] The Constitution specifically calls upon the legislature to pass a law providing for such an amnesty and creating proper tribunals for adjudication thereof. The Constitutional mandate was realized on 26 July 1995 in the form of the "Promotion of National Unity and Reconciliation Act."[62] This act creates the Truth and Reconciliation Commission, the functions of which include the facilitation of inquiries into "gross violations of human rights," "the identity of persons involved in such violations" and "the accountability … for any such violation."[63] The law specifically creates the Committee on Human Rights Violations, with a clear investigatory mandate.[64] Likewise, a Committee on Amnesty is created and specific guidelines are set to determine the application of amnesty. The law calls upon individuals seeking amnesty "in respect of

[60] As numerous articles and books have considered the South African Truth and Reconciliation Commission in extensive detail, this Article will not provide a comprehensive treatment. Rather, it will look only at how the Truth and Reconciliation Commission fits the political amnesty model. For detailed analysis of the historical background and work of the commission see TRUTH AND RECONCILIATION COMMISSION, TRUTH AND RECONCILIATION COMMISSION REPORT (1999); ALEX BORAINE, ET. AL., EDS., DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA (1997); M.R. RWELAMIRA AND G. WERLE, CONFRONTING PAST INJURIES, APPROACHES TO AMNESTY, PUNISHMENT, AND REPARATION IN SOUTH AFRICA AND GERMANY (1996); ALEX BORAINE, ET. AL., EDS., THE HEALING OF A NATION (1995); TRUTH AND RECONCILIATION COMMISSION, SOUTH AFRICA'S HUMAN SPIRIT: AN ORAL MEMOIR OF THE TRUTH AND RECONCILIATION COMMISSION (2000); Kenneth Christine, THE SOUTH AFRICAN TRUTH COMMISSION (2000); ALLY RUSSELL, THE TRUTH AND RECONCILIATION COMMISSION: LEGISLATION, PROCESS, AND EVALUATION OF IMPACT (1999); Marianne Guela, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transnational Government Conflicts in a Divided Society*, 18 BOSTON UNIV. INTL. L. J. 57; Emily H. McCarthy, *South Africa's Amnesty Process: a Viable Route Toward Truth and Reconciliation*, 3 MICH. J. RACE AND L. 183; Paul Lansing, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753.

[61] SOUTH AFRICAN INTERIM CONSTITUTION, (Constitution Act, 1993).

[62] Promotion of National Unity and Reconciliation Act, No. 95-34 (1995) (South Africa) (colloquially, Truth and Reconciliation Act).

[63] Truth and Reconciliation Act, *supra* note 63, at Ch. 2, Art. 4.

[64] Truth and Reconciliaiton Act, *supra* note 62, at Ch. 3, Art. 12.

any act, omission, or offence on the grounds that it is an act associated with a political objective" to submit an application.[65] The Committee is then empowered to review and investigate the application to determine whether the act was in furtherance of a political objective and whether a grant of amnesty is appropriate. Significant, and unique to the South African example, perpetrators seeking amnesty must make a full confession of their acts to the Commission before amnesty will be considered.[66] This mandatory confession process ensures that at a minimum a record of past atrocities can be kept[67] and a partial version of the truth found. If amnesty is granted, both criminal and civil liability of the perpetrator and the State are extinguished.[68]

Examining the South African legislation authorizing the creation of the Truth and Reconciliation Commission in relation to the two criteria outlined above – namely the scope and legitimacy – suggests that this law, like that of Haiti fits within the general framework of a political amnesty. The legislation limits the grant of amnesty to those crimes "associated with a political objective" committed between March 1960 and December 1993. A competent body with both investigatory and adjudicatory powers is established to determine which acts were associated with a political objective.[69] The Commission is specifically directed to deny amnesty for acts which were not proportional to the objective pursued, or which were undertaken for personal gain or out of personal malice.[70] While this limitation may exclude common crimes or personal crimes, it does

[65] Truth and Reconciliaiton Act, *supra* note 62, at Ch. 4, Art. 18.
[66] Truth and Reconciliaiton Act, *supra* note 62, at Ch.4, Art. 18.
[67] *See* TRUTH AND RECONCILIATION COMMISSION REPORT, *supra* note 60.
[68] Truth and Reconciliation Act, *supra* note 62, at Ch. 4, Art. 20(7).
[69] The Commission consists of sixteen impartial members, from academe and the human rights community, among other fields. *See* Peter A. Schey, et. al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325.
[70] Truth and Reconciliaiton Act, *supra* note 62, at Ch. 4, Art. 20, III (f).

allow the Commission to grant amnesty in respect of gross violations of human rights linked to political objectives.[71]

The South African legislation does not totally bar victims from redress. In cases where amnesty is denied, standard criminal or civil cases may ensue. In cases in which amnesty is granted, victims may still have an alternate means of recourse. While the amnesty applies both to the individual and the state, both criminally and civilly,[72] the victim may apply to the Committee on Reparation and Rehabilitation for relief. The goal of such relief is neither to provide criminal sanctions to the persecutors nor economic compensation to the victim, but rather to "restore the human and civil dignity of the victim"[73] and may therefore come in a variety of forms. The legislation thus directly limits the amnesty to political crimes, provides a competent means of determination thereof, and provides a viable, though restricted, alternate means of recourse for victims.

On the second criterion, the South African Promotion of National Unity and Reconciliation Act is marked by a number of significant legitimising factors. While these factors do not necessarily ensure compliance with international obligations, they do place the South African example firmly within the category of political amnesty. The amnesty, enshrined in the Interim Constitution of South Africa, was passed by a democratically elected parliament and signed by President Nelson Mandela, whose personal history as a victim of the Apartheid regime gives him unique credibility to institute an amnesty law.

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[71] To date more than 4,500 applications for amnesty have been filed and numerous amnesties granted, many in relation to serious and systematic crimes against human life. In one recent case, for example, Eugene DeKock was granted amnesty for counts of assault, abduction, and murder. *See* Truth and Reconciliation Commission Press Releases, "DeKock Granted Amnesty," 2 June 2000, (visited 4 September 2000) <www.truth.org.za/media/prindex.htm>.

[72] *See* Schey, *supra* note 69 at 328.

[73] Truth and Reconciliaiton Act, *supra* note 62, Ch. 4, Art. 26(3).

Moreover, the process of developing the Truth and Reconciliation Commission involved extensive consultations with individuals, community groups, and political parties, culminating in 47 hearings across South Africa in 1996 during which political parties and individuals alike were able to air their views on the Commission.[74]

Both the Haitian and South African amnesties combine a significant domestic legitimacy with a limitation to acts committed with political objectives. The ultimate effect of these amnesties is left largely to the judiciary or a truth commission to determine which acts are political and which associated acts will be covered in the amnesty. While this model does allow the potential for an extremely restricted amnesty, in both of these cases, the amnesty has been interpreted very broadly in practice. In Haiti there have been very few prosecutions attempted after the amnesty was enacted. [75] In South Africa, the Truth and Reconciliation Commission has been extremely liberal in its grants of amnesty.[76] The legal result of these amnesties has, therefore, been quite similar to the blanket amnesties described in the previous category. However, political amnesties embody both a greater domestic legitimacy and prosecutorial potential to bring perpetrators to justice if political will is found.

C. Internationally Legitimatized Immunity

The defining element of Internationally Legitimatized Immunity is the specific

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[74] *See* Schey, *supra* note 69, at 329.

[75] In Haiti, for example, President Aristide declared that no "plans to prosecute members of the security forces and their allies" who might have committed acts outside of the Amnesty. Aristide did, however, prosecute a few members of para-military groups for the murders of his supporters. *See* Scharf, *supra* note 1, at 18; "Judge Sentences 14 Haitians to Life," BOSTON GLOBE, 27 Sept. 1995, at 4 (discussing the conviction of Michel Francois, Chief of Police of Port-au-Prince, and 13 others charged with assassinating Antoine Izmery, a fervent supporter of Aristide).

[76] For an list and discussion of amnesties granted by the Commission *see* Truth and Reconciliation Commission Press Releases, *supra* note 71.

exclusion of impunity for serious and systematic crimes against human life. These amnesty laws are restricted so that they can not possibly be construed to apply to Genocide, Torture, Rape, and other Crimes Against Humanity. In form, international constitutional amnesties are normally characterized by a high degree of both domestic and international legitimacy. Amnesties that meet these qualifications are a relatively recent development, emerging only in the mid 1990s. Guatemala, Croatia, and Bosnia and Herzegovina have followed this model.

The amnesty legislation enacted in Croatia[77] and Bosnia and Herzegovina[78] in mid-1996 is restricted to exclude the most serious human rights abuses and violations of international humanitarian law. The Croatian law begins with a grant of "general amnesty," not unlike those of the blanket amnesty section *infra* for all "criminal acts … committed during the period 17 August 1990 to 23 August 1996." Article 2 extends the scope of the law to cover all those who committed criminal acts in Croatia, be they already convicted, currently subject to criminal proceedings, or not yet indicted.[79] Article 3 of the Croatian amnesty, however, differs dramatically from the texts of both blanket and political amnesties by exempting from the grant of amnesty "the most flagrant violations of humanitarian law." The exception references specific items in the new Croatian Penal Code[80] including Genocide, War Crimes, Slavery, Torture, Terrorism, and Hostage Taking.[81] Article 3 further restricts the amnesty, subjecting it to the "provisions of international law."

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[77] Law on General Amnesty, No. 80 (1996) (Republic of Croatia). On file with author.
[78] Amnesty Law (1996) (Federation of Bosnia and Herzegovina). On file with author.
[79] Law on Genral Amnesty, *supra* note 77, at Art. 2.
[80] Penal Code of the Republic of Croatia, cited in M. WELLER AND W. BURKE-WHITE, NO PLACE TO HIDE : NEW DEVELOPMENTS IN THE EXERCISE OF INTERNATIONAL CRIMINAL JUSTICE (forthcoming 2000).
[81] Law on General Amnesty, *supra* note 77, at Art. 3.

The amnesty law of the Federation of Bosnia and Herzegovina of 30 June 1996 provides a similar limitation through an alternate textual device. It offers amnesty to "all persons who committed against the foundation of social system and security of Bosnia and Herzegovina." Thus, the crime must have been directed against the state, encompassing the social system and the military and including acts such as draft evasion and desertion.[82] The amnesty does not apply to crimes against individuals and, as such serious violations of international humanitarian law directed at particular persons are not included in the amnesty. The text goes on to explicitly exclude some serious and systematic crimes against human life. The Republika Srpska, the other constituent entity of Bosnia and Herzegovina, passed a separate amnesty law with similar effect on 13 September 1996, calling for a "release from criminal prosecution …[for] all persons who, in the period of 1 January 1991 to 14 December 1995, committed any of the criminal acts against the basis of the social organization of the Republic Srpska."[83] Again, the legislation limits the amnesty to cover only acts committed against the state and its social organization, excluding serious violations of international law.

The political background to the amnesty legislation in Croatia and Bosnia and Herzegovina explains the restricted scope of these amnesties and the domestic and international legitimacy they carry. These laws first took shape in the Dayton Peace Accords of 1995, which called upon the parties to grant amnesty to "returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former

[82] UNHCR Sarajevo, Commentary: Amnesty Laws in Bosnia and Herzegovina, (visited 4 September 2000) <http://www.refugees.net/en/doc/amnesty.html>.
[83] Amnesty Law of the Repbulika Srpska (1996) (Bosnia and Herzegovina). On file with author.

Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict."[84] States-Parties were thereby required to include within the legislation most crimes committed by displaced persons, but to exclude those violations of international humanitarian law within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, namely Genocide, Crimes Against Humanity, and Violations of the Laws and Customs of War.[85] The need to carefully draft legislation which walked this fine line was further reinforced by UN Security Council Resolutions establishing the Tribunal[86] and the Statute of the Tribunal itself[87], which empowered the Tribunal to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."[88] Any grant of amnesty that included crimes within the jurisdiction of the Tribunal would thus have been a flagrant breach of both the Dayton Accords and UN Security Council Resolutions.

The goal of the Bosnian and Croatian amnesties appears to have been the resolution outlined in the Introduction – to ensure protection of minorities from arbitrary prosecution, while simultaneously facilitating accountability for sever violations. The Croatian and Bosnian laws appear to have balanced these dual dictates of Dayton—a guaranteed amnesty for most crimes but, at the same time, explicit liability for violations

[84] The Dayton Peace Accords, Annex VII, Art. 6. (1995), available at http://www.state.gov/www/regions/eur/bosnia/bosagree.html./

[85] Statute of the International Criminal Tribunal for the Former Yugoslavia (1993). *Republished in* BASIC DOCUMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA 1 (1998).
[86] UNSCOR 808 (1993), UN Doc. S/Res/808 (1993), (affirming that "all parties are bound to comply with obligations under international humanitarian law"); UNSCOR 827 (1993), UN Doc. S/Res/827 (1993), (establishing the Tribunal and requiring that states "fully cooperate with [it]…[by taking] any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute").
[87] Statute, *supra* note 85.
[88] *I*d. at Article 1.

of international humanitarian law. The Croatian amnesty legislation has been invoked by a number of Croatian Serbs suspected of minor crimes during the war in the former Yugoslavia.[89] Yet, the legislation has not prevented the International Criminal Tribunal from the Former Yugoslavia from prosecuting the perpetrators of serious violations of international humanitarian law.[90] Croatia and Bosnia have found the middle ground of amnesty for some, but liability for others and thus secured international support and legitimacy.

The Guatemalan Law of National Reconciliation of 18 December 1996 follows a form similar to the Croatian Amnesty Law, excluding specifically designated international crimes from the grant of amnesty. Article 8 of the Guatemalan legislation exempts "the crimes of Genocide, Torture, Forced Disappearance, as well as those crimes which are imprescriptile or which do not permit the extinction of criminal liability in conformity with international law or international treaties ratified by Guatemala."[91] By invoking international law and international treaties generally, the amnesty law ensures that the most serious violations of human rights and international humanitarian law can still be prosecuted, either in Guatemala, an international forum, or a 3rd state.

The amnesty laws of each of Croatia, Bosnia and Herzegovina, and Guatemala also share a common thread of domestic, as well as international, legitimacy. In Croatia,

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[89] Dragan Lapcevic, for example, was released on 1 April 1998 after invoking the law and having his arrest warrant annulled. *OSCE Gives Reserved Welcome to Zagreb's Refugee Plans*, AGENCE FRANCE-PRESSE, 1 April 1998, Available at 1998 WL 2253161. In total more than 13,000 Serbs were pardoned under the legislation by March 1998. *Government so far Pardoned Thousands of Serbs from War-Related Charges*, ASSOCIATED PRESS, 18 March 1998.

[90] *See*, *Government so far Pardoned Thousands of Serbs from War-Related Charges*, *supra* note 89 (noting that by early 1998 the ICTY had indicted 25 Croatian suspects who were specifically exempted from the amnesty).

[91] Amnesty Law, No. 145-96 (1996) (Guatemala). On file with author.

the amnesty was passed by parliament, rather than simply being issued by means of a presidential decree.[92] In Bosnia and Herzegovina, both the Federation and the Republika Srpska amnesty laws were passed by representative governments created through the Dayton Accords. In Guatemala, the Law of National Reconciliation was preceded by a comprehensive peace settlement between leftist rebels and government negotiators.[93] The law itself passed in a 65-8 vote by the legislature, which emerged from the peace negotiations and was then signed by President Alvaro Arzu.[94] The legislation, though controversial, received support from a broad spectrum of Guatemalan society, including the Guatemalan Armed Forces and the Guatemalan National Revolutionary Unity Movement.[95] While perfect representation of the domestic polity is not possible even in a western liberal democracy, the political processes which led to the amnesties in these three countries were generally representative and legitimate, especially in comparison with the processes that led to the blanket amnesties, described *infra.*

D. Conclusion

Each of the three categories of amnesty—blanket, political, and internationally legitimized—represent vastly different approaches to the paradox presented by the conflicting needs of reconciliation and accountability. Blanket amnesties seek to forget

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[92] *Croat Parliament Ratifies Accord with Belgrade, Passes Amnesty Law*, DEUTSCHE PRESSE-AGENTUR, 20 September 1996.
[93] *36 Years of Civil War End in Guatemala*, THE PHOENIX GAZETTE, 12 November 1996, at A9.
[94] *See* Amnesty in Guatemala, HOUSTON CHRONICLE, 19 December 1996, at 35.
[95] *See Guatemalan Assembly Approves Amnesty Law*, FT. WORTH STAR TELEGRAM, 19 December 1996, at 5.

the past by granting impunity to all. They tend to accomplish this goal through executive decree or legislation with domestic or international credibility. Political amnesties take a middle ground between amnesia and accountability as crimes linked to political objectives are forgiven while others remain prosecutable. Much discretion is left to the judiciary or other investigatory body to determine which crimes fall within the scope of the legislation. Finally, internationally legitimised amnesties leave no discretion either for the judiciary or the political process that the most serious violators of human rights and international law can not be granted impunity. Often building a legitimate domestic and international consensus, these laws seek to move beyond a dark past without either forgetting or forgiving humanity's worst offenders. The effect of any of these amnesties either in hindering accountability or as in facilitating reconciliation depends largely on their application in both domestic international judicial settings. The next section will turn to this question.

III. Challenging Impunity

Legal challenges to the validity of amnesty legislation generally have taken two forms: petitions to the Inter-American Commission on Human Rights and cases brought before the high courts of the state which enacted the legislation. Neither of these methods, however, has been particularly successful for victims seeking redress for the wrongs suffered. While the Inter-American Commission has been particularly sympathetic to victims denied relief by amnesty legislation, its opinions are non-binding and have had little effect on the behaviour of the states in question. National high courts,

on the other hand, have had significant effect on state policy, but have tended to firmly support amnesty laws on a variety of grounds. The numerous challenges to impunity thus do more to expound the norms of law surrounding this type of legislation than to provide victims with a means of redress or to facilitate criminal prosecutions of perpetrators.

A. The Jurisprudence of the Inter-American System

Much of the relevant jurisprudence of the Inter-American Court and the Inter-American Commission on Human Rights considers the rights of victims to adequate means of redress for grave human-rights violations in the face of amnesty legislation.[96] While this line of cases does not directly address states' international criminal obligations it does help clarify the norms of international law vis-à-vis victims' rights. The vast majority of petitions before these two bodies base their claims on rights enshrined in the Inter-American Convention on Human Rights,[97] which requires states to uphold the "rights and freedoms recognized" in the convention, including the right to judicial personality,[98] the right to a fair trial,[99] and the right to judicial protection.[100] The Court and Commission have utilized these treaty-based rights to advance an argument that amnesty legislation violates state obligations to victims.

The line of cases in the Inter-American system begins with the Velasquez Rodriguez Case, brought against Honduras before the Inter-American Court of Human

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[96] For a discussion of the Inter-American Human Rights system see generally Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 BOS. U. INT'L L. J. 321 (1994).
[97] Pertinent excerpts included in Velasquez-Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).
[98] American Convention on Human Rights, 18 July 1978, 1144 U.N.T.S. 123, at Ch. 2, Art. 3.
[99] American Convention on Human Rights, *supra* note 98, at Ch. 2, Art. 8.1.
[100] American Convention on Human Rights, *supra* note 98, Ch. 2, Art. 25.1.

Rights in 1988. The Velasquez Rodriguez case was not, however, a direct challenge to an amnesty law, but rather a complaint on behalf of the relatives of Manfredo Velasquez, who had been illegally detained by members of the State Information Service and eventually became one of the "disappeared." Referencing Article 1(1) of the Inter-American Convention on Human Rights, the Court found "that [the] practice [of] torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person."[101] The Court went on to hold that Articles 8 and 25 of the Convention obligate states "to investigate every situation involving a violation of the rights protected" in the Convention.[102] The Court concluded that Honduras had breached its obligations "to carry out an investigation into the disappearance of Manfredo Velásquez, and … [to] fulfil … its duties to pay compensation and punish those responsible."[103] The implications of this decision for amnesty legislation is that States-Parties[104] to the Inter-American Convention have an affirmative duty to their citizens to prevent and punish serious human rights violations. Impunity does not stand.

The Inter-American system turned its attention directly to the question of impunity in a number of cases before the Inter-American Commission on Human Rights. The Commission, unlike the Court which heard the Velasquez Rodriguez Case, is only a "quasi-judicial body" with the authority to issue recommendations, but without

[101] Valasquez-Rodriguez, *supra* note 97, at Para. 175.
[102] Id. at Para. 176.
[103] Id at Para. 178.
[104] States Parties to the Convention with dates of signature include: Argentina (2/2/84), Chile (11/22/69), El Salvador (11/22/69), Guatemala (11/22/69), Haiti (9/14/77), Honduras (11/22/69), Nicaragua (11/22/69), Peru (7/27/77), and Uruguay (11/22/69).

enforcement power.[105] These cases before the Commission can be grouped into two categories – the early jurisprudence of 1993-94 and the more recent Chilean case of 1997. Tracing the development of this jurisprudence indicates a growing condemnation of impunity within the Inter-American system.

The 1992-3 cases before the Commission all found that states have a duty to investigate violations of human rights and ensure compensation for victims.[106] In its 2 October 1992 report in Consuelo et. al. v. Argentina,[107] the Commission confronted an amnesty law[108] which still allowed for the prosecutions of top military commanders and which created an investgatory mechanism. Nonetheless, the Commission found the amnesty incompatible with the state's obligations under the Convention. The Commission interpreted the right to a fair trial under Article 8.1 to apply to victims and perpetrators alike, noting that one of "the effects of the disputed measures was to weaken the victim's right to bring a criminal action in a court of law against those responsible for these human rights violations."[109] In respect to "access to judicial protection" under Article 25.2 of the Convention, the Commission noted a duty to "ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system."[110] Finally, the Commission cited the Velasquez Rodriguez case for the proposition that states have an obligation to investigate violations:

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[105] Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L. J 857, 866 (1995).
[106] *See* Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*" 59 L. AND CONTEMP. PROBLEMS 197, 212 (1996).
[107] *See* Consuelo et. al v. Argentina, *supra*, note 38. In this case six petitions were filed, some by ndividuals and some by organizations, claiming that Argentine Laws 23,492 and 23,521 were in violation of the Convention.
[108] Final Act (Argentina) and Due Obedience Law (Argentina), *supra* note 30.
[109] Consuelo et. al v. Argentina, *supra*, note 38, at Para. 33.
[110] Consuelo et. al v. Argentina, *supra*, note 38, at Para. 38(a).

"states must prevent, investigate and punish any violation of the rights recognized by the Convention."[111] In a similar report of the same date in Mendoza v. Uruguay,[112] the Commission reached a nearly identical conclusion, finding the legislation to have violated the right to a fair trial, the right to judicial protection, and the state obligation to investigate. In this case the Commission did not deem all amnesties *de facto* violations of the Convention, but rather indicated the need to "weigh the nature and gravity of the events with which the law concerns itself."[113] Furthermore, the Commission stressed the importance of investigation, rather than punishment.[114] In the third early case, the Commission considered the amnesty legislation in El Salvador and again reached similar conclusion, but noted that an amnesty not preceded by an individual acknowledgement of responsibility was particularly problematic.[115]

A collective analysis of these three cases concludes that the Commission was dismayed by the amnesty legislation in Argentina, Uruguay, and El Salvador. Yet, due both to its non-binding authority and its awareness of the political realities of Latin America,[116] the Commission was not in a position to make a definitive statement that all amnesties were precluded by the Inter-American Convention or that all perpetrators must be punished. Rather, the Commission sought to identify certain aspects of the legislation that were in breach of the Convention and propose alternate solutions that would conform

[111] Consuelo et. al v. Argentina, *supra*, note 38, Para. 40.
[112] Mendoza v. Uruguay, Case No. 10.029, Inter-Am. C.H.R. 154, OEA/ser. L/V/II.83, doc. 14 (1993). In this case the Commission addressed the Uruguayan amnesty, approved by voters in a referendum, which barred all criminal prosecutions but left civil remedies intact. *See* Cassel, *supra* note 106 at 211. Four petitioners had denounced Uruguayan law No. 15.848 as applied arguing that it violated rights enshrined in the Inter-American Convention.
[113] Mendoza v. Uruguay, *supra* note 112, at Para. 38.
[114] Mendoza v. Uruguay, *supra* note 112, at Para. 50.
[115] *See* Report on the Situation of Human Rights in El Salvador, Inter-Am. C.HR. OEA/Esr/L/V/II.86 (1994).
[116] *See* Cassel, *supra* note 106, at 209.

to the Convention. The Commission's final recommendations focused not on the inherent illegality of amnesties nor on the obligation to punish perpetrators, but rather on the right of victims to "just compensation for the violations."[117] One commentator suggests that the Commission would likely approve of an amnesty met the following conditions: that it did "not preclude individual investigation, that it did not prejudice the victim's opportunity to seek and obtain reparations" and that it did "not preclude public acknowledgement of the facts."[118] The Commission thus appears in the awkward position of simultaneously condemning amnesties while giving guidance as to what might be a legitimate amnesty.

The Inter-American Commission on Human Right's more recent report of October 15, 1996 in Hermosilla, et. al., v. Chile[119] extends its previous holdings and affirms an obligation to prosecute perpetrators of serious violations of the Convention. The Commission notes that Chile has "recognized its obligations to investigate previous violations of human rights" through a truth commission.[120] Nonetheless, the Commission boldly states: "the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under … the Convention."[121] The Government of Chile is not merely instructed to compensate victims, but is condemned for a "failure to amend or revoke the *de facto* Decree Law."[122] The argument here is that

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[117] *See* Consuelo v. Argentina, *supra* note 38, Recommendations, Para. 2 ; Mendoza v. Uruguay, *supra* note 112, Recommendations, Para. 2.

[118] Weiner, *supra* note 105, at 870.

[119] Hermosilla et. al. v. Chile, *supra* note 14. This case considered the problem of impunity in Chile for those responsible for the arrest and disappearance of 70 individuals. The petitioners had sought domestic recourse in Chile but had their case dismissed pursuant to the Amnesty Decree law 2.191. See discussion of the Chilean law, *supra*, text accompanying notes 8 - 22.

[120] Hermosilla et. al. v. Chile, *supra* note 14, at Para. 41.

[121] Hermosilla et. al. v. Chile, *supra* note 14, at Para. 50.

[122] Hermosilla et. al. v. Chile, *supra* note 14, at Para. 61.

the amnesty is blatantly contrary to the obligations of the convention. Moreover, Chile is instructed to "identify the guilty parties, establish their responsibilities and effectively prosecute… them" and "impose appropriate punishment on them."[123] The Hermosilla case thus clarifies the extent of a state's duty under the Inter-American Convention to investigate violations, identify perpetrators, and punish the guilty.[124] No amnesty law, no matter how carefully tailored, could conform to the dictates of Hermosilla.

The case law of the Inter-American system evidences a trend in the interpretation of amnesty legislation in Latin America, moving from criticism of certain elements of particular amnesty laws to general condemnation of impunity. Despite the Commission's strong recommendations to Chile, it has no effective enforcement power to ensure compliance with its holdings. Petitions to the Inter-American Commission have thus been useful in clarifying norms of international law under the Convention and pressuring states to conform with those norms, but have not had a direct effect on the content, scope, and application of amnesty laws throughout the region. Moreover, the Commission focused its inquiries on victims' rights within the context of the Inter-American Convention. As such, it did not consider states' international criminal obligations, under other international instruments and customary international law, which may, in fact, provide, even more concrete obligations to prosecute perpetrators of certain crimes.

B. Challenging Impunity in Domestic Forums

Domestic challenges to amnesty legislation in the high courts of various states

[123] Hermosilla et. al. v. Chile, *supra* note 14, at Recommendations, Para. 110, 77.
[124] *See* Cassel, *supra* note 106, at 217.

have generally claimed that the given amnesty law violates a right established in the constitution of the state in question. Though unlike the Inter-American Commission discussed *supra,* the national courts in question do have binding authority, challenges in these domestic courts have generally been unsuccessful. Judiciaries have often yielded to legislative and executive authority, citing important policy reasons behind the amnesty legislation. Similar to the adjudicatory bodies of the Inter-American system, domestic courts have not considered legislation in light of international criminal obligations. These challenges do not, therefore, resolve the international legal validity of amnesty legislation, but rather provide guidance as to the application of amnesty laws and thus an indication of some state practice in relation thereto. The most significant domestic challenges to impunity have occurred in Argentina,[125] Chile,[126] El Salvador,[127] and South Africa.[128]

The first of these challenges occurred before the Supreme Court of Argentina in 1987. The petitioners claimed that the Due Obedience Law, which created an irrebutable presumption that soldiers acted pursuant to command orders, "prevented courts from examining issues which are of their exclusive competence."[129] Without providing any meaningful reasoning, the Court determined that "Congress has the power … to seek its

[125] Decision on the Law of Due Obedience, Case No. 547, 22 June 1987 (Supreme Court of Argentina).
[126] In 1990, the Chilean Supreme Court upheld the validity of the 1978 Amnesty Law. *See* Edward S. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 Tulsa J. Comp. & Int'l L. 253, 275. In 1998, however, the court invoked international treaty law, namely the Geneva Conventions, to strike down the Amnesty Law in relation to certain crimes, allowing the case of the disappearance of human rights activist Pedro Enrique Cordovo to be reopened. *See Supreme Court Adheres to Geneva Convention* EL MERCURIO, 9 November 1998.
[127] Decision on the Amnesty Law, Proceedings No. 10-93, 20 May 1993. (Supreme Court of Justice of El Salvador).
[128] The Azanian People's Association, et. al., v. The President of the Republic of South Africa, 25 July 1996. (Constitutional Court of South Africa).
[129] Decision on the Law of Due Obedience, *supra* note 125.

policy objectives in a reasonable manner through the enactment of laws." In the eyes of the Court, the Due Obedience Law was such a reasonable measure. In a concurring opinion, Justice Carlos Fayt noted the important policy reasons that "motivated the enactment of the law" and found the Court not to be in a position to modify those policy reasons or the legislature's means of achieving them. Justice Fayt further sought to break with a tradition of command responsibility established in numerous jurisdictions after WWII, which held superiors liable for the acts of their inferiors while still holding inferiors liable for their own illegal acts even if following orders.[130] Justice Fayt argued that "subordinate officers have the legal capacity to verify the extrinsic characteristics of the act for the purposes of establishing whether or not it is an order . . . but such capacity to verify does not extend to the legal or illegal nature of the order."[131] The Supreme Court thereby upheld the Due Obedience Law, affirming impunity for most members of the military and state services.

The challenges to impunity in both Chile and El Salvador invoke somewhat questionable logic to deny the judiciary jurisdiction. In considering a petition challenging the 1993 Salvadoran Law of Amnesty and Rehabilitation, the Supreme Court of Justice of El Salvador held that "matters of purely political nature are not [within] the domain of tribunals."[132] In a convoluted discussion of sovereignty, the Court determined amnesty to be a right of the sovereign, initially conferred by "divine grace," and therefore an

[130] For an excellent review of command responsibility, see generally MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR (1999); William H. Parks, *Command Responsibility For War Crimes*, 62 MIL L. REV. 1 (1973); for case law establishing the rule of command responsibility, see In re Yamashita, 327 US 1 (1946); The High Command Case, UNITED NATIONS WAR CRIMES COMMISSION, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 76 (1948).
[131] Decision on the Due Obedience Law, *supra* note 125, at Para. 21.
[132] Decision on the Amnesty Law (El Salvador), *supra* note 127 at (I).

"eminently political act." It concluded that the power to grant amnesty had been "constitutionally conferred on the Legislative Assembly" and that it was not within the Court's jurisdiction to review such a political act. The problem with this logic is two fold. First, it invokes the divine right of kings to declare amnesty a political act. The weight of such analysis is questionable. Secondly, even if amnesty is a solely political matter, it is not clear that it should be beyond the scope of judicial review. If the judiciary can not review a political act by the legislature, what role does it serve? As an apparent afterthought, the decision turns briefly to the merits of the case, invoking an often misconstrued passage of Additional Protocol II of the Geneva Conventions which calls upon States Parties "at the cessation of hostilities . . . [to] grant the broadest possible amnesty to persons who have taken part in the armed conflict."[133] While this brief discussion does not seem appropriate after the courts decision to decline jurisdiction, it is also troubling in that it is both a limited and fundamentally inaccurate interpretation of the Geneva Conventions. The Court does not consider the fundamental obligations of the Geneva Conventions, in light of which the Amnesty clause must be interpreted, nor does it mention the Red Cross Commentaries[134] which drastically limit the reading of Article 6.5. The Salvadoran Supreme Court thus yields to perceived political necessity and denies itself jurisdiction, while indirectly adding supposed international legal support for the amnesty.

A challenge to the National Unity and Reconciliation Act before the

[133] Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts Additional to the Geneva Conventions, 1125 UNTS 609, Art 6.5 (1977).
[134] *See infra* notes 149 - 151.

Constitutional Court of South Africa was equally unsuccessful.[135] Petitioners, represented by the Azanian People's Association, argued that Section 20(7) of the National Reconciliation Act, according to which "no person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organization or the State shall be liable . . . for any such act, omission, or offense," was in violation of Section 22 of the South African Constitution. Section 22 guarantees every person "the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum." In a decision authored by Vice-President of the Court and President Mandella's former attorney, the Court held that the Constitution itself mandated an amnesty law. Like the Argentine Supreme Court decision, *supra*, the South African Constitutional Court places great emphasis on the historical background to the amnesty, opening its decision by noting "decades" of "deep conflict."[136] Once again, as in the Chilean and Salvadorian decisions, the political reality appears at the forefront of the judiciary's logic. Nonetheless, the Constitutional Court grounds affirmation of the Truth and Reconciliation Act on a strong legal foundation. The Court acknowledges that "an amnesty undoubtedly impacts on fundamental rights" protected by the Constitution.[137] The Court observes, however, that Section 33(2) of the Constitution allows the Constitution itself to limit the rights it guarantees.[138] Deeming the Epilogue of the Constitution,[139] which explicitly calls for an amnesty act, a part of the Constitution with

[135] *See* The Azanian People's Association, *supra* note 128.
[136] The Azanian People's Association, *supra* note 128, at Para. 1.
[137] The Azanian People's Association, *supra* note 128, at Para. 9.
[138] The Azanian People's Association, *supra* note 128, at Para. 10.
[139] The Epilogue instructs the Parliament that it "shall adopt a law providing *inter alia*, for the mechanisms , criteria, and procedures … through which … amnesty shall be dealt with." Azania People's Organization, *supra* note 128, at Para. 14.

equal status to the rest of the document, the Court upholds the validity of the Truth and Reconciliation Act. The rhetoric of the Court then returns to the need for an "historic bridge" and the importance of peaceful political transition. Law and policy are thus skillfully woven to affirm the act and its political and social implications.[140]

While the Constitutional Court of South Africa was predominately concerned with the relation of the amnesty decree to the Constitution, it does provide some consideration of international law. The Court's logic in relation to international law, however, is circular and its conclusions in breach of fundamental principles of public international law. According to the Constitutional Court:

> International law and the contents of international treaties to which South Africa might or might not be a party are . . . relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorize any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country . . . unless they are incorporated into the municipal law by legislative enactment.

The Court thus claims that Constitutional lawmakers can infringe international law, but they should not be lightly presumed to do so. Yet, the Court fails to engage the question of whether such a presumption against a breach of international law should apply to a domestic law mandated by the Constitution. If the terms of the Constitution should not lightly be read to contradict international law, why is a domestic law exempt from such a more stringent reading? The Court does cite the Constitution itself for the proposition that courts "should have regard to public international law applicable to the protection of

[140] The Azanian People's Association, *supra* note 128, at Para. 19.

rights entrenched in this Chapter,"[141] yet the Court argues such scrutiny is not necessary as the Constitution itself mandates the grant of amnesty. This troubling and circular logic denies the applicability of international law and seeks to exempt the South African legislation from the rigorous obligations of international law.

The Constitutional Court's brief treatment of international obligations under select treaties fails to acknowledge the full scope of the treaty obligations it faces and does not even consider potential obligations under customary international law. It is important to note however, that even a Constitutional Court decision upholding the law's international validity does not absolve South Africa of its international obligations. The Court writes off South Africa's obligations under the Geneva Conventions and their additional protocols, noting that the acts in South Africa were "perpetrated … within the territory of a sovereign state in consequence of a struggle between the armed forces of that sate and other dissident armed forces." In such a case, the Court deems there to be "no obligation . . . to ensure prosecution."[142] The Geneva Conventions and their additional protocols may well obligate states to prosecute crimes in non-international armed conflicts. At the very least, the Court should have fully considered this possibility. While it is true that at the time South Africa was not party to many other conventions requiring prosecution,[143] it certainly faced customary law obligations, at least with respect to genocide and crimes against humanity, both of which were articulated in international customary law at the

[141] SOUTH AFR. CONST., Sec. 35(1).
[142] The Azanian People's Association, *supra* note 128, at Para. 30.
[143] South Africa did not accede to the Genocide Convention and the Convention Against Torture until 12 October 1998 and would not therefore be under a treaty-based obligation to prosecute crimes before those dates. *See* WELLER & BURKE-WHITE, *supra* note 80, at Ch. 3 (discussing the requirements for prosecution under international treaty law).

time.[144] In its failure to consider these potential limits on amnesty legislation, the Court abrogates its international obligations and fails to fulfill its duties both to the international community and to the citizens of South Africa.

IV. Resolving the Paradox: Reconciling International Obligations with Amnesty Legislation

The need for peaceful political transition and reconciliation often presents a direct conflict with the international legal obligation and domestic demands of accountability serious and systematic crimes against human life. States have attempted to mediate this conflict in a variety of ways, each of which has been challenged and criticized for its failure to foster peace, protect victims, and meet international obligations. The third and final section of this Article offers one resolution to this paradox by looking at the problem from the perspective of the emergent international constitutional order. IT seeks to determine the appropriate structure of amnesty law so as to protect minorities from arbitrary prosecution, ensure accountability for serious and systematic violations, and conform with international obligations. This Section first clarifies the norms of international law in relation to impunity and the obligation to prosecute certain crimes. It then tests how each of the three classes of amnesty—blanket, political, and internationally legitimized—meets or fails to meet those obligations. Finally, it looks at the effects of amnesty legislation on criminal prosecutions in third states.

[144] *See* Weller & Burke-White, *supra* note 80 at Ch. 3. In relation to Crimes Against Humanity see Geoffrey Robertson, crimes Against Humanity:1999).

A. International Obligations to Prosecute and Punish

In a previous work, the author has developed three categories of international criminal obligations that stem from treaty and customary law.[145] According to this scheme, some crimes are subject to permissive universal jurisdiction; states are legally permitted, but not required, to exercise universal jurisdiction over them.[146] A second group of crimes is subject to preparatory universal jurisdiction; states are required to enact legislation facilitating the prosecution of these crimes.[147] Finally, a select class of crimes is subject to proactive universal jurisdiction; states face an absolute requirement to prosecute them.[148] While amnesty legislation relates to the domestic prosecution of crimes under the territoriality or nationality principles, rather than the universality principle of jurisdiction, these same three categories are particularly useful in understanding the obligations to prosecute these crimes in relation to amnesty legislation. As will be shown, the relevant provisions of international treaties and customary international law which obligate states to exercise universal jurisdiction, also require them to prosecute domestically under the territoriality and nationality principles, and thereby limit the scope of amnesty laws.

Crimes subject to permissive universal jurisdiction, namely non-grave breaches of the Geneva Conventions and Grave Breaches of the Conventions in non-international armed conflicts have the least stringent requirements for prosecution and thus the widest possibility for amnesty. The Geneva Conventions require "Each High Contracting Party

[145] For a detailed discussion of this scheme, see WELLER & BURKE-WHITE, *supra* note 80.
[146] These crimes include non-grave breaches of the Geneva Conventions in international armed conflicts and grave breaches of the Geneva Conventions and their Additional Protocols in non-international armed conflicts.
[147] These crimes include Apartheid, Crimes Against Humanity, and, arguably, Genocide.

[to] take measures necessary for the suppression of all acts contrary to the provisions of the present Conventions other than the grave breaches.'[149] The Red Cross Commentaries further suggest a duty "to [provide] for the punishment of other breaches."[150] In relation to grave breaches in non-international armed conflicts, treaty law does not provide an absolute requirement to prosecute. However customary international law suggests an obligation to prosecute grave breaches in non-international armed conflict. While ICTY jurisprudence has not been consistent on this point, the Tadic Appeal's judgement held that "Customary international law imposes criminal liability for serious violations of common Article 3."[151] Neither non-grave breaches in international armed conflicts nor grave breaches in non-international armed conflicts are subject to absolute obligation to prosecute, either universally or domestically. At most, States Parties and non-parties alike face an obligation to "suppress" and "repress" such violations of the Geneva Conventions. Amnesty legislation is not, therefore, inherently incompatible with such an obligation. An amnesty law tailored to repress violations through a truth commission, investigation, publication of crimes and perpetrators or other methods would likely satisfy international legal obligations. Recent developments in customary international law, especially through the jurisprudence of the international tribunals suggest, however, that the legal requirements in relation to grave breaches in non-international armed conflicts, are moving toward an absolute requirement to prosecute incompatible with any amnesty.

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[148] This most stringent obligation attaches to crimes including Grave Breaches of the Geneva Conventions, Torture, and Crimes against Internationally Protected Persons.
[149] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31, Art. 49, (1949).
[150] International Committee of the Red Cross, Commentary to the First Geneva Convention1st Geneva Convention, Art. 49, *available at* <http://www.icrc.org/ihl>.

Crimes subject to preparatory universal jurisdiction include Genocide, Apartheid, and Crimes Against Humanity; states generally can not legally grant amnesty for these crimes. In relation to Apartheid, states face obligations "to adopt legislative, judicial and administrative measures to prosecute and punish in accordance with their jurisdiction persons responsible."[152] A similar obligation exists in customary international law for Crimes Against Humanity.[153] For both Apartheid and Crimes Against Humanity, states are required to empower their judiciaries to prosecute violations. A grant of amnesty in relation to these crimes effectively deprives the judiciary of the ability to prosecute. If the legislative or executive branch determines that any of these crimes can not be prosecuted due to an amnesty decree, the judiciary is incapable of prosecuting and international obligations are breached.

A brief consideration of the opposability of obligations enshrined in these treaties is useful for it helps delineate which states face obligations not to grant amnesties for certain crimes. A similar analysis in relation to impunity is useful. Crimes Against Humanity are not covered in an international treaty, but the ability to prosecute these crimes is required by customary international law. As such, the requirements apply to all states and no state can legally grant an amnesty for Crimes Against Humanity. The crime of Apartheid is a crime solely under international treaty law and the requirements to be able to punish the crime and the correlative duty not to pass an amnesty in relation thereto are only applicable to States-Parties to the Apartheid Convention. For example, South

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[151] *The Prosecutor v. Dusko Tadic*, Case No. It-94-1-A, 15 July 1999, at 134, 7. For a more detailed discussion of the status of grave breaches in non-international armed conflicts, see Weller and Burke-White, *supra* note 80, Chapter I, notes 34-50 and accompanying text.
[152] International Convention for the Suppression and Punishment of the Crime of Apartheid, 78 UNTS 277, at Art 5 (1973).
[153] *See* WELLER & BURKE-WHITE, *supra* note 80 at Ch. 1.

Africa is not a party to the Apartheid Convention and would not be barred from granting amnesty for the crime of Apartheid. However, given the customary obligations to be able to prosecute Crimes Against Humanity, South Africa would face an obligation to be able to prosecute Crimes Against Humanity committed as part of the Apartheid regime.

While this schematic has generally categorized Genocide along with Crimes Against Humanity, states face an even more proactive requirement to prosecute Genocide in their domestic courts. The Genocide Convention for example, mandates that perpetrators of Genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed.[154] This text leaves uses the world "shall" and leaves no room for derogation from the obligation to prosecute domestically. As such, amnesty legislation granting impunity for genocide is a fundamental breach of the Convention. This obligation is opposable to all states in the international community. States Parties to the Genocide Convention are obligated to prosecute and thus not to amnesty the crime through treaty law. In addition, as I have argued in a previous work,[155] Genocide is also a crime in customary international law and the obligation not to grant amnesty for the crime thereby extends to all states.

The third category of obligations requires the proactive exercise of jurisdiction and prosecution of certain serious and systematic crimes against human life. This requirement also embodies a requirement not to grant amnesty. For crimes giving rise to this obligation, namely Grave Breaches of the Geneva Conventions, Torture, and Crimes Against Internationally Protected Persons, states face an absolute requirement to "bring

[154] Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948).
[155] *See* WELLER & BURKE-WHITE, *supra* note 80 at Ch. 1.

[perpetrators] before [their] own courts" [156] or to "submit the case to its competent authorities for the purposes of prosecution."[157] The language of these two treaties is unambiguous. States must bring perpetrators before a court of law in order to prosecute them; impunity is not a possibility. Moreover, the language excludes the possibility of a truth commission or other proceedings not either in a court of law nor conducted with the purpose of prosecution. Grave Breaches, Torture, and Crimes Against Internationally Protected Persons must be prosecuted and can not be amnestied in conformity with international legal obligations. Grave Breaches of the Geneva Conventions and Torture are both criminalized in international treaty and customary law.[158] In treaty law, this obligation not to grant amnesty is opposable to all states parties to the two relevant treaties. In customary international law, the obligation extends to all states. Crimes Against Internationally Protected Persons has not yet fully emerged as a crime in customary international law[159] and the obligation not to amnesty these crimes only extends to States Parties to the Convention.

One element of international treaty law is worthy of particular scrutiny. Article 6(5) of the Protocol II Additional to the Geneva Conventions has been often invoked as a justification for broad grants of amnesty. According to this article, "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty

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[156] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field , 75 UNTS 311 at Art. 49 (1949); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Art. 50; Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 129 (1949).

[157] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1035 UNTS 167 (1973).

[158] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 1465 UNTS 85 (1984); *see also* WELLER & BURKE-WHITE, *supra* note 80, at Ch. 1.

[159] *See* WELLER & BURKE-WHITE, *supra* note 80 at Ch. 1.

for reasons related to the armed conflict, whether they are interned or detained."[160] This passage has often been read to contradict the above stated obligations to prosecute and has been used to justify broad amnesty laws.[161] Despite these claims, Article 6(5) does not permit the grant of amnesties for serious and systematic crimes against human life. Rather, it is intended to encourage amnesties for common crimes committed under domestic law in the course of the armed conflict.[162] Such common-crimes amnesties do facilitate the process of reconciliation and refugee return by guaranteeing that minorities will not be arbitrarily prosecuted for minor offences committed during the conflict.

The definitive treatment of this Article is contained in the International Committee of the Red Cross commentary:

> Article 6(5) of Protocol II is the only and very limited equivalent in the law of non international armed conflict of what is known in the law of international armed conflict as combat immunity, i.e., the fact that a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respected international humanitarian law . . . In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought, even if they respected international humanitarian laws. The *traveaux preparatoires* of [Article 6(5)] indicate that this provision aims at encouraging amnesty . . . for 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 humanitarian law.[163]

The Supreme Court of El Salvador was thus fundamentally mistaken when it invoked this

[160] Second Additional Protocol, *supra* note 133.
[161] *See supra* notes 133- 135 and accompanying text.
[162] *See* Cassel, *supra* note 106, at 218.
[163] Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Geneva, to The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, 15 April 1997, cited in Cassel, *supra* note 106, at 218.

Article to justify a blanket amnesty including impunity for serious violations of international humanitarian law.[164] This Article must be read only in a narrow sense as authorization or encouragement for limited amnesties in conformity with international legal obligations.

B. Measuring-Up: Comparing Past Amnesties with International Obligations

This section considers how the three classes of amnesties described in Part I meet or fail to meet the basic international obligations relevant to amnesty legislation articulated in Part III, Section A. In their extraordinarily broad scope, blanket amnesties grant impunity for any and all crimes. Included in such grants are serious and systematic crimes against human life, such as Genocide, Torture, War Crimes, and Crimes Against Humanity. By enacting blanket amnesty legislation, Chile, Argentina, Peru, and Sri Lanka, among others, violated fundamental norms of international law. States are required to enact legislation enabling them to prosecute these crimes and, in some cases, are under an affirmative duty to prosecute. Blanket amnesty legislation denies the judiciary the potential to prosecute and makes actual prosecution impossible. As such, blanket amnesties have no place within the international legal order.

Political amnesties limit impunity to crimes carried out in furtherance of political objectives. On their face they do not violate any of the enacting state's obligations in international law. The legislation itself does not confer impunity unless a designated adjudicatory body deems the crime to have been in furtherance of a political objective. Whether or not such amnesties conform to international obligations depends fully the

[164] *See supra* notes 132 - 134 and accompanying text.

adjudicatory body's determination of which crimes are political. In order for such political amnesties to meet international obligations, the adjudicator must find that Genocide, Grave Breaches of the Geneva Conventions, Crimes Against Humanity, and Torture, are inherently apolitical and therefore not included within the amnesty. Depending on the state's particular treaty ratifications, the crimes of Apartheid, Crimes Against Internationally Protected Persons, and Grave Breaches of the Geneva Conventions in Non-International Armed Conflicts may also be included in this prohibition. In effect, for a political amnesty to conform to international law, the adjudicatory body would have to read into the legislation a contingency that the determination of the crimes committed in furtherance of political objectives conforms to international obligations. Some political amnesties are thus acceptable within an international legal context, while others are not. As applied, the political amnesties in Haiti and South Africa have, *inter alia*, granted amnesty in respect of massive Crimes Against Humanity, and therefore do not comply with international legal obligations. Moreover, the judgement of the Constitutional Court of South Africa that the amnesty grant is not subject to the limitations of international law is indicative of the failure of such a political amnesty as applied to meet international obligations.

Internationally legitimised amnesties, by definition, conform to the mandates of the international constitutional order. They specifically exempt from the grant of impunity those crimes that the state is obligated to punish under international law. The amnesties in Bosnia and Croatia, for example, apply first to crimes against the state, such as treason. Given that the state is the victim of the crime, it has standing without violating either a victim's rights or an international obligation to forgive the crime. While these amnesties do apply to common crimes against individuals, states do not face an obligation in international criminal law to prosecute such

crimes. By specifically legislating that the amnesty will not apply to violations of international humanitarian law, states ensure that amnesties, however applied by the judiciary, will comply with the dictates of the international constitutional order. These amnesties must first meet the norms of customary international law and can not therefore include impunity for Grave Breaches of the Geneva Conventions, Crimes Against, Humanity, Genocide, and Torture. They must then be tailored based on a state's particular treaty obligations to prosecute additional crimes including Apartheid, other War Crimes, and Crimes Against Internationally Protected Persons.

V. Conclusion

International criminal law provides a framework for resolving the paradox presented by the dual goals of accountability and political transition/reconciliation. It does not offer firm guidance on every aspect of the problem. Rather, it helps define the boundaries of permissible impunity. To be sure, this Article has not sought to make normative judgments as to whether amnesties facilitate or hinder post-conflict reconciliation. Rather, the goal of this Article has been to identify those boundaries international law places on impunity by surveying state practice, clarifying international obligations to prosecute certain systematic crimes against human life and determining the extent of the correlative duties not to grant amnesties in relation to those crimes.

From the perspective of international criminal law a few significant conclusions emerge as to the nature and validity of amnesty legislation. First, of the three categories of amnesty legislation surveyed, blanket amnesties, especially as implemented in Latin America, are fundamentally incompatible with international obligations and represent flagrant breaches of both customary and treaty law. Such amnesties have no international

legal validity and should not be respected by other states. Political amnesties, while not inherently incompatible with international law are often in violation of treaty and customary obligations as applied. When such amnesties breach international obligations, they need not be respected, but, when they conform to international norms, they probably carry extra-territorial validity. Internationally legitimized amnesties are by far the least problematic from the perspective of international criminal law. In their statutory compliance with international obligations, these amnesties are worthy of respect by third states.

When surveying state practice with regard to amnesties over the past two decades, a clear trend is evidenced. The majority of the blanket amnesties were passed in the late 1970s and the 1980s.[165] Political amnesties, and their potential compliance with international obligations, are a phenomenon of the mid-1990s.[166] Internationally legitimized amnesties and their explicit compliance with the norms of international law are a more recent development.[167] While the sample size is small, there is clear evidence that state practice is moving from blanket amnesties and total amnesia toward internationally legitimized amnesties and more limited grants of impunity permitted by international law. This trend, embodying both the state practice and *opinio juris* discussed throughout this Article, is evidence of a growing consensus in customary international law that blanket amnesties will not be tolerated and any grants of impunity must be circumscribed by the limits of the international constitutional order.

[165] Argentina (1986), Chile (1978), Honduras (1991), Nicaragua (1990), Peru (1995), Sri Lanka (1982), Uruguay (1986). Those in this group passed more recently—Honduras and Nicaragua—do have some limitations on the scope of the amnesty.
[166] Haiti (1994), South Africa (1995).
[167] Bosnia and Herzegovina (1995), Croatia (1996), Guatemala (1996).

For states grappling with the paradox of impunity and accountability, international criminal law provides a few concrete lessons. First, blanket amnesties breach basic international obligations and will not be respected by third states. Even the most self-interested dictator should avoid such general impunity or he may face trial on his next foreign visit. Political amnesties present a unique compromise by leaving the specific determination of the extent of the amnesty to the judiciary or other adjudicatory body, often after the political transition is complete. However, such amnesties as applied may not conform with the dictates of international law and may not, therefore, be respected. The only certain way to grant an amnesty that meets a states international obligations and to ensure international respect thereof is to follow the international constitutional model. Such amnesties must explicitly exempt serious and systematic crimes against human life from the grant of impunity. If the trend toward internationally legitimized amnesties continues, the day may soon come when the paradox of accountability and political transition resolves itself as impunity for the most serious violations of international criminal law is taken off political bargaining tables the world over.

From what has been said, is follows that it is possible to structure an amnesty program that resolves the paradox of accountability and political transition/reconciliation. If an internationally legitimized amnesty is enacted that grants amnesty for low level crimes—theft, vandalism, etc—committed during an armed conflict, ethnic minorities can be assured that they will not face arbitrary or retaliatory prosecution for their acts during the conflict upon their return to a state in which they find themselves a minority. Such a carefully tailored, limited amnesty will not, however, foreclose the prosecution of

serious and systematic violators of human rights and international humanitarian law. In fact, amnesty legislation if drafted properly can actually facilitate such prosecutions by reaffirming the legislative will to prosecute. Such a hypothetical amnesty program could actually help guarantee minorities and majorities alike that the most serious oppressors and violators will be held accountable.

Biographical Note

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