Vanderbilt Journal of Transnational Law

Volume 43
Issue 2 *March 2010*

Article 5

2010

The Conflict Between the Alien Tort Statute Litigation and Foreign Amnesty Laws

Carlee M. Hobbs

NOTES

The Conflict Between the Alien Tort Statute Litigation and Foreign Amnesty Laws

ABSTRACT

Since the landmark case Filártiga v. Peña-Irala, foreign individuals have increasingly utilized the Alien Tort Statute to raise claims of human rights violations in the United States federal courts. Defendants, however, have alleged that principles of international comity necessitate dismissal of the suit when the foreign country in which the human rights violations occurred has granted defendants amnesty. While the doctrine of international comity permits dismissal if the case requires a federal court to adjudicate the internal affairs of a foreign country, the Supreme Court held, in Sosa v. Alvarez-Machain, that the Alien Tort Statue grants U.S. courts jurisdiction over violations that are universally recognized and specifically defined. This Note argues that this standard encompasses jus cogens crimes such as genocide, torture, summary execution, disappearance, arbitrary detention, war crimes, crimes against humanity, slavery, and cruel, inhuman or degrading treatment. An analysis of international law demonstrates that amnesties that provide blanket immunity for serious international crimes, such as violations of jus cogens norms, are illegal. Given this illegality, this Note argues that, even in the face of political pressure from the U.S. and other countries, federal courts should decline to dismiss Alien Tort Statue cases under international comity when a foreign amnesty law provides impunity for jus cogens crimes.

TABLE OF CONTENTS

I. INTRODUCTION

Starting in the 1980s, two phenomena in international law began to develop concurrently: the use of the Alien Tort Statute (ATS)[1] as a vehicle for pursuing claims against human rights violators in the United States,[2] and the use of granting amnesty in order to bring peace to nations experiencing internal conflict.[3] Since the landmark case *Filártiga v. Peña-Irala*,[4] foreign individuals have used the ATS to pursue international human rights claims in the United States federal courts. However, while the ATS provides redress for human rights violations, foreign amnesties provide immunity for crimes committed during conflicts in order to end civil war and bring peace and reconciliation. Recently, the two developments have clashed in

---

1. Alien Tort Statute, 28 U.S.C. § 1350 (2006). The statute has been called the Alien Tort Claims Act (ATCA), Alien Tort Act (ATA), or Alien Tort Statute (ATS). This Note will adopt the terminology used by the Supreme Court in *Sosa v. Alvarez-Machain* and refer to the statute as the Alien Tort Statute. *See* 542 U.S. 692, 697 (2004).

2. *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 1–2 (2d ed. 2008) ("The ATS was rarely invoked until 1980, when the Second Circuit's landmark decision in *Filártiga v. Peña-Irala* recognized that the statute authorizes claims for violations of international human rights norms.").

3. *See* FAUSTIN Z. NTOUBANDI, AMNESTY FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW 5 (2007) (granting amnesty to criminals of interstate wars gave way to the granting of amnesty in intrastate wars).

4. 630 F.2d 876 (2d Cir. 1980).

cases where the defendants claim that a suit under the ATS would violate an amnesty granted to defendants in the country where the tort or harm took place.[5]

The conflict between El Salvador's 1993 grant of amnesty for crimes committed during its civil war and a recent ATS suit in federal court illustrate this tension. In 2003, El Salvadoran victims of extrajudicial killings and torture filed a complaint[6] in U.S. federal court pursuant to the ATS[7] and the Torture Victims Protection Act (TVPA).[8] The defendant, El Salvador's Sub-Secretary of Defense and Public Security from 1979 to 1981, claimed that the El Salvadoran amnesty law barred the plaintiffs' suit in the U.S.[9] To support the defendant's claim, the Republic of El Salvador filed an amicus brief arguing that the U.S. court should defer to El Salvador's chosen method for handling domestic issues.[10] How should U.S. federal courts resolve such conflicts?

There is no easy resolution to the conflict that occurs when an ATS litigant is confronted with a defendant protected by a foreign amnesty. U.S. courts have relied on prudential doctrines to guide their ATS decisions,[11] but the conflict is further complicated when an amnesty is present because it is not squarely established whether amnesties are legal under international law.[12]

This Note attempts to determine under what conditions U.S. courts should dismiss a case when an ATS suit conflicts with a foreign state's amnesty law. Part II provides a brief history of the development of the ATS and the use of amnesty laws around the world and describes the conflict that exists between the two. Part III analyzes the use of international comity and the status of amnesties under international law as ways U.S. courts could dismiss an ATS claim involving a foreign amnesty. Part IV suggests that U.S. federal courts, when faced with a conflict between an ATS cause of action and a corresponding amnesty law, should only dismiss a claim when the amnesty excludes violations of *jus cogens* crimes. Using examples of

---

5. *See* Chavez v. Carranza, 559 F.3d 486, 494–96 (6th Cir. 2009) (claiming El Salvador's amnesty precludes a claim under the ATS); Khulumani v. Barclay Nat'l Bank Ltd., 504 F. 3d 254, 296–97 (2d Cir. 2007) (discussing whether South Africa's efforts to address the effects of apartheid warrant dismissing the suit).

6. *Carranza*, 559 F.3d at 491.

7. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

8. Torture Victim Prevention Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350 (2006)).

9. Chavez v. Carranza, No. 03-2932 M1/P, 2005 WL 2659186, at *3 (W.D. Tenn. Oct. 18, 2005).

10. Brief of The Republic of El Salvador as Amicus Curiae in Support of Appellant, Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) (No. 06-6234).

11. *See, e.g.*, Alperin v. Vatican Bank, 410 F.3d 532, 561–62 (9th Cir. 2005) (dismissing claims on grounds of political question doctrine); Doe v. Unocal Corp., 963 F. Supp. 880, 899 (C.D. Cal. 1997) (dismissing claims on act of state grounds).

12. *See infra* Part III.

the El Salvadoran and South African amnesties, this Note concludes that courts should look to the developing international standards regarding the acceptability of amnesties in determining whether to dismiss an ATS claim.

II. THE CONFLICT BETWEEN ATS LITIGATION AND AMNESTIES

A. *The Alien Tort Statute*

The ATS, originally part of the Judiciary Act of 1789 and codified today as 28 U.S.C. § 1350, states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[13] There is no record of the ATS's legislative history, but recent scholarship has uncovered its "jurisprudential background."[14] The framers worried about the United States' inability to comply with international law and, in particular, the responses of powerful European states when torts were committed against their diplomats in the United States.[15] For example, in the 1780s, two disputes concerning foreign diplomats left the federal government embarrassed and unable to intervene since the federal courts had no jurisdiction over the claims.[16] Thus, the ATS granted the federal government jurisdiction over these types of cases [17] and demonstrated "an articulated scheme of federal control over external affairs . . . where principles of international law are in issue."[18]

The ATS was rarely used between 1795 and 1976.[19] The modern use of the ATS in the landmark *Filártiga v. Peña-Irala* decision arose from the context provided by an increase in global human rights norms and international agreements.[20] Filártiga had been tortured and killed by a Paraguayan police officer in 1976.[21] In *Filártiga*, the Second Circuit held that the ATS authorized claims against foreign individuals for violations of international human

---

13. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

14. STEPHENS ET AL., *supra* note 2, at 3–4. For further discussion, see the background section of the Supreme Court's discussion in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–26 (2004).

15. STEPHENS ET AL., *supra* note 2, at 4–5.

16. *Id.* at 5.

17. *Id.*; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) ("There is evidence . . . that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

18. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

19. STEPHENS ET AL., *supra* note 2, at 7.

20. 630 F.2d at 883–84, 888.

21. STEPHENS ET AL., *supra* note 2, at 8.

rights norms brought by foreign individuals in federal court.[22] Approximately 150 ATS claims were filed in the wake of *Filártiga*.[23]

Congress weighed in by enacting the TVPA in 1992.[24] The TVPA provides a cause of action for torture or extrajudicial execution committed under color of foreign law against aliens or U.S. citizens.[25] The TVPA's legislative history explicitly endorses the ATS as interpreted by *Filártiga*.[26]

In *Sosa v. Alvarez-Machain*, the Supreme Court finally addressed the ATS and generally endorsed the approach of *Filártiga* and the lower courts by holding that the ATS constitutionally permits courts to recognize common law claims for violations of international law.[27] However, the claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the . . . 18th-century paradigms" on which the statute was based.[28] This interpretation of "a tort in violation of the law of nations" is only slightly different from the "universal, obligatory, and definable" formula that the courts developed after *Filártiga*.[29] Therefore, the crimes of genocide, torture, summary execution, disappearance, arbitrary detention, war crimes, crimes against humanity, slavery, and cruel, inhuman or degrading treatment—crimes that had been recognized by courts as creating ATS jurisdiction pre-*Sosa*—most likely trigger ATS jurisdiction post-*Sosa* as well.[30]

Importantly, the opinion also clarified choice of law issues, which until *Sosa* had caused problems and vast inconsistencies among the lower courts.[31] The opinion clarified that while the substantive violation is governed by international law, federal common law provides the cause of action and governs non-substantive issues.[32]

The Court in *Sosa* declined to "close the door to further independent judicial recognition of actionable international norms"

---

22. 630 F.2d at 887–88.

23. STEPHENS ET AL., *supra* note 2, at 12, 16. The majority of these claims were dismissed for failure to allege recognizable violation of international law. *Id.* at 12.

24. Torture Victim Prevention Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as note to 28 U.S.C. § 1350 (2006)).

25. Torture Victim Prevention Act of 1991 § 2.

26. STEPHENS ET AL., *supra* note 2, at 17 (citing H.R. Rep. No. 102-367, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 ("[The ATS] has . . . important uses and should not be replaced.")).

27. Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

28. *Id.* at 725.

29. STEPHENS ET AL., *supra* note 2, at 47.

30. *Id.* at 50.

31. *Id.* at 36–38.

32. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 641 (2006); *see generally Sosa*, 542 U.S. 692 (holding that the ATS constitutionally permits courts to recognize common law claims for violations of international law).

but cautioned that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[33] In an important footnote, the Supreme Court identified two principles that would further limit the availability of relief in federal courts: (1) the exhaustion of remedies available in the domestic legal system; and (2) a policy of case-specific deference to the political branches.[34]

Even though "case-specific deference" to the executive branch made its debut in *Sosa*, scholars have argued that it is not a new doctrine of deference.[35] Courts have long used several prudential doctrines to dismiss ATS cases.[36] The political question doctrine, act of state doctrine, international comity, and the foreign affairs doctrine have been used by defendants in ATS litigation to claim that the litigation interferes with the sovereign rights of a foreign government, requiring the case to be dismissed.[37] While the footnote in *Sosa* has generated much scholarly debate,[38] post-*Sosa* lower courts have ultimately applied the case-specific deference together with existing doctrines, such as the political question and foreign affairs doctrines.[39] As a result, ATS litigation post-*Sosa* appears unchanged for the most part, and courts have generally applied the same pre-*Sosa* doctrines.[40]

B. *Amnesty*

While the development of ATS legal jurisprudence in the United States permitted victims of human rights abuses to obtain redress, the increase in the use of amnesty laws in many countries following civil strife has conversely denied redress to many of those victims. Amnesty laws have long been a part of inter-state peace agreements,

---

33. 542 U.S. at 729.

34. *Id.* at 733 n.21.

35. Recent Cases, 119 HARV. L. REV. 2292, 2297 (2006).

36. STEPHENS ET AL., *supra* note 2, at 337.

37. *Id.*

38. *See, e.g.*, James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT'L ENVTL. L. REV. 109, 128 (2006) (discussing the discretion that courts possess to dismiss cases); Margarita S. Clarens, Note, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT'L L. 415, 416–17 (2007) (discussing deference to the political branches).

39. Lungisile Ntsebeza v. Daimler, AG, 617 F. Supp. 2d 228, 280–81 (S.D.N.Y. 2009) ("*Sosa*'s reference to 'case-specific deference' implicates either the political question or international comity doctrine." (citing Khulumani v. Barclay Nat'l Bank Ltd., 504 F. 3d 254, 262 n.10 (2d Cir. 2007)); *see also* Recent Cases, *supra* note 35, at 2297 n.38 (discussing lower court deference).

40. STEPHENS ET AL., *supra* note 2, at 21; *see also* Clarens, *supra* note 38, at 431 (discussing the role that deference to the executive still plays).

dating back to 1286 BC.[41] Amnesty is "an act of sovereign power designed to apply the principle of *tabula rasa* to past offences, usually committed against the State, in order to end proceedings already initiated or that are to be initiated, or verdicts that have already been pronounced."[42] As amnesties have become increasingly absent in international peace agreements and inter-state wars occur with less frequency,[43] current amnesties are more often used to end civil wars, insurrectional war, and domestic political disturbances.[44]

The purposes of an amnesty may vary depending on the nature of the conflict.[45] Amnesties have been justified as necessary to end recurring violence, bring about peaceful transition, and serve as an important incentive for key players in the conflict to cooperate in a process of transition.[46] Amnesties have also been justified as aiding in national reconciliation and forgiveness.[47] While amnesties may reduce or even eliminate the ability to bring perpetrators of crimes to justice, the underlying assumption of amnesty is that it is a more appropriate way of achieving a lasting and peaceful coexistence than punishment.[48]

The scope of amnesties may also vary dramatically: general amnesties provide immunity to everyone for all wrongful acts committed during the war,[49] while limited amnesty provides immunity only for specific offenses or particular groups of offenders.[50] Furthermore, internal amnesties are primarily domestic, while external amnesties are used in inter-state peace agreements.[51] Amnesties can cover both civil and criminal liability of the individual.[52]

Amnesties found in domestic instruments concluding a civil war or resolving political strife generally cover offenses "committed in the course or in relation to a specific conflict."[53] Some countries may

---

41. NTOUBANDI, *supra* note 3, at 12; ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 5, 7–21 (2002).

42. NTOUBANDI, *supra* note 3, at 9; *see also* BLACK'S LAW DICTIONARY 82–83 (6th ed. 1991) (providing a similar definition of "amnesty").

43. O'SHEA, *supra* note 41, at 21–22.

44. NTOUBANDI, *supra* note 3, at 5; O'SHEA, *supra* note 41, at 22. Amnesties have been employed in Albania, Algeria, Angola, Argentina, Burundi, Bhutan, Bolivia, Brazil, Bulgaria, Cambodia, Chad, Chile, Colombia, the Comoros, Croatia, Cyprus, Ecuador, El Salvador, Ghana, Haiti, Jordan, Mauritania, Mauritius, Nepal, Oman, Poland, Romania, Russia, Sierra Leone, South Africa, Spain, Sri Lanka, Syria, Serbian Republic of Yugoslavia, and Zaire. *Id.*

45. NTOUBANDI, *supra* note 3, at 24.

46. O'SHEA, *supra* note 41, at 23.

47. *Id.*

48. *Id.*

49. NTOUBANDI, *supra* note 3, at 12.

50. *Id.*

51. *Id.*

52. *Id.* at 32.

53. *Id.* at 30.

distinguish between international crimes and political and related common crimes to define the scope of their amnesty, often excluding international crimes from the amnesty.[54] For example, the Guatemalan National Reconciliation Law of November 18, 1996, made an exception for the most serious crimes such as forced disappearances, torture, and genocide, and the Honduras Amnesty Law Decree of July 1991 excluded forced disappearances.[55] Other countries, however, have granted blanket amnesties that did not exclude the crimes of torture, disappearances, abduction, or extrajudicial killings.[56]

In South Africa, the epilogue to the Interim Constitution of 1993 provided that "in order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions[,] and offences associated with political objectives committed in the course of the conflict of the past."[57] It gave no definition of "conflict of the past" or "acts, omissions[,] and offences associated with political objectives."[58] "The subsequent Amnesty Law of 1995 later defined acts associated with political objectives . . . to cover both perpetrators of apartheid and common criminals."[59] Instead of prosecuting and trying individuals involved in political crimes (e.g., apartheid) and common crimes, South Africa established its Truth and Reconciliation Commission.[60] In order to receive amnesty from the Amnesty Committee, "[i]ndividual perpetrators of past wrongs [had to] give a full account of what they [did] and the context within which it was done."[61]

The amnesty in El Salvador was enacted by the legislature after the Truth Commission released its report implicating several elected officials.[62] During the 1980s, a civil war raged in El Salvador, leaving thousands dead, missing, or tortured.[63] Between 1989 and 1992, the government of El Salvador and the opposition group Farabundo Martí

---

54. *Id.* at 29.
55. *Id.* at 29–30.
56. *Id.* at 30.
57. *Id.* at 29.
58. *Id.*
59. *Id.*
60. O'SHEA, *supra* note 41, at 45 n.48.
61. *Id.*
62. Elizabeth B. Ludwin, *Trials and Truth Commissions in Argentina and El Salvador, in* ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 273, 286 (Jane E. Stormseth ed., 2003); *see also* Ley de Amnistia General para la Consolidacion de la Paz [Law of General Amnesty for the Consolidation of Peace], Legislative Decree No. 486 (1993) (El. Sal.) [hereinafter El Salvador Amnesty Decree] (granting amnesty); U.N. Sec. Council, The Comm'n on the Truth for El Sal., *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, 18–20, U.N. Doc. S/25500 (Apr. 1, 1993) [hereinafter Truth Comm'n Report] (discussing the foundation and role of the Truth Commission).
63. Ludwin, *supra* note 62, at 283–84.

National Liberation Front (FMLN) negotiated an end to the war with the help of the United Nations.[64] The Peace Agreement of January 16, 1992, set up the Commission on the Truth, which was charged with "investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth."[65] Once the commission released its report, however, the Salvadoran legislature passed a general amnesty granting "absolute and unconditional amnesty" to anyone who participated in "political crimes, related common crimes, and common crimes committed by at least [twenty] persons, before March 1, 1992."[66]

Amnesties are not generally considered to have extraterritorial effect, barring only prosecution within the state enacting the amnesty.[67] Even if an individual is immune from prosecution in his or her own nation, the International Criminal Court could assert jurisdiction, the United Nations Security Council could create an ad hoc tribunal, or another country could prosecute the individual under the principle of universal jurisdiction,[68] a principle based on the theory that particular crimes affect the fundamental interests of the international community as a whole.[69]

The legality of amnesties under international law is widely debated, and their legality is "in a state of transition and considerable uncertainty."[70] On the one hand, many of the crimes protected by amnesties are violations of *jus cogens* norms, such as crimes against humanity, war crimes, and genocide.[71] Several treaties, such as the Genocide Convention and the Convention Against Torture create a duty to prosecute genocide and torture.[72] For example, El Salvador's amnesty laws of 1992 and 1993 were held to violate El Salvador's

---

64. Truth Comm'n Report, *supra* note 62, at 31–35.

65. *Id.* at 179–81.

66. El Salvador Amnesty Decree, *supra* note 62, art. 1 (granting amnesty).

67. Diane F. Orentlicher, *Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction*, *in* JUSTICE FOR CRIMES AGAINST HUMANITY 213, 234 (Mark Lattimer & Phillipe Sands QC eds., 2003); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 304 (2007).

68. Trumbull, *supra* note 67, at 304.

69. Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 975 (2006) ("[U]niversal jurisdiction is predicated largely on the notion that some crimes are so heinous that they offend the interest of all humanity, and, indeed, imperil civilization itself.").

70. Trumbull *supra* note 67, at 285; *see* Sadat, *supra* note 69, at 971–72 (discussing differing views on the validity of amnesties under international law); *see also infra* Part III.B (discussing in more detail the legality of amnesties under international law).

71. Sadat, *supra* note 69, at 971–72 ("Examples [of violations of customary international law] include war crimes, genocide, and crimes against humanity.").

72. NTOUBANDI, *supra* note 3, at 3–4; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

obligations under Article 1 of the American Convention on Human Rights in part because the amnesty applies to crimes against humanity.[73]

On the other hand, several states have argued that support for the legality of amnesties is found in Article 6(5) of the Additional Protocol II to the Geneva Conventions.[74] Article 6(5) states that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[75]

Some scholars, viewing amnesties as an important tool for bringing peace to civil war and facilitating transitional governments, argue that continued use of amnesties by states demonstrates that amnesty laws are not per se illegal under customary international law.[76]

C. *ATS Conflicts with Amnesty*

The conflict between amnesties and international law clearly manifests itself in U.S. federal courts when a defendant claims immunity from suit under the ATS due to a foreign amnesty. The ATS provides a cause of action to plaintiffs for certain violations of customary international law, such as torture, genocide, and extrajudicial killing,[77] but in some instances, these crimes are covered by amnesty laws of the defendant's country. For example, in *Chavez v. Carranza*, several plaintiffs filed ATS and TVPA claims against Nicolas Carranza, alleging extrajudicial killings and torture during the Salvadoran civil war.[78] The defendant, in his motion for judgment on the pleadings, argued that the court should decline to exercise jurisdiction because the broad amnesty law passed by the Salvadoran legislature barred plaintiffs' claims, and that the United States should not exercise jurisdiction which circumvents the

---

73. *Id.* at 6.

74. Both the El Salvadoran and South African constitutional courts relied on Article 6(5) to justify their amnesty laws under international law. *Id.* at 223.

75. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 6(5), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol Additional to the Geneva Conventions].

76. Trumbull, *supra* note 67, at 285–86.

77. *See* Lungisile Ntsebeza v. Daimler, AG, 617 F. Supp. 2d 228, 248–49 (S.D.N.Y. 2009) (summarizing the different torts recognized by Circuit Courts as falling within the jurisdiction of the ATS).

78. Chavez v. Carranza, No. 03-2932 M1/P, 2005 WL 2659186, at *1 (W.D. Tenn. Oct. 18, 2005).

"sovereign law of El Salvador."[79] Carranza argued that the court should dismiss the case based on the doctrine of international comity.[80]

In *In re South African Litigation*, plaintiffs filed a suit against several corporations that did business in South Africa during the apartheid regime, alleging that they had "aided and abetted" the government of South Africa in perpetrating "apartheid related atrocities, human rights' violations, [and] crimes against humanity[,]" among other things.[81] The defendants argued that the prudential doctrines of "case-specific deference to the political branches," political question, and international comity required dismissal since the suit would interfere with U.S. foreign policy and the government of South Africa's domestic approach to crimes that occurred during apartheid: the Truth and Reconciliation process.[82]

In cases such as these, a federal court may rely on several prudential doctrines to dismiss the case. The court may also rely on the status of amnesties under international law in order to determine whether they should give any deference to the foreign amnesty. Given the debatable legality of certain amnesties under international law, however, it is unclear to what extent federal courts may respect a foreign amnesty under international comity or any other deferential doctrine. As amnesties become more and more prevalent, and as human rights activists look to the U.S. and the availability of the ATS as a way to bring claims for human rights violations, it is unclear to what extent federal courts will rely on these doctrines or international law to resolve this conflict.

III. MUST COURTS DEFER TO FOREIGN AMNESTIES AND DISMISS ATS SUITS?

As discussed in Part II, federal courts may use several prudential doctrines to dismiss ATS cases when faced with a defendant who claims to be protected by a foreign amnesty law.[83] Of these doctrines, only international comity and a case-specific deference to the political branches have been raised in defense against ATS claims.[84] Courts may also look to international law for

79. *Id.* at *3.

80. *Id.* at *3–5.

81. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2nd Cir. 2007); *Lungisile Ntsebeza*, 617 F. Supp. 2d at 240–41.

82. *Khulumani*, 504 F.3d at 261–62.

83. *See supra* Part II.

84. *See* Chavez v. Carranza, 559 F.3d 486, 495–96 (6th Cir. 2009) (raising the issue of international comity); *Khulumani*, 504 F. 3d at 261–62 (discussing both arguments). The act of state and the political doctrine have also been raised in ATS cases, but are beyond the scope of this article.

guidance on how to treat amnesty laws and to determine their extraterritorial effect.

A. *The Doctrine of International Comity*

The doctrine of international comity is a loosely defined and often confusing prudential doctrine.[85] International comity is "the recognition which one nation allows within its territory to the legislative, executive[,] or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[86]

The Court's modern formulation of international comity in *Hartford Fire Insurance Co. v. California* narrowed the types of cases that could be dismissed on grounds of international comity by requiring that there be a "true conflict" between U.S. and foreign law before the court would dismiss the case.[87] In *Hartford*, nineteen states and several private plaintiffs alleged that certain London reinsurers illegally conspired to coerce primary insurers in the U.S. to offer certain insurance coverage in violation of the Sherman Act.[88] The London reinsurers argued that their alleged conduct was entirely consistent with the comprehensive regulatory framework that exists in Britain.[89] The Court held that "[s]ince the London reinsurers [did] not argue that British law require[d] them to act in some fashion prohibited by the law of the United States," and because they did not "claim that their compliance with the laws of both countries is otherwise impossible[,]" there was no conflict with British law.[90] The Court in *Hartford*, therefore, confirmed that the threshold question in a comity analysis is whether a true conflict exists.[91] Post-*Hartford*, lower courts have resisted dismissing human rights claims in the absence of a true conflict.[92]

---

85. Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 897 (1998) (arguing that confusion occurs because "comity" actually refers to four separate doctrines).

86. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

87. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 798 (1993) (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

88. *Id.* at 770.

89. *Id.* at 798–99.

90. *Id.*

91. *Hartford Fire Ins. Co.*, 509 U.S. at 765; *Société Nationale*, 482 U.S. at 555 (Blackmun, J., concurring in part and dissenting in part); *see also* H.K. & Shanghai Banking Corp. v. Simon (*In re* Simon), 153 F.3d 991, 999 (9th Cir.1998) (interpreting *Hartford* to require a finding of conflict first).

92. *See e.g.*, Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000) (determining that France had no conflicting law or policy and declining to dismiss the case).

However, if a true conflict is established, lower courts have considered several additional factors to determine whether dismissal on grounds of international comity is appropriate. The circuit courts' criteria are slightly different than those found in the Restatement (Third) of the Foreign Relations Law of the United States. In *Timberlane Lumber Co. v. Bank of American National Trust and Savings Association*, the Ninth Circuit established a seven factor test to determine "whether the interests of, and links to, the United States . . . are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority."[93] In addition to the factors set forth in *Timberlane*, the Second Circuit has stated that the objection of foreign government to U.S. adjudication bears significant weight in comity analysis.[94] Thus, the approach of the circuit courts and the Restatement (Third) generally "looks at the degree of conflict with foreign law or policy; the connections of the parties and their activities to the United States and to the foreign state; and the importance of the regulation of the conduct at issue to the United States and the foreign state."[95]

Courts may also look to the non-exhaustive standards set forth in Foreign Relations Law Restatement § 403(2):

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

---

93. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 749 F.2d 1378, 1384 (9th Cir. 1984).

94. Jota v. Texaco, 157 F.3d 153, 160 (2d Cir. 1998).

95. STEPHENS ET AL., *supra* note 2, at 357.

(h) the likelihood of conflict with regulation by another state.[96]

Comment b explains that the list of considerations in §403(2) is not exhaustive and "[n]ot all considerations have the same importance in all situations; the weight to be given to any particular factor depends upon the circumstances."[97]

In *Sarei v. Rio Tinto, PLC*, the district court found that there was a true conflict between the foreign state's law and the filing of a claim under the ATS and thus proceeded with analyzing the conflict according to the Restatement factors.[98] The court found that Papua New Guinea's Compensation Act, which "prohibit[ed] the taking or pursuing in foreign courts of legal proceedings in relation to compensation claims arising from mining projects and petroleum projects in Papua New Guinea" was in direct conflict with the ATS litigation brought by plaintiffs in the U.S. courts.[99] The court held that, while various factors pointed towards dismissal on the grounds of comity, the war crimes and crimes against humanity claims were not within the scope of the Compensation Act and that the crimes' gravity "argues strongly in favor of the retention of jurisdiction."[100] On appeal, the Ninth Circuit upheld the District Court's refusal to dismiss the war crimes and crimes against humanity claims on the basis of comity.[101]

International comity is a discretionary doctrine, and courts have noted that no nation is under an "unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum."[102] The obligation of comity ends when the strong public policies of the forum are vitiated by the foreign act.[103] For example, in *Pravin Banker Assoc. v. Banco Popular Del Peru* the Court of Appeals determined that the District Court was correct in

---

96. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

97. *Id.* § 403 cmt. b.

98. Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116, 1201–08 (C.D. Cal. 2002).

99. *Id.* at 1201–02.

100. *Id.* at 1207.

101. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1211 (9th Cir. 2007). The court noted that the defendant had not appealed the district court's denial of the motion to dismiss the war crimes and crimes against humanity claims on comity grounds, and that it was within the district court's discretion to deny the motion. *Id.*

102. Pravin Banker Assoc., LTD v. Banco Popular Del Peru, 109 F.3d 850, 854 (2d Cir. 1997) (citing Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984)).

103. *Id.*; *see also* Philadelphia Gear Corp. v. Philadelphia Gear de Mex., S.A., 44 F.3d 187, 191 (3d Cir.1994) ("[C]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." (citing Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971)).

declining to extend comity to Peru's debt negotiations because doing so would be contrary to two U.S. policy interests.[104]

Thus, the application of international comity to the conflict between ATS cases and foreign amnesties raises three critical questions: (1) whether there is a true conflict; (2) if there is a true conflict, whether the balance of the several factors requires adherence to international comity; and (3) whether enforcement of the foreign interest would be contrary to the policy interests of the U.S. In *Carranza*, the Sixth Circuit affirmed the district court's denial of the defendant's motion to dismiss on international comity grounds, despite an amicus brief filed by the Republic of El Salvador stating that the litigation interfered with its internal affairs.[105] The court held that there existed no "actual conflict" between the domestic and foreign law because there was nothing about the El Salvadoran Amnesty Law that suggested that it "should apply or was intended to apply" extraterritorially.[106] Thus, the defendant could comply with the laws of both states.[107] Because the court answered the first question in the negative, it was not necessary to evaluate the policy interests of the U.S.

However, there are several problems with the international comity analysis, particularly where disrespecting an amnesty may complicate the relations between the U.S. and the foreign state. For instance, in *In re South African Litigation*, both South Africa and the United States were very concerned about the impact that the suit would have on their foreign relations.[108] While the Second Circuit ultimately declined to address the merits of the prudential doctrines raised by defendants and instead remanded to the District Court for further determination, it discussed international comity as if it were a variant of the political question doctrine.[109] The Second Circuit cited *Bigio v. Coca-Cola Co.*, which described international comity as a doctrine which asks whether adjudication would "offend amicable working relationships" with a foreign country.[110] Judge Korman's dissent also intertwined the reasoning for dismissal on international

---

104. 109 F.3d at 855.

105. Chavez v. Carranza, 559 F.3d 486, 495 (6th Cir. 2009).

106. *Id.*

107. *Id.*

108. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 259 (2d Cir. 2007). South Africa submitted an *ex parte* declaration declaring that the proceedings interfered with "a foreign sovereign's efforts to address matters in which it has the predominant interest." *Id.* The U.S. State Department submitted a Statement of Interest asserting that the adjudication "risks potentially serious adverse consequences for significant interests of the United States." *Id.*

109. *Id.* at 261–62.

110. *Id.* at 262 (citing Bigio v. Coca-Cola Co., 448 F.3d 176, 178 (2d Cir. 2006)). Beth Stephens analyzes the use of international comity in *Bigio* as a variant of the political question doctrine. STEPHENS ET AL., *supra* note 3, at 358.

comity grounds with the doctrine of case-specific deference and political question.[111] Thus it is likely that the lower court, and any other court on appeal, will be influenced by the U.S. government's historical support of South Africa's amnesty laws and the declarations of both the South African and U.S governments in the case.

In cases where courts construe international comity as a variant of the political question doctrine, the analysis will most likely not rely on the "true conflict" *Hartford* test. Instead, the court will evaluate the conflict on the basis of the existing relationship between the U.S. and the foreign country, taking into consideration the statements of the foreign country and the statements of the U.S. government.[112] Thus, the international comity analysis may be based on whether the ATS litigation offends the "amicable working relationship" of the U.S. and the foreign country.[113] This is very similar to the case-specific deference referred to in *Sosa*[114] and is therefore subject to the policies of the political branches. However, as the next section will argue, the legality of amnesties under international law constrains the court's ability to defer to either the U.S. government or the foreign government under the political question variant of the international comity analysis.

B. *The Legality of Amnesties under International Law*

Even if there is a chance that courts will dismiss an ATS case under international comity due to a desire to not offend amicable working relationships, a court is further constrained from dismissing an ATS case involving a foreign amnesty by international law. In *Sosa*, the Court determined that the choice of law for the substantive claim in an ATS claim would be international law.[115] Thus, one must consult the international law regarding whether an amnesty may give impunity for violations of international law, such as crimes against humanity, genocide, and war crimes, when a defendant claims that an amnesty precludes suit under the ATS's "violation of the law of nations" jurisdiction. When looking to international law to evaluate the legality of the amnesty, a U.S. court must keep in mind that "the greater the degree of codification or consensus concerning a

---

111. *Khulumani*, 504 F.3d at 292 (Korman, J., concurring in part and dissenting in part).

112. *See id.* at 292–337 (Judge Korman urges dismissal because of the adverse effect prosecution of these cases would have on relations between U.S. and other countries).

113. *Bigio*, 448 F.3d at 178.

114. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

115. *See supra* notes 31–32 and accompanying text.

particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it."[116]

As mentioned in Part II, while it is established that amnesties do not apply extraterritorially, the actual legality of amnesties under international law is still subject to great debate among scholars.[117] Some scholars argue that amnesties are not per se illegal under international law because state practice and the international response to amnesties are too inconsistent to create a customary international norm against them.[118] More convincingly, however, other scholars argue that amnesties that give impunity for *jus cogens* crimes are illegal under international law.[119]

Despite the language in Protocol II, some scholars argue that the duty to prosecute is enshrined in international conventions and required by the customary international law status of crimes against humanity as *jus cogens* crimes (which impose obligations *erga omnes*).[120] *Jus cogens* crimes have been "deemed so fundamental to the existence of a just international legal order that states cannot derogate from them, even by agreement."[121] Therefore, amnesties granting immunity for torture, genocide, slavery, apartheid, piracy, and grave breaches of the Geneva Conventions are illegal.[122] *Jus cogens* norms are related to the principle of universal jurisdiction, under which "any state may exercise jurisdiction over an individual who commits certain heinous and widely condemned offenses, even when no other recognized basis for jurisdiction exists."[123] The rationale behind this principle is that the crime committed was so egregious that it is considered to be committed against all members of

---

116. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

117. Trumbull, *supra* note 67, at 285–86; *see* Sadat, *supra* note 69, at 1018–23 (provides a discussion of the legality of amnesties under international law); *see generally* NTOUBANDI, *supra* note 3, 34–37 (discussing criticisms of amnesties); O'SHEA, *supra* note 41 (discussing how amnesties fit into international law).

118. *See* Trumbull *supra* note 67, at 290–91 (arguing that state practices do not support the claim that amnesties are illegal under international law).

119. NTOUBANDI, *supra* note 3, at 229; O'SHEA, *supra* note 41, at 322.

120. JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS PROCESS 58–59 (2d ed. 2006); *see generally* NTOUBANDI, *supra* note 3, at 229 (crimes against humanity are a jus cogens norm); O'SHEA, *supra* note 41, at 322 ("[F]or an amnesty law to comply with existing international law it should exclude from its scope a category of the most serious crimes against international law.").

121. DUNOFF ET AL., *supra* note 120, at 58–59.

122. NTOUBANDI, *supra* note 3, at 229; O'SHEA, *supra* note 41, at 322 ("[F]or an amnesty law to comply with a state's duty to prosecute, the amnesty law must exclude . . . : genocide, crimes against humanity, aggression, torture, slavery, piracy, apartheid, summary executions, enforced disappearances, and grave violations of the Geneva Convention of 1949.").

123. DUNOFF ET AL., *supra* note 120, at 380.

the international community, and so every state is granted jurisdiction over the crime.[124]

First, the 1949 Geneva Conventions, the Convention Against Torture, and the Genocide Convention are three widely ratified treaties that impose an affirmative duty to prosecute particular international crimes.[125] The Geneva Conventions impose a duty to prosecute perpetrators of acts described as "grave breaches."[126] However, these grave breach provisions apply solely to international armed conflict, and thus do not impose a duty on governments to prosecute those within its own borders for serious crimes.[127] The Genocide Convention requires that states criminalize and prosecute individuals who commit genocide.[128] However, the duty to prosecute under the Genocide Convention is severely limited and arises only in specific situations.[129] The Convention Against Torture requires states to criminalize and prosecute torture.[130] It also requires states to assert jurisdiction over the accused and to either extradite the accused to the country of the crime or prosecute the accused under domestic laws.[131]

---

124. Crimes such as piracy, war crimes, genocide, and slave trade have been accepted by states as permitting universal jurisdiction. *Id.*

125. Convention Against Torture, *supra* note 72; Geneva Convention (I) for the Amelerioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention (IV) Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

126. Geneva Convention I, *supra* note 125, art. 49; Geneva Convention II, *supra* note 125, art. 50; Geneva Convention III, *supra* note 125, art. 129; Geneva Convention IV, *supra* note 125, art. 146; *see generally* NTOUBANDI, *supra* note 3, at 114–31, 229 (summarizing the Geneva Convention); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (describing the obligations to prosecute under the Geneva Conventions).

127. Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 20 (1998); *see* Geneva Convention I, *supra* note 125, art. 2 (stating that the convention applies to cases of declared war or other armed conflict); Geneva Convention II, *supra* note 125, art. 2 (same); Geneva Convention III, *supra* note 125, art. 2 (same); Geneva Convention IV, *supra* note 125, art. 2 (same).

128. Genocide Convention, *supra* note 125, art. 3.

129. Trumbull *supra* note 67, at 288. To be guilty of genocide, a person must commit one of the following acts with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Genocide Convention, *supra* note 125, art. 3.

130. Convention Against Torture, *supra* note 125, art. 4–6.

131. *Id.* art. 5, 6.

Some states and scholars who claim that amnesties are not per se illegal under international law point to Article 6(5) of Protocol II to the Geneva Conventions, which appears to endorse the use of amnesties.[132] Article 6(5) states that the authorities in power at the end of hostilities "shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict."[133] However, it is not clear that amnesty under Article 6(5) was meant to permit amnesties for *jus cogens* crimes "given the general framework of the Geneva Conventions of 1949 requiring prosecution for grave breaches of the Conventions."[134] Thus, an interpretation of Article 6(5) must take into account the prohibition of *jus cogens* crimes such as crimes against humanity.[135]

Former UN Secretary General Kofi Annan stated that, while amnesty is legally acceptable to aid peace and reconciliation at the end of internal conflict, the UN has "consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law."[136] The UN Commission on Human Rights has stated that "amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes."[137] Despite these pronouncements, the UN supported the 1994 South African amnesty[138] and was involved in negotiations of a blanket amnesty that attempted to resolve the conflict in Haiti in 1993.[139]

Additionally, three international courts have strongly disapproved of amnesties but have not determined that they are

---

132. *See* NTOUBANDI, *supra* note 3, at 223 ("Many recent decisions on amnesty have relied on Article 6 (5) of Additional Protocol II of 8 June, 1977 as support for their decisions that amnesties for serious human rights violations are permitted under international law."). The South African Supreme Court interpreted Article 6(5) as establishing "an exception to the peremptory rule prohibiting an amnesty in relation to crimes against humanity contained in Additional Protocol II to the Geneva Conventions." *Id.* (quoting Cape Provincial Division of the Supreme Court in *Azanian Peoples Organisation (AZAPO) & Others v Truth and Reconciliation Commission* 1996 (4) SA 562 (CC) at 574 D-E (S. Afr.)). The Supreme Court of El Salvador also relied on the provisions of Article 6(5) to validate their amnesty. *Id.* at 223.

133. Protocol Additional to the Geneva Conventions, *supra* note 75, art. 6(5).

134. NTOUBANDI, *supra* note 3, at 224.

135. *Id.*

136. Trumbull, *supra* note 67, at 292 (quoting The Secretary-General, *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, *delivered to the Security Council*, U.N. Doc S/2000/915 (Oct. 4, 2000)).

137. Impunity, U.N. Commission on Human Rights Res. 2002/79, 58th mtg., U.N. Doc. E/CN.4/RES/2002/79 (Apr. 25, 2002).

138. Trumbull, *supra* note 67, at 293.

139. *Id.*

illegal.[140] The Special Court for Sierra Leone found that the Lomé Agreement, which granted broad amnesty, did not bar its universal jurisdiction over international crimes since "a state cannot sweep such crimes into oblivion and forgetfulness . . . [, as] the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[141] The International Criminal Tribunal for the former Yugoslavia also refused to create a per se rule against amnesties, but did say in dicta that "amnesties are generally incompatible with the duty of states to investigate [torture]."[142] Similarly, the Inter-American Commission on Human Rights found El Salvador in violation of its treaty obligations under Article 1 of the American Convention on Human Rights[143] and concluded in *Masacre Las Hojas v. El Salvador* that the amnesty law was a violation of the Salvadoran government's obligation to investigate and punish violations of the Las Hojas victims.[144]

It is true that some states continue to grant amnesties to perpetrators of serious international crimes.[145] Even states that are not affected by the crimes that amnesty covers have acted as third parties in negotiating amnesties.[146] A key example is the worldwide support of South Africa's 1993 amnesty.[147] The United States has also supported a negotiated a 1993 amnesty for Haiti,[148] and in 1996, Mexico, Norway, Spain, the U.S., Venezuela, and Colombia facilitated an amnesty for Guatemala.[149] However, recent state practice indicates that there is less and less approval of blanket amnesties

---

140. These are: the ICTY, the Special Court for Sierra Leone, and the Inter-American Court of Human Rights. *But see* Sadat, *supra* note 69, at 963–64 (arguing that recent decisions from international and national courts provide an example of international norm creation that amnesties are increasingly unacceptable).

141. Prosecutor v. Kallon & Kamara, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶¶ 1, 65 (Mar. 13, 2004).

142. Prosecutor v. Anto Furundzija, Case No., IT-95-17/1-T, Judgment, ¶ 155 n.172 (Dec. 10, 1998).

143. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN EL SALVADOR (1994) *available at* http://www.cidh.oas.org/countryrep/ElSalvador94eng/toc.htm.

144. Masacre Las Hojas v. El Salvador, Case 10.287, Inter-Am. C.H.R., Report No. 26/92, OEA/Ser.L/V/II.83 Doc. 14 (1992).

145. Trumbull *supra* note 67, at 2945–97(discussing that Argentina, Chile, Uruguay, El Salvador, Guatemala, Peru, Zimbabwe, South Africa, Haiti, Sierra Leone, Colombia, Afghanistan, and Algeria have provided amnesty to perpetrators of serious international crimes in the past twenty-three years).

146. *Id.* at 296.

147. O'SHEA, *supra* note 41, at 42; Leila Sadat, *National Amnesties and Truth Commissions*, *in* UNIVERSAL JURISDICTION 193, 204 (Stephen Macedo ed., 2004) (hypothesizing that support for the amnesty might have been different if South Africa had adopted a blanket, instead of conditional, amnesty).

148. Trumbull, *supra* note 67, at 296.

149. *Id.*

which grant impunity for *jus cogens* crimes,[150] and this practice has been followed out of a sense of legal obligation.[151] State practice need not be "supported by every state at every moment in its political history" to be customary international law.[152] Even some of the countries which had originally granted amnesty for serious international crimes have since found those amnesties illegal.[153]

Furthermore, more and more amnesty laws have included some form of justice, truth, or reparations.[154] For example, Uruguay's amnesty law permitted civil liability,[155] and the 1993 Haitian amnesty decree excluded human rights crimes.[156] The most prominent example has been South Africa, where individuals must disclose their crimes to the Truth and Reconciliation Committee in order to petition for amnesty.[157] Even though the South African Amnesty Law grants amnesty for crimes of apartheid, which is technically a crime against humanity, it has been widely accepted by other states and international institutions.[158] This is because the amnesty provisions were carefully calculated to be conditional upon full disclosure of the crimes, and they also provided for civil suits and criminal prosecutions if the amnesty application was rejected.[159] States have taken this approach out of a legal obligation to hold criminals accountable in some way—if not criminally accountable—and to give victims some form of justice or reparation.[160] In South Africa, the government rejected calls for a blanket amnesty and declared its intent to follow international law in drafting its amnesty legislation.[161]

Due to what he considers inconsistent state practice, Charles Trumbull has proposed a balancing test to accommodate the "competing interests of justice and peace" as an alternative to a clear-

---

150. *Id.* at 300–01; NTOUBANDI, *supra* note 3, at 132–49; O'SHEA, *supra* note 41, at 228–266.

151. NTOUBANDI, *supra* note 3, at 132–49; O'SHEA, *supra* note 41, at 228–266.

152. O'SHEA, *supra* note 41, at 263; *see* NTOUBANDI, *supra* note 3, at 134 ("[O]nly substantial uniformity is required, not complete uniformity.").

153. *See e.g.*, *Argentina Holds Dirty War Trial*, June 21, 2006, BBC NEWS, http://news.bbc.co.uk/1/hi/world/americas/5099028.stm (explaining how the Supreme Court of Argentina overturned amnesty laws in June 2005); Larry Rohter, *Chile's Leader Attacks Amnesty Law*, N.Y. TIMES, Dec. 24, 2006, http://www.nytimes.com/2006/12/24/world/americas/24chile.html (noting jurisprudence in Chile allows prosecution of kidnappings since the crime is considered ongoing).

154. Trumbull, *supra* note 67, at 301.

155. O'SHEA, *supra* note 41, at 64.

156. *Id.* at 68.

157. John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277, 294 (1998).

158. O'SHEA, *supra* note 41, at 42.

159. Sadat, *supra* note 69, at 985–87 (noting only 849 of the 7112 applications received by the Amnesty Committee of the Commission were accepted).

160. Trumbull, *supra* note 67, at 301.

161. *Id.*

cut rule that delineates which crimes amnesties may not legally cover under international law.[162] Trumbull's perspective recognizes the value of amnesties in bringing peace to civil wars that, if not stopped, may cause more harm.[163] The test evaluates (1) the process by which the amnesty was enacted; (2) the substance of the amnesty legislation; and (3) the domestic and international circumstances.[164] In evaluating the process, states should consider whether the amnesty was passed by democratic procedures, the people had access to adequate information, and the victims favored the amnesty.[165] The second factor to be weighed, substance, should take into consideration the "substantive measures [taken] to achieve some of the benefits commonly associated with prosecution: accountability and incapacitation."[166] Finally, the third factor, international circumstances, should make the international community "more amenable to . . . amnesties when it appears that the amnesty is reasonably necessary to end the hostilities."[167]

Trumbull's balancing test provides a useful way of analyzing the *legitimacy* of amnesties, but it does not necessarily evaluate the *legality* of amnesties. The balancing test weighs the benefits of granting an amnesty and ending a civil war against the protection of victims and the democratic process necessary to make the amnesty legitimate.[168] Trumbull's balancing test may reflect the realities of the political situations regarding amnesties, but it does not further the establishment of *jus cogens* norms against impunity for human rights violations. Arguably, amnesties may be beneficial for a particular country, particularly to end civil wars or bring transitional justice, but the violation of *jus cogens* norms affects everyone in the international community and should not go unnoticed. Interestingly enough, the balancing test will often result in a recommendation against amnesties that grant immunity for serious international crimes, as the circumstances necessitating a blanket amnesty will most likely be very difficult to prove.[169] A clear-cut rule that prohibits amnesty for *jus cogens* crimes is more in line with the principle of universal jurisdiction and makes the availability of justice for human rights violations more realistic.

This analysis of the scholarship pertaining to the legality of amnesties, while not exhaustive, demonstrates that federal courts need not defer to any amnesty that provides immunity for *jus cogens*

---

162. *Id.* at 318.
163. *Id.* at 312–17.
164. *Id.* at 318.
165. *Id.* at 320.
166. *Id.* at 321.
167. *Id.* at 322–23.
168. *Id.* at 318.
169. *Id.* at 337–39.

crimes. The ATS clearly gives courts jurisdiction over "violations of the law of nations[,]" which has been interpreted by *Sosa* to provide a cause of action for a set of highly defined violations of customary international law, such as *jus cogens* crimes.[170] In fact, many ATS cases cite the Restatement's list of customary international law violations as content of international law.[171] Section 702 includes genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systemic racial discrimination; or a consistent pattern of gross violations of internationally recognized human rights.[172] However, the Restatement emphasizes that this list is "not necessarily complete . . . [, as] human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."[173] Thus, any amnesty that provides impunity for widely accepted, highly defined international norms is illegal, regardless of whether a foreign state has decided to grant amnesty covering those crimes.

In certain circumstances, however, an amnesty that provides immunity for a serious crime may actually meet developing standards of legality if it has provided for some form of justice, either through reparations, civil liability, or truth and reconciliation.[174] One example of this is the amnesty in South Africa. Because the South African amnesty requires perpetrators to speak the truth about their crimes or be subject to criminal or civil liability if they do not, the international community has given much deferential respect to South Africa's amnesty.[175] South Africa is thus viewed as a country that addresses human rights violations instead of one that just sweeps them under the rug.[176] Furthermore, *Sosa* cautioned that courts should be sensitive to the exhaustion of local remedies, and thus where a foreign state's amnesty provides for some form of remedy for serious violations of human rights and *jus cogens* crimes it may be appropriate for a U.S. court to defer to those remedies.[177]

---

170. *See supra* notes 27–29 and accompanying text.

171. STEPHENS, ET AL., *supra* note 2, at 70.

172. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

173. *Id.* § 702 cmt. a. However, *Sosa* said that the Restatement's listing of a violation may not be sufficient to provide the clear definition required to trigger ATS jurisdiction. Sosa v. Alvarez-Machain, 542 U.S. 692, 737 (2004).

174. *See supra* notes 145–149 and accompanying text.

175. Sadat, *supra* note 147, at 204.

176. *Id.*

177. *Sosa*, 542 U.S. at 733 n.21.

IV. NO DEFERENCE FOR BLANKET AMNESTIES

From the analysis above, it appears that a U.S. court would not be required to dismiss an ATS case implicating a foreign domestic amnesty under either the doctrine of international comity or under international law.[178] Recent formulations of international comity do not require courts to dismiss a case involving a foreign amnesty because there is most likely no true conflict between the foreign amnesty—which does not apply extraterritorially—and the domestic ATS litigation.[179] In fact, most courts will likely not dismiss cases involving foreign amnesty.[180] However, in certain cases, courts are inclined to interpret the international comity analysis as a question of whether the adjudication would "offend amicable working relationships" due to the nature of the relationship between the U.S. and the foreign government.[181] In those cases, U.S. courts should proceed with an ATS case regardless of the existence of a foreign amnesty when the amnesty permits impunity for *jus cogens* crimes for which *erga omnes* obligations attach.[182] This solution contributes to the developing norm against impunity for serious international crimes, while at the same time furthering the purposes of the ATS by giving victims of "violations of the laws of nations" a consistent remedy in U.S. courts.[183]

First, and most simply, it is established under international law that amnesties have no extraterritorial effect.[184] Thus, courts should decline to find a conflict under the analysis provided in *Hartford*.[185] This permits courts to advance the purposes of the ATS and the intent of Congress—as demonstrated by their support of the TVPA—

---

178. *See supra* Part III. Unfortunately, this solution is still susceptible to *Sosa's* "case-specific deference to the executive." Using the example of litigation against corporations who had done business in South Africa, the Supreme Court suggested that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733 n.21. In making this statement, the Court cited *Republic of Austria v. Altmann*, a case that stated that the State Department's opinion of the implications of exercising jurisdiction over a particular case "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* (citing Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004)).

179. *See supra* notes 105–07 and accompanying text.

180. *See supra* note 92.

181. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 262 (2d Cir. 2007).

182. These would be genocide, war crimes, crimes against humanity, crimes against peace, torture, piracy, and slavery.

183. *See supra* notes 27–29 and accompanying text.

184. *See supra* notes 67–69 and accompanying text.

185. *See e.g.*, Chavez v. Carranza, 2005 WL 2659186, at *4 (W.D.Tenn. Oct. 18, 2005) ("Where, as here, 'a person subject to regulation by two states can comply with the laws of both,' there is no conflict for comity purposes." (quoting Hartford Fire Ins. Co. v. Cal., 509 U.S. 764, 799 (1993))).

to provide a remedy for victims of "violations of the law of nations."[186] While the *Hartford* analysis provides a simple and uninteresting solution to the conflict between an ATS claim and a foreign amnesty, some courts may apply a different international comity standard that permits the inclusion of political question-type factors in the analysis due to the confusion over the doctrine of international comity.

In some ATS cases, courts may be persuaded by statements made by the U.S. government and foreign countries to dismiss the litigation out of respect for the working relationship between the U.S. and the foreign country.[187] For example, a court may be influenced by the fact that the U.S. government supported a particular amnesty, as the defendants argued in both *Carranza*[188] and *In re South African Litigation*.[189] Yet, victims of serious international crimes should not be excluded from remedy under the ATS simply because the U.S. at one point supported or helped negotiate a peace that involved an amnesty law. In *Sosa*, the Supreme Court clarified that the substantive violation in an ATS case is governed by international law.[190] This means that U.S. courts may look to international law when evaluating amnesties and that "there is little doubt that international law is incorporated into United States domestic law as a form of federal common law."[191] If the violation exists under international law, then no blanket amnesty should be permitted to override the U.S. courts' ability to provide a remedy.

A case-by-case analysis, in which courts determine the legality of the particular amnesty by using a balancing test or evaluating the amnesty in light of the country's international obligations to prosecute particular crimes, may serve "the interest of justice more than a per se rule."[192] However, a case-by-case approach fails to capture the benefit of promoting *jus cogens* norms and the prosecution of those who violate such norms.[193] In fact, recognizing amnesties that ignore obligations of international law "would seem contrary to the foundational principles of international . . . law, and stand[s] in opposition to the clear weight of authority and much of the

---

186. H.R. REP. No. 102-367, at 3, (1992), *reprinted in* 1992 U.S.C.C.A.N. 84 (stating that the ATS has "important uses and should not be replaced").

187. *See supra* notes 108–11 and accompanying text.

188. The defendants in *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), were supported by an amicus filed by The Republic of El Salvador. Brief of The Republic of El Salvador as Amicus Curiae in Support of Appellant, Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009) (No. 06-6234).

189. *See e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2nd Cir. 2007) (noting that amicus briefs were filed by the U.S. government and the government of South Africa).

190. Sosa v. Alvarez-Machain, 542 U.S. 692, 725–26 (2004).

191. Casto, *supra* note 32, at 641.

192. Sadat, *supra* note 69, at 1028.

193. *Id.*

state and international practice emerging in this field."[194] Thus, the performance of a balancing test as suggested by Charles Trumbull is unworkable for U.S. courts;[195] instead, U.S. courts should decline to defer to a foreign amnesty law that provides amnesty for *jus cogens* crimes—and any other crimes—for which the U.S. courts have jurisdiction under the ATS jurisprudence.[196]

First, this clear-cut rule for when a court may or may not dismiss an ATS claim based on a foreign amnesty is consistent with the requirement in *Sabbatino* that U.S. courts rely only upon firmly established customary international law.[197] Keeping in mind that state practice need not be entirely consistent, blanket amnesties that provide impunity for *jus cogens* crimes are illegal under international law and should not be given deferential treatment in U.S. courts—regardless of U.S. politics or foreign policy.

Second, support for this solution is found in Justice Breyer's concurrence in *Sosa*. Justice Breyer "endorsed that the principle of universal civil jurisdiction is a safeguard of international comity."[198] The concurrence reiterated that international law "will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute . . . torture, genocide, crimes against humanity, and war crimes,"[199] otherwise known as *jus cogens* crimes. Justice Breyer concluded that "[t]he fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity," and that the adjudication of foreign conduct involving foreign parties "will not significantly threaten the practical harmony that comity principles seek to protect."[200] Furthermore, Justice Breyer determined that universal criminal jurisdiction included the availability of civil tort recovery.[201] Thus, according to Justice Breyer, federal courts may exercise a type of universal civil jurisdiction over *jus cogens* crimes without respect for a foreign amnesty.

An application of this solution to the *Caranza* and *In re South African Litigation* cases illustrates that courts have thus far denied dismissal on the basis of international comity and have correctly interpreted the legality of amnesties—or at least *hinted* at a correct

---

194. *Id.*

195. Trumbull, *supra* note 67, at 318.

196. *See supra* notes 26–29 and accompanying text (describing crimes that fall within "law of nations.").

197. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

198. Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 148 (2006).

199. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

200. *Id.*

201. *Id.* at 763.

interpretation. In El Salvador, the blanket amnesty provides impunity for serious international crimes.[202] Therefore courts should decline to dismiss an ATS case based on both international comity and international law. In fact, that is exactly what the Sixth Circuit did.[203] The court held that there was no true conflict between the foreign amnesty law and the ATS jurisdiction because El Salvador's amnesty did not apply extraterritorially.[204] Although it did not need to reach the question of the amnesty's legality, had the court done so, it would have found that the amnesty law provided a blanket amnesty for *jus cogens* crimes and thus violated international law.[205]

The result in *In re South African Litigation* is also illustrative. On remand from the Second Circuit, the District Court held that "case-specific deference" did not require dismissal of the plaintiffs' claims.[206] First, the court acknowledged that international comity was part of a case-specific deference.[207] Despite the statements filed by the U.S. and South Africa, the court refused to dismiss the case based on international comity because the court found no true conflict between the South African amnesty and the ATS, as the Sixth Circuit did in *Carranza*.[208] The court noted that the South African amnesty does not give blanket immunity and "provides immunity against suit only to those who testified voluntarily."[209] Because the defendants decline to participate in the truth and reconciliation process, they were not granted amnesty and were free to be sued in other forums since the truth and reconciliation "process was not exclusive."[210] Thus, while the District Court followed the analysis in *Carranza*, the Second Circuit opinion and Judge Korman's strong arguments that domestic remedies preclude suit under the ATS demonstrate that there are still judges and courts that may be more persuaded by the statements of governments.[211] In that case, dismissal for case-specific deference or political question reasons would still be permissible under the legality of amnesties analysis in Part III.B, as the South African amnesty is not unconditional or absolute like El Salvador's and does not necessarily violate international law.[212]

---

202. El Salvador Amnesty Decree, *supra* note 62, art. 1 (granting general amnesty without regard to whether the crime committed was international in nature).

203. Chavez v. Carranza, 559 F.3d 486, 495 (6th Cir. 2009).

204. *Id.*

205. *See* Trumbull, *supra* note 67, at 285 (discussing the legality of amnesties).

206. Lungisile Ntsebeza v. Daimler, AG, 617 F.Supp.2d 228, 280–81 (S.D.N.Y. 2009).

207. *Id.*

208. *Id.* at 286.

209. *Id.*

210. *Id.* at 285–86.

211. Khulumani v. Barclay Nat'l Bank Ltd, 504 F.3d 254, 292–337 (2nd Cir. 2007) (Korman, J., concurring in part and dissenting in part).

212. *See* NTOUBANDI, *supra* note 3, at 151–85 (discussing amnesty law in South Africa).

V. CONCLUSION

A defendant's claim that a foreign amnesty precludes suit under the ATS provides an interesting example of the conflict between the growing international desire to hold perpetrators of human rights violations accountable and the desire to respect, out of international comity, a nation's own determination of the best way to bring peace, stability, and healing to a violent civil war. U.S. federal courts confronted with this conflict may rely on several prudential doctrines, such as international comity, the act of state doctrine, the political question doctrine, and case-specific deference to the political branches to avoid adjudicating a foreign sovereign's internal affairs. Given the complexity of the doctrine of international comity and the resulting confusion over how to apply it to different situations, courts may be tempted to give deference to a foreign nations' amnesty law—especially considering the impact their adjudication would have on the relationship between the foreign nation and the U.S.

However, the ATS has granted U.S. courts jurisdiction over violations "of the law of nations," and Congress, in enacting the TVPA, underscored the purpose of the ATS and its ability to provide a remedy to victims of violations of *jus cogens* norms in the United States. Thus, federal courts should resist pressure by the political branches to dismiss a case for international comity reasons, and instead should look to the legality of the particular amnesty under international law. An analysis of international law demonstrates that amnesties that provide blanket immunity for serious international crimes, such as violations of *jus cogens* norms, are illegal. Given this illegality—under the same standard that has given ATS plaintiffs a cause of action—courts should not defer to a foreign amnesty law that provides impunity for *jus cogens* crimes or violations of customary international law, even in the face of political pressure from the U.S. and other countries. While certain forms of amnesties may provide a beneficial—and in some cases the only—way to stop violence and the perpetuation of human rights violations, *jus cogens* norms are so fundamental that they cannot be derogated, swept under the carpet, or ignored.

~ *Carlee M. Hobbs**

---

* J.D. Candidate, Vanderbilt University, B.A. Duke University. Special thanks to Professor Ingrid Wuerth for her help in framing the issues, to the entire editorial team at the *Vanderbilt Journal of Transnational Law* for all of their hard work, and to my family and Peter Toth for their love and support.