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Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation

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Over the past two decades, as dictatorships gave way to democracies across the globe, countries faced the dilemma of holding former regimes liable for human rights abuses while facilitating transitions of power. The goal of political transition has come into conflict with the goal of providing accountability for past crimes. On the one hand, former dictators are understandably loath to leave office if they fear prosecution for their actions.[1] On the other hand, national and international interest groups have good reason to demand the accountability *and* resignation of former dictators. Amnesty legislation has attempted to solve this dilemma in countries ranging from Chile to Croatia, South Africa to Bosnia by immunizing both dictators and regimes from criminal and civil liability for past atrocities.

Amnesty legislation appears to offer attractive transitional expediency, facilitating non-violent surrender of power by former dictators. Such legislation has eased recent power transitions, while avoiding recourse to either domestic unrest or international political intervention. However, amnesty legislation rests on problematic foundations. First, it is often enacted by self-serving dictators. Second, it may conflict with the subject state's domestic law or constitution. Third, it often violates a state's international obligations to prosecute certain crimes and to provide citizens with specific rights of redress.

While many considered amnesty an over-studied phenomenon in the 1980s, it has recently taken on renewed importance. The trend toward increased extraterritorial prosecutions under the principle of universal jurisdiction[2] suggests that, in the years ahead, numerous states may need to deter-

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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* Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3) 1 A.C. 147 (H.L. 2000) (U.K.); REDRESS TRUST, UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, TORTURE,

mine whether to accord such legislation extraterritorial validity. Moreover, as the international community has become more involved in the process of post-conflict reconciliation, amnesty has re-emerged as an important political and legal tool.[3]

Much of the past debate over amnesty legislation has been circumscribed by three mental paradigms: retribution, sovereignty, and expediency. Adherents to retributive justice have argued that amnesty laws are per se invalid and that perpetrators must be punished.[4] Supporters of these laws have often argued that states have a right to grant amnesty on grounds of state sovereignty. Consequentialists have taken a middle ground, finding amnesty valid when it leads to expedient political transitions. In light of the renewed importance of amnesty legislation, this Article seeks to transcend these limitations with a new theoretical approach. By imbuing liberal international law theory with certain normative values, this Article constructs a new deontological framework for the analysis of amnesty legislation, which simultaneously accepts the potential value of amnesty legislation and respects the objective nature of international law. Amnesty legislation does have a place in the international system and can be an effective tool for social reconciliation. For amnesty laws to carry domestic or extraterritorial validity, however, they must be narrowly tailored and legitimately enacted.

This Article expounds a fundamentally new view of amnesty legislation (and potentially other types of legislation as well). While past studies have been based on realist models and have assumed that the governments enacting such legislation were unified entities, this Article applies liberal international law theory to the study of amnesty and, in particular, to determinations of the validity and the scope of amnesty legislation. Liberal international law theory is itself void of normative values. To construct a theoretical platform for an analysis in which the preferences of individuals and social actors are meaningful variables in determining the validity of an amnesty law, this Article overlays a set of value preferences on the disaggregated-state model of liberal international law theory. In addition, this Article provides textual sources for and analyses of recent, often unstudied, amnesty laws in countries including Bosnia, Croatia, Fiji, and Guatemala.

This Article speaks primarily to three audiences: academics, drafters, and enforcers. For academics, it seeks to reenergize the debate over extraterritorial validity of domestic laws by providing a new theoretical approach. Bridging the often irreconcilable gap between legal academics and political scientists, this Article draws on both bodies of literature and grounds its analysis in the methodologies of both fields. For practitioners in states con-

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AND GENOCIDE (1999).

3. *See, e.g.*, Carlotta Gall, *Yugoslav Parliament Passes Amnesty for Jailed Kosovars*, N.Y. TIMES, Feb. 27, 2001, at A5.

4. *See, e.g.*, Steven Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707 (1999); Michael P. Scharf, *The Amnesty Exception to the International Criminal Court*, 32 CORNELL INT'L L.J. 507 (1999).

sidering enacting amnesty legislation, this Article employs comparative analysis to assist legal drafters in crafting enforceable laws with extraterritorial validity. For practitioners in states enforcing amnesty legislation, this Article provides a framework for analysis of the validity of such legislation, and argues that the judiciary is, in fact, capable of making nuanced determinations of legitimacy and scope.

Part I of this Article develops the theoretical basis by incorporating certain normative values into liberal international law theory and applying the resultant model in the amnesty context. Legitimacy and scope are presented as the two key axes of this model. In Part II, the axes of legitimacy and scope are utilized to construct a framework analyzing the four categories of amnesty legislation: (1) Blanket Amnesty; (2) Locally Legitimized, Partial Immunity; (3) Internationally Legitimized, Partial Immunity; and (4) International Constitutional Immunity. Part II goes on to present a broad survey of recent amnesty legislation and, through detailed case studies, to define the characteristics of each category of amnesty legislation.

Part III examines recent domestic and international challenges to each category of amnesty legislation. Cases before both domestic courts and the Inter-American Commission are reviewed, and the effects of these judgments are considered. The Conclusion begins to operationalize the framework for determinations of extraterritorial validity developed in this Article, demonstrating that judiciaries are capable of applying this framework.

I. Toward a Normative Repositioning of Liberal International Law Theory

Liberal international law theory provides a consistent, comprehensive, and conceptual foundation for analyzing an apparently divergent body of amnesty legislation. Since the mid-1970s, at least fourteen states on four continents have declared amnesties and/or enacted laws immunizing past regimes from accountability and liability.[5] These amnesty laws have ranged from dictatorial decrees to legitimate acts of parliament. In scope, these laws vary from encompassing all acts of previous regimes to covering only a particular and internationally limited subset of crimes. Some of these laws have immunized from prosecution an entire country's population. Others have granted immunity only to select groups. A new theoretical approach is therefore needed to allow systematic study of this body of legislation.

This Article takes as its starting point liberal international relations theory as applied to international law.[6] Anne-Marie Slaughter first articulated

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5. The list includes Argentina, Uruguay, Chile, Brazil, Peru, Guatemala, El Salvador, Honduras, Nicaragua, Haiti, Ivory Coast, Angola, Togo, and South Africa. *See* Ratner, *supra* note 4, at 722–23.

6. For a more detailed discussion of liberal international relations theory, upon which this international law theory is based, see Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513, 516–21 (1997). Andrew Moravcsik, The Choice For Europe, 24–27, 54 (1998) (applying a variant of this theory to a study of European integration).

this approach, describing it as "bottom up . . . rather than top down."[7] According to Jose Alvarez, this approach "leaves the realist critique to others."[8] In Slaughter's words, it "require[s] us to focus on the precise interactions between individuals and 'states.'"[9] This theory presumes that state functions depend on "individual choices."[10] It disaggregates the state into its component parts, focusing on individuals and organizations to predict and interpret state behavior.

Liberal international law theory alone, however, is but a positive model. It makes predictions, not judgments. It gives us tools to understand outcomes based on interactions between citizens and the state, but it does not provide values on which to make normative distinctions between those interactions.[11] Positive theory has been subject to the criticism that its utility is limited. It is a predictive mechanism of political scientists, not a normative basis upon which citizens and courts can make judgments about another state's legislation.

This Article incorporates a set of norms and values into liberal international law theory, giving meaning and application to a theoretical construct otherwise devoid of values. Once this is done, liberal international law theory is transformed from a positive theory into a normative tool for judges and policymakers. Applying this normative, liberal international law theory to the analysis of amnesty legislation, this Article proposes two axes of analysis—legitimacy and scope—upon which a framework for determining the extraterritorial validity of legislation is built. Legitimacy addresses domestic and international sources and results of amnesty laws; scope refers to the crimes and individuals covered by these laws.

A liberal test for legitimacy, based on a disaggregation of the state and an evaluation of the support of citizens and interest groups, is particularly useful for evaluating amnesty legislation. There are, admittedly, a number of situations in which a realist, billiard-ball approach to state action may be more appropriate. For example, when a legislature passes, or an executive enacts, a bilateral military procurement agreement, consideration of the preferences of the ordinary citizens may not further understanding of the state's behavior. In granting amnesty, however, the state cedes particular citizen rights, which are enshrined in international treaties and domestic

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7. Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 241 (2000).

8. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 385 (1999) (using a variant of liberal theory to analyze the significance of hate crimes for international criminal prosecution).

9. Slaughter, *supra* note 7, at 241. *See also* Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819, 832 (Dec. 2000) (acknowledging the validity of such inquiry and noting that "popular pressures can and sometimes do have distinct consequences" for state behavior).

10. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 519 (1995).

11. *See id.* at 515 (noting that "the positive model cannot itself give rise to normative propositions").

law, to bring justice to past wrongs.[12] Since a grant of amnesty entails a relinquishment of these citizens' rights, disaggregation of the state and consideration of the relation of those citizens to the state through a liberal analysis of legitimacy is particularly appropriate.

A. Legitimacy

Determinations of the legitimacy of a political regime are always controversial. In order to avoid the controversy surrounding normative determinations of governmental legitimacy, the Westphalian system of classical international law offers a positive test for the recognition of states. States must have a permanent population, a defined territory, a government, and "the capacity to enter into relations with other states."[13] Classical international law publicists, who focus largely on the "existence of an effective and independent government," have applied this positive test without examining characteristics of the government itself beyond the question of mere effectiveness.[14]

Liberal international law theory offers a new lens through which to view government behavior. Liberal scholars examine the state from a bottom-up perspective to identify the "seam of individual-state interaction."[15] The positive model says nothing about the nature of a legitimate government. The theory presented in this Article, however, fashions the positive model into a normative one by incorporating normative values into the positive model. This, in turn, allows one not merely to make predictions about the nature of government, but also to utilize liberal international law theory to test the validity of amnesty and other types of legislation. This normative model looks not just to the existence of seams of interaction between individuals and governments, but to the very nature of those seams to determine how they compare with these chosen normative values.

The value set that this Article overlays on liberal international law theory is that the "will of the people is to be the basis of the authority of govern-

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12. These rights to judicial process are guaranteed in, *inter alia*, The International Covenant on Civil and Political Rights, which guarantees that each State-Party will "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . ." International Covenant on Civil and Political Rights, Dec. 16, 1966, *entered into force* Mar. 23, 1976, art. 2(3), 999 U.N.T.S. 171, 174. While criminal prosecution in the United States is an act of the executive, in some continental systems, individual rights to prosecution are effectuated through the *partie-civile* system, by which individuals may bring criminal actions directly against the perpetrator as a kind of co-prosecutor. *See, e.g.*, Richard S. Fraser, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How We Can Find Out, and Why We Should Care?*, 78 CAL. L. REV. 539, 613 (1990) (discussing the discretion of the French prosecutor and the rights of victims to file charges directly).

13. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 U.N.T.S. 19; *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 70–77 (1998).

14. BROWNLIE, *supra* note 13, at 91.

15. Slaughter, *supra* note 10, at 243; *see also* Moravcsik, *supra* note 6, at 518 (noting the importance of "representative institutions as a 'transmission belt' by which the preferences and social power of individuals and groups are translated into state policy.").

ment."[16] This fundamental value choice leads to three different questions upon which the consideration of a law's legitimacy is based: (1) Did the government supervising the law's enactment base its authority on the will of the people? (2) Was the process by which the law was passed reflective of the people as the ultimate source of authority? (3) Was the process by which the law was applied reflective of the people's will? In considering legitimacy, this Article looks to each of these three questions derived from the application of this fundamental value judgement.

Resolving the first of these questions, concerning the status of the government enacting the legislation, requires a determination of whether the government in question was a democracy. Democracy thus serves as a "seam" to connect individual preferences and governmental action. Through fair, periodic elections, government behavior can be linked to the collective expression of individual preferences. This transformation from a positive to normative theory is aided by a growing body of international law/international relations literature emphasizing individual rights to participate in electoral processes. Thomas Franck, for example, recognizes a "right to democracy, . . . the right of people to be consulted and to participate in the process by which political values are reconciled and choices made."[17] As democracy has become a basic norm, governments have recognized that their legitimacy depends upon complying with that norm.[18] The notion of democratic entitlement[19] provides a basis for this Article's normative value choice: governments should be considered legitimate and their legislation extraterritorially valid only to the extent that the government in question is democratic.

Testing the legitimacy of the enacting government by applying normative liberal international law theory leads to the conclusion that the legitimacy and power of the state rests solely on the actual source of its authority: the aggregated preferences of individuals within it. This test moves beyond classical definitions of a state's legal personality and legitimacy, transferring the

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16. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., art. 13.3, at 71, U.N. Doc. A/810 (1948); *see also* James Crawford, *Democracy and the Body of International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 91, 92 (Gregory H. Fox & Brad R. Roth eds., 2000).

17. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 83 (1995). *See also* M.N.S. Sellers, *Separatism and the Democratic Entitlement in International Law*, 92 AM. SOC'Y INT'L L. PROC. 116, 117–19 (1998); Crawford, *supra* note 16, at 92 (discussing "the democratic idea").

18. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) ("[G]overnments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation that those who seek the validation of their empowerment patently govern with the consent of the governed."); *see also* Gregory M. Fox, *The Right to Political Participation in International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 16, at 48, 89 (arguing that "when the will of the people is the basis of the authority of government, regimes that thwart the will of the people will lack legitimacy"). Even a realist critique of the democratic entitlement accepts much of this argument. *See generally* BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999).

19. Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 1–2 (1995).

source of a state's international authority to the people.[20] In many ways, however, this test just begs another question: what really is democracy?

Definitions of democracy abound. Joseph Schumpeter's classic procedural definition serves as the basis of much democratization literature.[21] While this Article accepts the necessity of a procedural definition, Schumpeter's definition of democracy, set merely in terms of elections, is clearly insufficient.[22] The mere fact that elections have occurred, even if they are free and fair, is not enough to demonstrate that the will of the people is the basis of the authority of the government.

This Article accepts the basic framework of procedural democracy, but goes further, scrutinizing a government's continued responsiveness to the will of its citizens.[23] Robert Dahl's definition of democracy comes closest to this idea, stating that "a key characteristic of democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals."[24] Accepting Dahl's definition, this Article first considers democracy in terms of free and fair elections, and proceeds to look to the ongoing responsiveness of the government based on the specific political context in which the amnesty legislation is enacted.

Such determinations of democracy, made easily when speaking in more abstract terms, may appear ambiguous in application. In applying the first test of legitimacy—whether the enacting government reflects the authority of the will of the people—this Article draws lessons from positive liberal theory, which suggests that "representation in the liberal view is not simply a formal atribute of state institutions, but includes other stable characteristics of the political process, formal and informal, that privilege particular societal interests."[25] This Article therefore looks closely at the historical back-

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20. *See* Fox, *supra* note 18, at 90 (noting that the "nineteenth century conception of the State has undergone a substantial change: international notions of legitimacy are no longer obvious to the origin of governments, but have come to approximate quite closely those domestic conceptions of popular sovereignty").

21. Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 269 (2d ed. 1947); *see also* Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 7 (1991) (defining democracy as based on "fair, honest, and periodic elections").

22. Huntington himself admits this, noting that "[t]o some people democracy has or should have much more sweeping and ideological connotations. To them, 'true democracy' means *liberté, egalité, fraternité* . . . ." Huntington, *supra* note 21, at 9.

23. Slaughter, *supra* note 10, at 511. As Slaughter points out, liberal democracy "denotes some form of representative government secured by the separation of powers, constitutional guarantees of civil and political rights, juridical equality, and a functioning judicial system . . . ." *Id.*

24. Robert A. Dahl, Polyarchy: Participation and Opposition 1 (1971). This Article does not require that Dahl's ideal polyarchy ("regimes that have been substantially popularized and liberalized, that is, highly inclusive and open to public contestation") be met for a state to be considered a democracy. *Id.* at 8. Nonetheless, this Article considers the two dimensions Dahl deems significant, "public contestation and the right to participate." *Id.* at 5. In determining whether a state is a democracy, then, this Article looks to Dahl's concerns that citizens have "unimpaired opportunities: 1. To formulate their preferences. 2. To signify their preferences to their fellow citizens and the government by individual and collective action. 3. To have their preferences weighed equally in the conduct of the government." *Id.* at 2.

25. Moravcsik, *supra* note 6, at 518.

ground of the regime in question. Freedom House democracy scores provide additional evidence as to the quality of democracy in each state studied.[26] Freedom House scores are not, however, taken as definitive benchmarks. These scores only supplement and confirm the overall analysis developed through historical inquiry. When considered in conjunction with an historical analysis, however, Freedom House scores allow for rough judgments about the state of democracy.

The normative value that the will of the people should govern leads to the application of the second test for legitimacy—legitimacy of process. The question raised is whether the process by which the law was enacted reflected the authority of the will of the people. In order that an amnesty law carry legitimacy, the government must represent the popular will,[27] as evidenced through free and fair elections, *and* it must enact the legislation in question through processes approved by the people.[28]

In determining whether an amnesty law is enacted through legitimate processes, this Article looks to two guidelines proposed by Franck. First, a law must have coherence or "treat like cases alike."[29] Second, it must demonstrate adherence, "from its having been made in accordance with the process established by the constitution, which is the ultimate rule of recogni-

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26. FREEDOM HOUSE, *Annual Survey of Freedom Country Scores 1972–73 to 1999–00*, http://www.freedomhouse.org/ratings/index.htm (visited Feb. 26, 2001). The scores are measured on a one-to-seven scale, "with one representing the highest degree of freedom and seven the lowest." The first number presented represents political rights, the second civil liberties. "Countries whose combined averages for political rights and civil liberties fall between 1.0 and 2.5 are designated 'free;' between 3.0 and 5.5 'partly free;' and between 5.5 and 7.0 'not free.' *Id.* For a discussion of these categories, see FREEDOM HOUSE, *Survey Methodology*, http://www.freedomhouse.org/research/freeworld/2000/methodology.html (visited Feb. 26, 2000). Despite some detractors, Freedom House scores are often used in democratization literature. *See, e.g.*, HUNTINGTON, *supra* note 21, at 11; Larry Diamond, *Is the Third Wave Over?*, 7.3 J. DEM. 20, 23 n.11. Courts have been able to rely on Freedom House scores. *See, e.g.*, Melendez-Flores v. I.N.S., 165 F.3d 35, **3 (Memorandum, 9th Cir. 1998) (noting that the INS had "failed to submit the Freedom House report on which it relies into evidence" hindering a judicial determination of the political situation in El Salvador).

27. *See, e.g.*, Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, *in* TRUTH V. JUSTICE, 22, 35–36 (Robert I. Rotberg & Dennis Thompson eds., 2000) (noting the importance of reciprocal deliberative democracy in giving truth commissions moral legitimacy).

28. Franck explains this second, process-based requirement, stating that "[w]hen it is asserted that a rule or its application is legitimate, two things are implied: that it is a rule made or applied in accordance with a right process, and therefore, that it ought to promote voluntary compliance by those to whom it is addressed." FRANCK, *supra* note 17, at 26. *See also* Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1949 (1997).

29. FRANCK, *supra* note 16, at 38. According to Franck,

> [a] rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules in the same system . . . . The legitimacy of rules is augmented when they incorporate principles of general application. General application requires not only that likes are treated alike.

Id. at 38, 41. This formulation is similar to that put forward by Gutmann and Thompson, who argue a legitimate amnesty law is one that "cannot be reasonably rejected by any citizen committed to democracy because it requires only that each person seek terms of cooperation that respect all as free and equal citizens." Gutmann & Thompson, *supra* note 27, at 37.

tion."[30] While this Article does not rigidly apply Franck's criteria, or any of the purely procedural definitions of democracy, coherence and adherence are helpful in considering the legitimacy of the enactment process.

The exploration of legitimacy herein is based largely on the application of these first two questions: was the status of the government reflective of the popular sovereignty and was the law enacted through a process reflective of that sovereignty. In addition, this Article looks to the third question noted above: was the law applied in a manner reflective of the ultimate authority of the will of the people? To resolve this third question, the Article looks again to historical and judicial sources for evidence of how a given law was applied.

The liberal approach advanced by this Article has based determinations of legitimacy largely on domestic considerations. A second level of analysis—the international perspective—is also necessary. A liberal theory of international law takes into consideration the inextricable links between the domestic and international contexts. Liberal theory depends not only on individuals interacting with their own government, but also on individuals and groups interacting "through governmental institutions with the individuals and groups of other states."[31] Thus, the interaction between the citizens of one legitimate democracy and their government may cause that government to interact with the government of another state enacting an amnesty law, either in support of or against that law.[32] In a world of liberal states, "the baseline assumption is that governments will interact with one another within a web of individual and group contacts in transnational civil society."[33] When this Article's normative value judgments are overlaid on liberal international law theory, such widespread and significant interactions within the transnational polity become the root authority of international law and therefore affect the validity of the law in question. The preferences of these individuals, articulated through a government, should therefore have bearing on the international legitimacy and extraterritorial validity of amnesty legislation.

The role of international actors and audiences in the amnesty process varies. In some cases, the amnesty law may be universally condemned. In such instances, the international community may be viewed as having rejected the validity of the legislation. In other cases, there may be no international involvement whatsoever. In these latter cases, an analysis of international legitimacy is unavailing, and determinations must be made solely on the

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30. FRANCK, *supra* note 16, at 11. Franck defines adherence broadly as "the vertical nexus between a single primary rule of obligation . . . and a pyramid of secondary rules governing the creation, interpretation, and application of such rules by the community." *Id.*

31. Slaughter, *supra* note 7, at 241, 243.

32. *See, e.g.*, Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, *in* TRUTH V. JUSTICE, *supra* note 27, at 3, 12 (noting the importance of globalized civil society in "reinforc[ing] the work of truth commissions").

33. Slaughter, *supra* note 10, at 528.

basis of domestic legitimacy. Alternatively, the amnesty law in question may garner widespread international support, conferring on it some international legitimacy. In other cases, the amnesty law may be part of a multi-lateral treaty or even sanctioned by a UN Security Council resolution. Where amnesty is conferred by a Security Council resolution, states may even be absolved of pre-existing international duties to prosecute certain crimes.

Determinations of international legitimacy can be difficult. What level of international support is sufficient to confer legitimacy? How should cases be resolved where an amnesty law has popular support in the enacting state but is widely condemned internationally? Do domestic actors carry greater weight in the determination of legitimacy than do actors in the larger international society? Neither the positive liberal theory of international law nor this Article's normative transformation thereof has yet been applied to help resolve these questions. This Article begins the application process, conceding from the start that questions of legitimacy will not be fully resolved. Such unresolved questions, however, may be illuminated by the second axis of analysis: scope.

Before turning to scope, it is worth pausing to consider a second potential theoretical ground for legitimacy—consequential legitimacy. Consequential legitimacy grounds a law's legitimacy in its effects. Advocates of this approach contend there may be a dynamic relationship between efforts to establish a stable democratic state and legitimacy. According to this teleological argument, if a law does, in fact, help establish democracy, it should carry legitimacy, independent of the factors discussed above.[34] The goal of justice in this sense is not retributive or rehabilitative, but restorative. Questions of the legitimacy of a law should focus on "its commitment to reconciliation."[35] Given the value judgment that individuals should be the source of authority of government, a test for legitimacy that looks to whether a law reconciles a society and reasserts the popular sovereignty, would seem appealing. The framework presented in this Article leaves room for the citizens of states enacting amnesties to formulate and articulate a preference that certain crimes should, in order to facilitate reconciliation, be amnestied rather than prosecuted. However, where such preferences have not been articulated by individuals, or where those preferences have not prevailed in formulating state policy, the default rule should be the thin preference of the transnational polity in favor of prosecution over amnesty. Consequentialists have given no compelling reason why, absent clear preferences of individuals

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34. For an articulation of this view, see generally Azanian People's Organisation, 1996 (8) BCLR 1015 (CC); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1988); *cf.* Steven Ratner, *New Democracies, Old Atrocities*, 87 GEO. L.J. 707, 732–38 (1999) (noting a causal relationship between democracy and accountability).

35. Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, *in* TRUTH V. JUSTICE, *supra* note 27, at 68, 79. Desmond Tutu comments that restorative justice "is concerned not so . . . with healing, harmony and reconciliation." Final Report of the Truth and Reconciliation Comm'n, ch 1, ¶ 36 (1998), *cited in* Kiss, *supra*.

in the enacting state, amnesty, not prosecution, should be the default rule. If, in the future, empirical evidence emerges or positive international relations theory can demonstrate that amnesty does, in fact, lead to stable transition, it is possible that the default preference of the transnational polity could change, and with it the background rule. Absent such evidence, however, the current international preference in favor of prosecution prevails. Even where the individuals in a state deem amnesty preferable on consequential grounds, the strong preferences of the transnational polity in favor of prosecuting certain heinous crimes may limit the freedom of the national polity to amnesty those crimes. Therefore, this Article acknowledges, but neither accepts nor applies, the test of teleological legitimacy of amnesty legislation.

B. Scope

This normative version of liberal international law theory gives rise to scope as a second axis of analysis. Scope considers the coverage of amnesty legislation: who is immunized from prosecution and which acts are immune. The wording of most amnesty laws gives clear textual answers to the question of scope, and when the text is not specific, one can determine to whom the law applies either through a consideration of judicial decisions or through quantitative data on the law's application.

While scope is traditionally expressed through a realist, state-focused analysis, this Article does not view scope through a realist lens. Rather, it also applies liberal international law theory to the consideration of scope. As noted above, international treaties and custom generally limit the potential scope of amnesty laws. From a liberal perspective, these treaties represent the aggregated preferences of individuals who, acting through governments, have created a regime that forbids certain acts and prohibits states from either committing or facilitating such acts. Liberal theory accounts for such preferences of the international community and "assumes that the pattern of interdependent state preferences imposes a binding constraint on state behavior."[36]

Those binding constraints are referred to herein as "scope limitations" and should be conceived of as part of an international constitutional order.[37] Such a global order recognizes an emerging international criminal law regime, created by individuals and transnational groups expressing condemnation of certain crimes, which restricts the scope of amnesty legislation.[38] Considering these treaties as a kind of international constitution proves analytically useful. An emergent, treaty-based international constitution acts like a domestic constitution, setting a universal ceiling on legislative and

36. Moravcsik, *supra* note 6, at 520.

37. Marc Weller has articulated this idea in his treatment of the Yugoslav and Kosovo crises. *See* Marc Weller, The Crisis in Kosovo 28–33 (1999).

38. *See, e.g.*, Slaughter, *supra* note 10, at 530.

executive power and articulating the links between these limitations and the transnational polity.[39] As this emerging international constitution places checks and balances in the system, it "curb[s] the abuse of power"[40] or, from the perspective of this Article, it provides an objective test for when an amnesty-enacting national legislature or executive has exceeded the power retained by the citizens of a state and their national government in relation to the international constitution and the transnational polity. Such restrictions serve to limit the permitted scope of amnesty legislation, notwithstanding the domestic legitimacy of the law.

This normative version of liberal international law theory may be critiqued on grounds that it subjectivizes international law. After all, international law traditionally looks to objective tests, such as the existence of a defined territory, and speaks in terms of clear, finite obligations. This Article's normative theory admittedly raises subjective questions about the quality of interest representation in a particular country. This model, however, still protects the objective nature of international law. Scope determinations are objective by nature and can override subjective determinations of governmental legitimacy. Even if an amnesty law has full domestic legitimacy, there may be crimes for which a state simply cannot absolve individual responsibility. For example, the *jus cogens* prohibition of genocide[41] or grave breaches of the Geneva Conventions[42] impose *aut dedere aut judicare* (prosecute or extradite) requirements and would invalidate any domestic law that seeks to grant amnesty for these crimes. In these instances, the emergent international constitution will force the rejection of an amnesty on objective, substantive grounds.

This Article's inquiry into scope addresses the breadth of a particular grant of immunity. Specifically, the Article asks whether the scope of the law falls within a state's permissible range of competencies, either as limited by the state's own population through the domestic constitution or by the transnational polity through the international constitution. The availability of alternate modes of recourse for victims in a particular state is also considered.[43]

This analysis of scope seeks both to generate general themes as to the permissible reach of amnesty, while recognizing that such obligations are country-specific and determined in large part by the particular treaty obliga-

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39. *Id.* at 535 (noting that "a world of liberal states could be conceptualized as a transnational polity").

40. *Id.*

41. *See generally* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28) (advisory opinion).

42. *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 3146, 75 U.N.T.S. 31, 62.

43. In other words, the scope of amnesty reveals whether the state provided alternate means of recourse for victims, such as civil compensation or access to a truth commission. *See generally* MINOW, *supra* note 34; PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) (discussing the various forms and roles of truth commissions).

tions that a state has assumed. Such a country-specific inquiry is beyond the reach of this Article. Suffice it to say here that there are certain crimes that states are obligated either to be prepared to prosecute or to in fact prosecute and for which they can not grant amnesty in conformity with the emergent international constitution.[44] Such crimes include genocide, grave breaches of the Geneva Conventions, torture, and crimes against humanity.[45] While an analysis of particular state obligations is saved for future study, the emergent international constitution places clear and objective limits on the scope of any state's amnesty grant. Basic norms of customary and treaty law would bar any legislation which sought to grant amnesty in relation to the aforementioned acts, even in the face of overwhelming domestic and international support for the amnesty.

Before applying this normative liberal international law theory, it is worth recasting the conclusions of the preceding section. This theory can be seen as an international constitutional system with a federal structure. In determining the validity of an amnesty, normative liberal theory defers to the preferences of individuals in the state enacting the amnesty. A standard of presumptive deference is applied to these national polities, subject to the limitations of scope created by the international polity and articulated by the international constitution. Where the preferences of the national polity cannot be determined or the state has been "captured" by interests not representative of the will of the people as the ultimate source of authority, the thin international consensus in favor of prosecution intervenes to invalidate any grant of impunity.

II. A Two-Axes Framework for Analysis

By utilizing an analytical framework constructed with the axes of legitimacy and scope, amnesty legislation can be classified into four broad categories: (1) Blanket Amnesty; (2) Locally Legitimized, Partial Immunity; (3) Internationally Legitimized, Partial Immunity; and (4) International Constitutional Immunity. Admittedly, the boundaries between these categories are permeable. In fact, some legislation may not fit this model at all, while other laws may slide between these categories. Acknowledging imprecision, this two-axes framework nevertheless affords understanding as it allows for systematic classification of amnesty legislation and determination of local as well as international validity of amnesty laws.

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44. Elsewhere, the author has developed categories of state obligation to prosecute under the principal of universal jurisdiction. The three categories of state obligations can serve as the basis for an analysis of obligations not to grant amnesty as well. When states face obligations of "preparatory universal jurisdiction" (states must be able to prosecute) or "proactive universal jurisdiction" (states must prosecute), an amnesty would be fundamentally incompatible. For a detailed discussion, see M. Weller & W. Burke-White, No Place to Hide: New Developments in the Exercise of International Criminal Justice ch. 3 (forthcoming 2001).

45. *See id.*

Chart 1
A Framework for Analysis

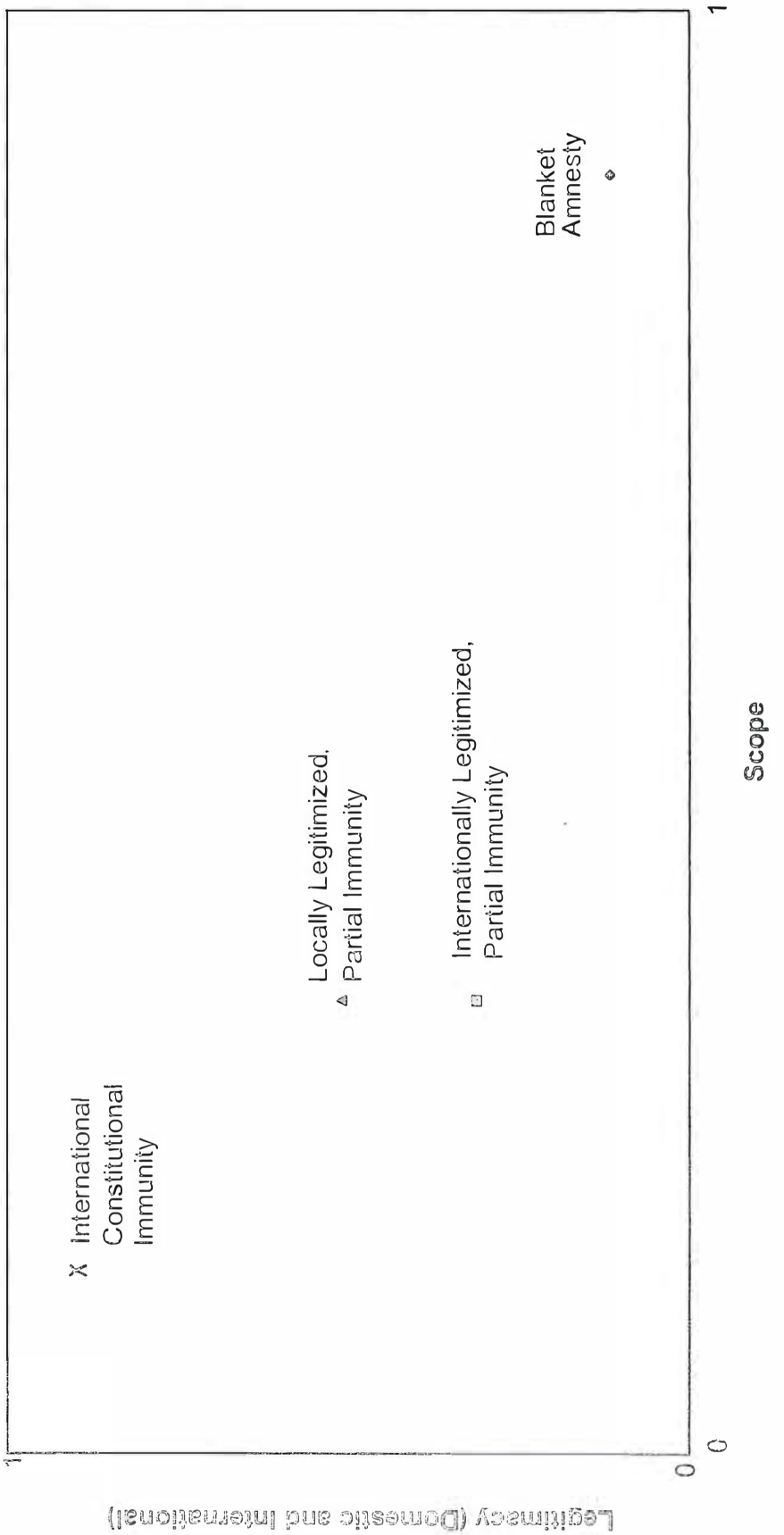

Chart 2
Amnesty Legislation Compared

Chart 1 maps these four categories graphically. Blanket Amnesties, on the lower far right, have the widest scope and the least legitimacy. Locally Legitimized, Partial Immunities have somewhat greater legitimacy on a local level and are often characterized by a more restricted scope. Internationally Legitimized, Partial Immunities carry legitimacy conferred by the international community and are somewhat limited in scope. Finally, International Constitutional Immunity, in the upper left, has significant international support, often including UN involvement, and the most restricted scope. Chart 2 plots examples of amnesty case studies within this framework. A more detailed exploration of each category follows.

A. Blanket Amnesty

Blanket Amnesty, the first type of amnesty legislation to appear in the modern international system, is usually enacted through the decrees of outgoing dictators, with neither domestic nor international approval. Blanket Amnesty, as the name implies, has an extremely broad scope and generally seeks to immunize all agents of the state for any and all crimes they committed during a specified period. Blanket Amnesty usually does not differentiate between common crimes, political crimes, and international crimes, nor does it consider the motives of the crime. This category is broad and sweeping, often effectively erasing a decade or more of abuse, repression, and violations with the stroke of a pen. Such legislation has been particularly common in Latin America, often enacted long before a negotiated transfer of power, hence obviating the need to placate the most violated domestic interest groups who might eventually demand 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. Moreover, enacting regimes were not characterized by the kind of political freedoms that could have given the legislation domestic legitimacy. Not surprisingly, such amnesties have been widely criticized.[46]

The first and foremost example of Blanket Amnesty is the Chilean law of April 18, 1978 ("the Chilean Law").[47] Applying the criterion of legitimacy, the Chilean law has no domestic legitimacy. 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 Ug-

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46. *See, e.g.*, Gutmann & Thompson, *supra* note 27, at 38–39 (explaining that "[v]ictims of injustice should not be expected to economize on their disagreement with perpetrators of injustice unless the perpetrators of injustice demonstrate a willingness to assume responsibility for their actions. . . . A commission that seeks to economize on moral disagreement will not grant blanket amnesty").

47. Law of Amnesty, No. 2,191 (Apr. 18, 1978) (Chile) [hereinafter Chilean Law], *reprinted in* AMERICAS WATCH, HUMAN RIGHTS AND THE "POLITICS OF AGREEMENTS": CHILE DURING PRESIDENT AYLWIN'S FIRST YEAR 32 (1991).

arte,[48] issued a self-serving amnesty decree, covering all acts committed since the overthrow of the democratic government of Salvador Allende on September 11, 1973.[49] Studies suggest that, during this period, more than 2000 civilians were killed and countless more became the victims of torture, detention, relocation, and other serious crimes.[50] Many of these crimes were committed by the National Intelligence Directorate (DINA) to eliminate members of the political opposition.[51] Most victims were members of the Socialist or Communist Parties and were targeted for their political views.[52]

A significant problem with this law is that its legal basis comes from the junta's de facto authority. The law has no effective link to the Chilean people and does not represent their preferences. After the dissolution of the Chilean DINA in 1977, the Pinochet government issued the amnesty law. It was neither passed by a democratically chosen parliament nor signed by a democratically elected head-of-state. The Freedom House score for Chile in the period of 1977 to 1978 was a 7, 5, which translates into a "not free" state. While its score improved to a 6, 5 in 1978 and 1979, Chile was still classified as "not free."[53] The situation was one of extreme repression. As one commentator puts it, "the keys to [Pinochet's] success were massive repression and economic innovation."[54] The Inter-American Commission on Human Rights [hereinafter the Inter-American Commission] deemed the amnesty legislation an "arbitrary act taken by the military regime. . . . It is the act therefore of authorities who lacked any legitimacy nor right, since they were not elected or appointed in any manner."[55] Nonetheless, the junta's de facto control over Chile was such that the amnesty decree was given legal

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48. 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).

49. 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).

50. COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, INFORME RETTIG app. 2 (1991), *translated in* COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION app. 2 (Phillip E. Berryman trans., U. of Notre Dame Press 1993), *cited in* Quinn, *supra* note 49, at n.5. *See also* LOIS HECHT OPPENHEIM, POLITICS IN CHILE 124–25 (1993) (noting that torture was used by the junta as a means to consolidate power and that more than 2279 people were killed under military rule).

51. OPPENHEIM, *supra* note 50, at 125.

52. *See* Quinn, *supra* note 49, at 915.

53. *See* FREEDOM HOUSE, *supra* note 26.

54. *See* Paul W. Drake & Iván Jaksić, *Introduction: Transformation and Transition in Chile, 1982–1990*, *in* THE STRUGGLE FOR DEMOCRACY IN CHILE 1, 4 (Paul V. Drake & Iván Jaksić eds., rev. ed. 1995).

55. Hermosilla v. Chile, Case 10.843, Inter-Am C.H.R. 156, OEA/ser.L/V/II.95 doc. 7 rev. ¶ 26 (1996).

effect[56] and enforced by the Chilean courts.[57] Within this Article's analytical framework, however, the law is clearly void of domestic legitimacy rooted in the individual authority of Chilean citizens.[58] The Chilean Law also lacks any international legitimacy.[59]

A close analysis of the text of the Chilean Law illustrates its sweeping breadth. The law grants amnesty to "all persons who committed, as perpetrators, accomplices or conspirators, criminal offences . . . between September 11, 1973 and March 10, 1978."[60] It applies to both actual perpetrators and accomplices before and after the fact. The law does not discriminate based on the motives for the crime. It applies equally, no matter if the crimes were committed out of personal animosity or in furtherance of state policy.

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56. The destruction of representative government in Chile was so complete that such legislation could be implemented without any recourse to the popular will. Cusack observes that "[t]he violent elimination of the elected government and the representatives of well over a third of the population meant the end of trust in the system." DAVID F. CUSACK, REVOLUTION AND REACTION: THE INTERNAL DYNAMICS OF CONFLICT AND CONFRONTATION IN CHILE 97 (1977). The amnesty decree of 1977 was passed before the reforms of the new 1980 Constitution, which, without redemocratizing Chile, called for a future of "protected or authoritarian democracy." OPPENHEIM, *supra* note 50, at 120. Neither of the proposed reforms of Pinochet's Chacarillas Speech of July 1977 (partially elected legislature, eventual civilian rule) had been implemented at the time of the amnesty decree. Even if the decree were analyzed in light of the new constitution, it lacked legitimacy, for the 1980 Constitution itself has been characterized as "a fundamentally undemocratic document whose purpose was to prolong Pinochet's rule . . . [and] severely limit popular participation. . . ." *Id.* at 136.

57. In one noteworthy case, victims' relatives brought suit 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 Appeals of Santiago. In December 1989, the Second Military Tribunal ordered dismissal of the case, pursuant to the Chilean Law. Hermosilla, Case 10.843, Inter-Am C.H.R. 156, ¶ 2–5 (1996).

58. The lack of legitimate connection of laws passed by the Pinochet government in the late 1970s to the popular will is indicated further by the power brokers of the Pinochet regime, namely "capitalists, technocrats, and . . . the military," rather than the sovereign will of the people. Drake & Jaksić, *supra* note 54. In the legislative process, the military firmly refused to negotiate with the opposition or take into account popular sentiment. *Id.* After the 1973 overthrow of the Allende government, "[l]iberal democracy came to an end." CUSACK, *supra* note 56, at 79. The only election held during the late 1970s was the plebiscite of 1978, in which Pinochet's authority was nominally supported, but even this measure was "totally controlled by the government." Drake & Jaksić, *supra* note 54, at 5. While Pinochet was not omnipotent, his power was limited only by the military and the state itself, institutions that, though somewhat responsive to societal pressures, did not speak directly for or represent legitimate popular authority. *See* Arturo Valenzuela, *The Military in Power: The Consolidation of One Man Rule*, *in* THE STRUGGLE FOR DEMOCRACY IN CHILE, *supra* note 54, at 21, 22. The lack of legitimacy of the amnesty decree is evidenced by the state's "unprecedented degree of autonomy from organized civilian interests and pressures." *Id.* at 23. The net result was that the Pinochet regime was able to implement its legislation "with minimal concern for the reaction of affected groups." *Id. See also* CUSACK, *supra* note 56, at 93, 95. In short, "civilian political behavior and party politics . . . were . . . eliminated." OPPENHEIM, *supra* note 50, at 117.

59. While the United States financially supported the Pinochet regime for the first few years after the 1973 coup and the CIA was active in the region, there is no evident support from the United States or the international community for the political system or the amnesty law in particular. CUSACK, *supra* note 56, at 121.

60. Chilean Law, *supra* note 47, art. 1.

Articles 3 and 4 of the Chilean Law establish a narrow range of exceptions to the amnesty. First, Article 3 exempts some common crimes including robbery, drug trafficking, and arson from the amnesty, and many crimes against the state such as tax fraud, embezzlement of public securities, and smuggling.[61] The exemptions here are paradoxical since amnesty is expressly withheld for crimes against the state, the very crimes that a state likely has standing to forgive. The only international crimes arguably excluded from the amnesty are plunder and rape as crime against humanity, delineated in the Article 3 exemption as "theft" and "rape." Other 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.[62]

The Chilean Law is noteworthy in that, on its face, it does not differentiate between perpetrators acting with state authority and members of the opposition who committed similar crimes. Rather, it applies equally to "all persons who . . . committed criminal offences," both the majority and the minority.[63] One commentator points out, however, that many government opponents were unable to benefit from this law as they "had already been killed, disappeared, or [were] in exile."[64] Moreover, the law was applied by military tribunals that had jurisdiction over most cases during this period, and were likely to favor the government, the military, and the police. Despite the release of several hundred persons imprisoned without trial after the law's entry into force,[65] it is fair to say that the Blanket Amnesty applied predominantly to government and military forces.[66]

The scope of the Chilean Law is further characteristic of Blanket Amnesty as it does not establish any alternate means of redress for victims. It has no provisions for an investigatory body to consider the amnestied acts 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.[67] The goal of a Blanket Amnesty, and that of the Chilean junta, was to forget the crimes of the past. It was not until President Aylwin came to power in 1990 that a National Commission on Truth and Reconciliation was created to investigate past abuses.[68]

More recently, in 1995, Peru followed Chile's example and enacted a Blanket Amnesty, forgetting past atrocity. In response to escalating attacks

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61. *Id.* art. 3.
62. *See id.*
63. *Id.*
64. Quinn, *supra* note 19, at 918.
65. AMERICAS WATCH, *supra* note 46, at 45.
66. *See id.*
67. *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).
68. *See* HAYNER, *supra* note 43, at 35.

by guerrilla groups, such as the Shining Path and the Tupac Amaru Revolutionary Movement, the Peruvian government in early 1983 transferred the counter-insurgency operations from the police to the military.[69] Thereafter, Amnesty International (AI) and other human rights organizations began to receive numerous complaints, documenting over 4000 disappearances and 500 extra-judicial executions between 1983 and 1992.[70] In order to prevent prosecution of the perpetrators of these abuses, the Peruvian Congress passed the first of two amnesty laws ("the First Amnesty Law"), Law No. 26479, on June 14, 1995.[71]

The Peruvian legislation grants wide-ranging immunity. The First Amnesty Law, like that of Chile, grants a Blanket Amnesty. It is, however, even more far reaching than the Chilean Law in that it applies both "to common or military crimes, whether within the jurisdiction of civil or military courts."[72] All crimes ranging from murder and rape to robbery and fraud are included. The only limitation on the grant of amnesty is that the crimes "derived, originated from, or [were] a consequence of the fight against terrorism . . . between May 1980" and June 1995.[73] As applied, the only significant restriction on the amnesty is temporal. Article 4 of the First Amnesty Law further extended the amnesty retroactively, mandating the "annul[ment] of all police, judicial, and criminal records . . . [and the] release of those pardoned who are currently under arrest."[74]

While the scope of crimes covered by the First Amnesty Law is broader than that covered by its Chilean counterpart, the Peruvian Law is tailored to benefit only the military regime in power when the amnestied crimes oc-

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69. For a brief review of the history of the Shining Path movement, see Carlos Ivan Degregori, *Shining Path and Counterinsurgency Strategy Since the Arrest of Abimael Guzmán*, *in* PERU IN CRISIS: DICTATORSHIP OR DEMOCRACY? 81, 82–84 (Joseph S. Tulchin & Gary Bland eds., 1995) [hereinafter PERU IN CRISIS].

70. AMNESTY INTERNATIONAL, PERU: AMNESTY LAWS CONSOLIDATE IMPUNITY FOR HUMAN RIGHTS VIOLATIONS (1996) [hereinafter AMNESTY LAWS CONSOLIDATE IMPUNITY], http://www.web.amnesty.org (visited Feb. 23, 2001); *see also* Degregori, *supra* note 69, at 92 (contending that, from 1988 until 1991, Peru had the world's highest rate of disappearances).

71. First Amnesty Law of June 14, 1995, No. 26479 (1995) (Peru) [hereinafter First Amnesty Law], *translated in* AMNESTY LAWS CONSOLIDATE IMPUNITY, *supra* note 70.

72. First Amnesty Law reads in pertinent part:

> Article 1. Grant a general amnesty to the Military, Police or Civilian personnel . . . , who face a formal complaint, investigation, criminal charge, trial, or conviction for common or military crimes, whether under the jurisdiction of the civil or military courts, in relation to all events derived or originated from, or a consequence of, the fight against terrorism, and which may have been committed either individually or by two or more persons between May 1980 and the date on which this law is promulgated.
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> . . .
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> Article 5. The Military, Police or Civilian personnel who face a formal complaint, investigation, judicial process or conviction for the crimes of Illegal Drug Trafficking, of Terrorism and of Treason as regulated by Law N°25,659, is excluded from the provisions in this law.
>
> Article 6. The events or crimes covered by the amnesty law, all rulings in favor of definitively closing a judicial process, and acquittals, are not subject to investigation, inquiry or summary proceedings; all judicial cases, whether ongoing or executed, remaining definitively closed.

Id. arts. 1, 5.

73. *Id.* art. 1.

74. *Id.* art. 4.

curred. The First Amnesty Law is specifically formulated to exempt members of the resistance from the amnesty, granting immunity only to "the Military, Police, or Civilian personnel."[75] As such, the amnesty applies only to members of the government (and their subordinates) who enacted it. By tailoring the amnesty only to benefit the government, the First Amnesty Law neither meets the test of coherence nor respects the people as the source of governmental authority.

The political circumstances under which the law was passed further suggest the legislation's lack of domestic legitimacy. In the years preceding the enactment of the amnesty laws, President Fujimori severely curtailed Peru's democratic political institutions.[76] The "reforms" of Fujimori's self-coup significantly undermined the government's capability to enact democratically legitimate laws, as congressional representation was decreased[77] and the judicial system emaciated.[78] Moreover, evidence suggests that the Peruvian congress often, and particularly in the case of the amnesty law, failed to consider or debate the legislation, but rather "rubber stamp[ed] legislation initiated by the executive."[79] The military was also able to wield extensive influence on the policies of the Fujimori government.[80]

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75. *Id.* art. 1.

76. For example, on April 5, 1992, the President "suspended the constitution, dissolved the Congress and the judiciary, placed several congressional leaders under house arrest, and imposed temporary but harsh censorship of the press." Carol Graham, *Introduction: Democracy in Crisis and the International Response*, *in* PERU IN CRISIS, *supra* note 69, at 1, 5. While some of the president's actions boosted his popularity, creating a kind of Fujimori personality cult, they did so outside institutions of democratic legitimacy, *see id.* at 6, and largely with the support of the military. *See* Fernando Rospigliosi, *Democracy's Bleak Prospects*, *in* PERU IN CRISIS, *supra* note 69, at 40, 42–43. Military support, however, was "coupled with a considerable degree of questioning of the legitimacy of democracy by the military, [making] a democratic regime unsustainable." *Id.* at 45. Fujimori proceeded to draft a new constitution, which was ratified in a national referendum in October 1993. *See* COLETTA A. YOUNGERS, DECONSTRUCTING DEMOCRACY: PERU UNDER PRESIDENT ALBERTO FUJIMORI 9 (2000).

77. Electoral changes led to "significantly less of the Peruvian population enjoying representation in Congress, and hence reduc[ed] even further the sense of accountability to the electorate." YOUNGERS, *supra* note 76, at 21. For example, in 1990, the Congress had 240 members, one for each 26,963 voters. However, at the time the First Amnesty Law was passed in 1995, Congress was comprised of only 120 members, with one representative for each 102,537 voters. *Id.* The net result was "a further 'divide between most Peruvians and the political process, and strength[ened] attitudes amongst the population at-large that government does not take its interests into account.'" *Id.*

78. From April 1992 to June 1996, Peru lacked a high court. The Constitutional Tribunal itself was abolished by the self-coup and not reinstated until 1996. *Id.* at 29. Even thereafter the Tribunal's effectiveness was limited. Any petitions for review of legislation had to be presented within six months. The result was effectively to prohibit meaningful judicial review. *Id.* The Tribunal also faced considerable pressure, threats, and intimidation, further restricting its freedom. *Id.* at 30. A number of lower-court judges were investigated or dismissed after ruling against the government. *Id.* at 36; *see also* Francisco Sagasti & Max Hernandez, *The Crisis of Governance*, *in* PERU IN CRISIS, *supra* note 69, at 22, 27.

79. YOUNGERS, *supra* note 76, at 2; *see* Sagasti & Max, *supra* note 78, at 22–23 (arguing that "Congress has tended to quickly approve laws put forward by the executive branch, sometimes with little debate and bypassing normal procedures").

80. *See* Enrique Obando, *The Power of Peru's Armed Forces*, *in* PERU IN CRISIS, *supra* note 69, at 101, 113–18 (noting that Fujimori's reliance on the military to implement his policies), 105 fig.8.1.

Freedom House, in its 1994–95 and 1995–96 studies, rated Fujimori's Peru a 5, 4 (partially free).[81] Though slightly better than Chile's 7, 5 rating (not free), Peru's scores are still far from the 2½ benchmark of freedom. Taken collectively, Fujimori's cult of personal power and his destruction of democratic institutions have been characterized as "a dismantling of the basic institutional structures of democratic governance,"[82] which, therefore, deny the amnesty law domestic legitimacy.

Like its Chilean counterpart, the First Amnesty Law provides no alternate means of recourse or investigation. In fact, Article 6 of the First Amnesty Law guarantees absolute immunity by ensuring that acts covered by the law are "not subject to investigation [or] inquiry."[83] All liability, both civil and criminal, is thereby extinguished. Individuals, victims, and society at large were denied any means of seeking truth, reparations, and collective healing of national wounds.[84]

The application of amnesty in Peru demonstrates that even an emaciated judiciary has found the law troubling. Immediately after the First Amnesty Law came into force, Judge Antonia Saquiciray, investigating the 1991 Barrios Altos massacre, ruled the First Amnesty Law inapplicable to that case. While the case made its way through the judicial system, the Peruvian Congress passed the Second Amnesty Law, extending the scope of immunity and ensuring the enforcement of the original order.[85] The Second Amnesty Law removed the First Amnesty Law from the realm of judicial review.[86] Whether

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81. FREEDOM HOUSE, *supra* note 26.

82. YOUNGERS, *supra* note 76, at 1; *see also* Sagasti & Hernandez, *supra* note 78, at 27 (arguing that the "checks and balances that are essential to a viable and working democracy are not in place in Peru, and the prospects for improving democratic governance in Peru appear uncertain and problematic"); *see also* Rospigliosi, *supra* note 76, at 42 (noting Fujimori was "willing to govern without the 'burdensome details' of the parliament and the judiciary").

83. First Amnesty Law, *supra* note 71, art. 6.

84. Martha Minow describes the importance of these alternative means of recourse, noting that "the process of seeking reparation, and of building communities of support while spreading knowledge of the violations and their meanings in people's lives may be more valuable, ultimately, than any specific victory or offer of remedy." MINOW, *supra* note 34, at 93.

85. *See* AMNESTY LAWS CONSOLIDATE IMPUNITY, *supra* note 70, at 2.

86. Second Amnesty Law of June 28, 1995, N°. 26.492 (1995) (Peru) (on file with Harvard International Law Journal) [hereinafter Second Amnesty Law]. The Second Amnesty Law reads in part:

> Article 1. . . . the amnesty granted by Law N°. 26.479 does not constitute an interference in the functioning of the judiciary, nor does it undermine the duty of the State to respect and guarantee the full enforcement of those human rights as recognized by article 44 of the Constitution and by, among other human rights Treaties, Article 1, Section 1, of the American Convention on Human rights.
>
> . . .
>
> Article 3. Article 1 of Law N°. 26.479 is to be interpreted in the sense that all Judicial Bodies are under the obligation to apply the general amnesty to all events derived or originated from, or a consequence of, the fight against terrorism, whether committed individually or by two or more persons between May 1980 and June 14, 1995, and whether or not the military, police or civilian personnel implicated, face a formal complaint, investigation, is subject to criminal proceedings, or has been convicted; all judicial cases, whether ongoing or executed, remain definitively closed in accordance with article 6 of the above mentioned Law.

Id. arts. 1, 3.

such a non-reviewable law was permissible under the Peruvian Constitution was questionable,[87] but the Peruvian Congress sought to imbue the Second Amnesty Law with constitutional legitimacy by 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."[88] Given the lack of a constitutional tribunal to review the law, however, its constitutionality was largely academic. The Second Amnesty Law effectively overturned Judge Saquiciray's ruling and extended amnesty to that case. In addition, the Second Amnesty Law expanded the temporal scope of the amnesty to cover crimes committed between May 1980 and June 15, 1995, but not reported until after June 15, 1995.[89]

The Peruvian Congress seems to have been aware of the problems with the scope and legitimacy of the First Amnesty Law. While expanding the scope of the first law, the second decree seeks to legitimize the First Amnesty Law and bring it into conformity with Peru's international obligations. The Second Amnesty Law declares that the First Amnesty 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."[90] While the net result of the Second Amnesty Law is still to expand the applicability of the previous decree, a strictly textual reading of the law suggests that the first law should be interpreted narrowly as to comply with international human rights obligations. The contradictions between the clear intent of the Second Amnesty Law and its strict textual interpretation highlight the tensions in the Peruvian executive-judicial equipoise and cast doubts upon the legitimacy of the legislation. Since there have been no meaningful opportunities to challenge the Peruvian amnesty laws, however, the interpretation of the two laws as applied appears broad. They grant a wide-ranging amnesty, are exempt from judicial review, and lack meaningful indicators of domestic legitimacy.

Many other states in Latin America and elsewhere have followed the model of Blanket Amnesty established by Chile and utilized by Peru. Ar-

87. *See* AMNESTY LAWS CONSOLIDATE IMPUNITY, *supra* note 70, at 2.
88. Second Amnesty Law, *supra* note 86, art. 2.
89. *Id.* art. 3.
90. *Id.* art. 1.

gentina,[91] El Salvador,[92] Nicaragua,[93] Sri Lanka,[94] and Uruguay[95] have all passed or enacted Blanket Amnesty immunizing political, military, and police officials for all significant crimes committed during a set period. While these laws differed slightly, they have all had little, if any, domestic legiti-

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91. Full Stop Law, No. 23.492 (1986) (Arg.) (on file with Harvard International Law Journal); Due Obedience Law, No. 23.521 (1987) (Arg.) (on file with Harvard International Law Journal).

92. Law of General Amnesty for the Consolidation of Peace, Decree No. 486 (1993) (El Sal.) (on file with Harvard International Law Journal). In pertinent part the law reads:

> Article 1: A broad, absolute and unconditional amnesty is granted in favor of all those who in one way or another participated in political crimes, crimes with political ramifications, or crimes committed by no less than twenty people, before January 1, 1992, regardless of whether proceedings against them for the perpetration of these crimes have commenced or not, or whether they have received a sentence as a consequence . . . .
>
> . . .
>
> Article 3: Those who will not be favored by the amnesty are:
>
> (a) Those who individually or collectively participated in the crimes typified in the second item of Article 400 of the penal code and carried out those crimes with a view to profit, whether or not the person is serving time in prison as a consequence: and
>
> (b) Those who individually or collectively participated in the crimes typified in Articles 220 and 257 of the penal code and those included in the law regulating drug related activities . . . .

Id. arts. 1, 3.

93. Law of General Amnesty and National Reconciliation, No. 81 (1990) (Nicar.) (on file with Harvard International Law Journal). The relevent passages read:

> Article 1: A general and unconditional amnesty is hereby granted to:
>
> 1. All Nicaraguans . . . , who committed crimes against the public order and the internal and external security of the state and other related acts.
>
> 2. All civilian and military Nicaraguans who may have committed infractions in carrying out or investigating criminal acts described in the proceeding paragraph.
>
> . . .
>
> Article 2. The amnesty referred to in the preceding paragraph includes the period from June 19, 1979 up to the date on which the current Law goes into effect.

Id. arts. 1–2.

94. Indemnity Law for Security Force Personnel, No. 20 (1982) (Sri Lanka) (on file with Harvard International Law Journal). The law reads in part:

> 2. No action or other legal proceeding whatsoever, whether civil or criminal, shall be instituted in any court of law for or on account of or in respect of any act, matter or thing, whether legal or otherwise, done or purported to be done with a view to restoring law and order during the period August 1, 1977 to [20 May 1982], if done in good faith, by a Minister, Deputy Minister or person holding office under or employed in any capacity whether naval, military, air force, police or civil, or by any person acting in good faith under the authority of a direction of a Minister, Deputy Minister or person holding office or so employed and done or purported to be done in the execution of his duty or for the enforcement of law and order or for the public safety or otherwise in the public interest . . . .

Id. art. 2.

95. Law Nullifying the State's Claim to Punish Certain Crimes, N°. 15.848 (1986) (Uru.) (on file with Harvard International Law Journal). The relevant portion reads:

> Article 1: It is recognized that as a consequence of the logic of the events stemming from the agreement between the political parties and the Armed Forces in August 1984 and in order to complete the transition to full constitutional order, the State relinquishes the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials either for political reasons or in fulfillment of their functions and in obeying orders from superiors during the de facto period.
>
> Article 2: The above Article does not cover:
>
> . . .
>
> b) crimes that may have been committed for personal economic gain or to benefit a third party.

Id. art. 1.

macy, no international legitimacy, and a broad scope, effectively barring the prosecution of government authorities for most serious crimes.

The Argentine amnesty represents a transition from Blanket Amnesty to Locally Legitimized, Partial Immunity. Its scope is still broad, but it has significantly greater domestic legitimacy. The Argentine amnesty legislation was passed in the wake of a period of trials of the former military juntas initiated at the outset of the Alfonsín regime,[96] which ultimately led to the conviction of five of the former junta members.[97]

The Argentine amnesty consists of two separate laws: the Full Stop Law of December 24, 1986[98] and the Due Obedience Law of June 4, 1987.[99] The

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96. Immediately after coming to power in 1983, the Alfonsín government revoked the military junta's self-amnesty laws and allowed trials against the leaders of the Process of National Reorganization to commence. *See* David Pion-Berlin & Ernesto López, *A House Divided: Crisis, Cleavage, and Conflict in the Argentina Army*, *in* THE NEW ARGENTINE DEMOCRACY: THE SEARCH FOR A SUCCESSFUL FORMULA 63, 70 (Edward Epstein ed., 1992) [hereinafter THE NEW ARGENTINE DEMOCRACY] (noting that the "democratic government took the offensive by annulling the military's self-amnesty"). Both Argentine amnesty laws were passed in response to the February 14, 1984, Law N°. 23.049 that allowed the Supreme Council of the Armed Forces to hear cases of certain crimes committed by the military. *See* ROGER GRAVIL, WRESTLING WITH THE PAST: HUMAN RIGHTS AND STABILITY IN ALFONSÍN'S ARGENTINA 14 (1995). Under this earlier law, a number of cases were brought in both civilian and military courts, including significant ones brought by Federal Prosecutor Julio C. Strassera against members of the first junta of 1976. *See id.* at 15; *see also* GARY W. WYNIA, ARGENTINA: ILLUSIONS AND REALITIES 184–85 (1986). In order to placate the military, the Alfonsín Government issued a series of instructions, *Instrucciones al Fiscal General del Consejo Supremo de las Fuerzas Armadas*, which limited the liability of subordinates. *See* LAURA TEDESCO, DEMOCRACY IN ARGENTINA 122–23 (1999). Thereafter, some members of the Argentine judiciary threatened to resign, claiming the instructions "constituted a hidden amnesty." *Id.* at 123. Alfonsín then codified that amnesty through the Full Stop Law. *See id.* at 122–24.

97. *See* Pion-Berlin & López, *supra* note 96, at 70. Though the judiciary worked overtime against the executive's and the military's implicit instructions to clear back cases before the Full Stop Law came into effect, many cases were not brought or resolved in time. *See* TEDESCO, *supra* note 96, at 123–24.

98. Full Stop Law *supra* note 91. In pertinent part the law reads:

> Article 1: Criminal prosecutions against any person, based on his alleged participation, of any nature, in the crimes referred to in Article 10 of 23.049 are extinguished by operation of law, unless such person . . . is indicted by a court of competent jurisdiction within sixty calendar days of the date of promulgation of this law.
>
> Under the same conditions shall be extinguished all criminal prosecutions against any person who has participated up to or before December 10, 1983 in the commission of crimes related to the use of violent means of political action.
>
> . . .
>
> Article 5: The law does not apply to criminal prosecutions for the crimes of change of civil status and kidnapping and hiding of minors.
>
> Article 6: The exception established in Article 1 does not prevent the filing of a civil claim.

Id. arts. 1, 5.

99. Due Obedience Law, *supra* note 91, in pertinent part reads:

> Article 1: It is presumed, without proof to the contrary being admitted, that those who at the time of the perpetration of the acts had the rank of chief officers, subordinate officers, officials, and soldiers of the armed forces, police, and prison forces, are exempt from punishment for the crimes referred to in Article 10, first paragraph of Law No. 23.049 by virtue of having followed orders. In those cases it shall be deemed by operation of law that these persons acted under duress, in subordination to a superior authority and following orders, without having the possibility of resisting or refusing to follow those orders and of examining their lawfulness.
>
> . . .

former sets a sixty-day statute of limitations for the prosecution of any crimes committed as part of the "dirty war," effectively preventing prosecutions after that period. When this proved insufficient in fully immunizing the past regime, a second law was adopted, establishing an irrefutable presumption that any member of the state services, with the exception of the highest-level commanders, acts in furtherance of command-orders and is not independently liable.[100]

The scope of the Argentine laws, while still sufficiently broad to meet the overall criteria of the category of Blanket Amnesty, differs from the Peruvian and Chilean legislation. Article 5 of the Full Stop Law specifically excludes kidnapping and disappearance of minors from the amnesty.[101] This is a significant exception given the number of disappearances which occurred.[102] Furthermore, Article 6 of the Full Stop Law clearly indicates that the amnesty does not preclude civil means of redress.[103] Yet, the laws still provide sweeping immunity for many serious crimes, including murder, torture, and some cases of disappearances. Moreover, the irrefutable presumption in the Due Obedience Law makes many prosecutions impossible and, as a result, widens the effective scope of the amnesty.

The legitimacy of the Argentine amnesty laws represents a transition from Blanket Amnesty to Locally Legitimized, Partial Immunity. Unlike the grants of amnesty in Chile and Peru, the Alfonsín government had a democratic political mandate.[104] The reach and power of democratic voices during Alfonsín's tenure, however, were questionable.[105] Freedom House rated Argentina a 2, 1 in its 1986–87 study, just barely classifying it as free.[106] In relation to the passage of the amnesty legislation, this score seems to be too

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> Article 2: The presumption established in the previous article shall not apply to crimes of rape, kidnapping, and hiding of minors, change in civil status, and appropriation of immovables through extortion.

Id. arts. 1–2.

100. *Id.* art. 1.

101. Full Stop Law, *supra* note 91, art. 5.

102. Estimates of the total numbers of abducted or missing persons vary from 8960 to more than 30,000. *See* GRAVIL, *supra* note 96, at 13. For a useful study of Argentine literature "narrating [the] hell" of the "[p]rocess of [n]ational [r]eorganization," see LIRIA EVANGELISTA, VOICES OF THE SURVIVORS: TESTIMONY, MOURNING, AND MEMORY IN POST-DICTATORSHIP ARGENTINA 1983–1995, 4–40 (Renzo Llorente trans., 1998).

103. Full Stop Law, *supra* note 91, art. 6; *see also* HAYNER, *supra* note 43, at 33–34 (discussing the Argentine Truth Commission).

104. *See* GRAVIL, *supra* note 96, at 5, 21 (indicating that the October 30, 1983 elections gave a resounding mandate to Raul Alfonsín with 51.7% of the vote for his Radical Party); *see also* Edward Epstein, *Democracy in Argentina*, *in* THE NEW ARGENTINE DEMOCRACY, *supra* note 96, at 1, 6 tbl.1.2. The Alfonsín government was, after all, a welcome change from the three military juntas that ruled from March 1976 until July 1982. *See* GRAVIL, *supra* note 96, at 2.

105. One scholar of the Argentine political process points to "the weakness of the major political parties and the relative strength of interest groups. Instead of aggregating (and moderating) conflicting interest group claims, parties serve largely as electoral vehicles for the strong personalities who dominate them and the political system as a whole." Epstein, *supra* note 104, at 13. The "resulting democracy [in Argentina] appears both poorly institutionalized and inherently unstable." *Id.* at 3.

106. FREEDOM HOUSE, *supra* note 26.

generous. After 1985, the Argentine democracy began to unravel. The Alfonsín government declared a "war economy" and launched the Austral Plan, which made the president the "central dominant focus of the political system."[107] In this context, the passage of the Due Obedience Law is the moment when "President Alfonsín lost his declared position as guarantor of the break with the past by reneging on his publicly given word not to yield to military pressure."[108] The significant defeat of the Alfonsín regime in the elections of September 6, 1987, soon after the laws passed, creates more doubt about the legitimacy of the amnesty legislation.[109] Moreover, the sweeping presumption of the Due Obedience Law was more a response to threats by the military authorities, angered by previous convictions, than a reflection of the authority of the people's will.[110]

B. Locally Legitimized, Partial Immunity

Locally Legitimized, Partial Immunity is characterized by a significant increase in legitimacy and a marked reduction in scope. In terms of scope, this category of amnesty excludes from the grant of immunity both common crimes and crimes committed for personal motives. The Argentine amnesty, discussed above, does not, therefore, qualify. Locally Legitimized, Partial Immunity must also allow for some meaningful adjudication of the amnesty's scope.[111] The existence of an alternate means of redress for victims,

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107. Marcelo Cavarozzi & María Grossi, *Argentine Parties under Alfonsín: From Democratic Reinvention to Political Decline and Hyperinflation*, *in* THE NEW ARGENTINE DEMOCRACY, *supra* note 96, at 173, 180.

108. Marcelo Cavarozzi & Oscar Landi, *Political Parties under Alfonsín and Menem: The Effects of State Shrinking and the Devaluation of Democratic Politics*, *in* THE NEW ARGENTINE DEMOCRACY, *supra* note 96, at 203, 212. In so doing, Alfonsín broke the implied pact with the Argentine citizenry upon which his legitimacy depended. "This pact was defined, for the most part, by the desire that the traumatic past of crisis and political violence not reoccur, as well as by the revaluing of individual rights and liberties." *Id.* at 208. This period also marked a steady decline in the public credibility of politicians in Argentina from 51% credibility rating before the passage of the amnesty laws to a mere 30% credibility rating in April 1988 after the two laws had been passed and the tacit pact broken. *See* Edward C. Epstein, *Conclusion—The New Argentine Democracy: The Search for a Successful Formula*, *in* THE NEW ARGENTINE DEMOCRACY, *supra* note 96, at 244, 251 tbl.10.2.

109. *See* GRAVIL, *supra* note 96, at 21 (noting the Peronists' success in these elections).

110. This coercive pressure, mainly from the military, is evidenced by a series of open rebellions, including "Operation Dignity," to protest, *inter alia*, the trials then taking place before the enactment of the Due Obedience Law. One commentator describes "the campaign against the law" as "wild, both at home and abroad, resulting in enormous political costs for the Alfonsín's government." Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2628–30 (1991); *see also* GRAVIL, *supra* note 96, at 17; Epstein, *supra* note 104, at 3 (referring to the May 1989 riots); Pion-Berlin & López, *supra* note 96, at 64; TEDESCO, *supra* note 96, at 127. For a discussion of the connection among the Full Stop Law, the military revolts, and the Due Obedience Law, see *id.*, at 123–26.

111. Contrast, for example, the South African Truth and Reconciliation Commission's extensive statutory authority and investigative powers, see *infra* text accompanying notes 120–125, with the Argentine Due Obedience Law, which set an irrefutable presumption that crimes were political and carried out pursuant to military orders. *See supra* text accompanying notes 98–102.

through civil cases or other forms of reparations further demonstrates the more limited scope of amnesties in this category.[112]

On the axis of legitimacy, Locally Legitimized, Partial Immunity carries support from a more significant domestic constituency than does Blanket Amnesty. For an amnesty to fit in this category, the government must, at least in part, respect the authority of the will of the people, often through either a popularly elected government or a national referendum.

The most prominent example of a Locally Legitimized, Partial Immunity is South Africa. South Africa's Truth and Reconciliation Act [hereinafter Reconciliation Act] established an independent quasi-judicial body with the power to grant amnesty for political crimes.[113] The amnesty granted by the Truth and Reconciliation Commission is grounded in strong domestic legal authority, and the Commission itself was authorized by a popularly elected democratic government. The South African Interim Constitution of 1993 requires that "amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past."[114] It specifically summons the legislature to pass a law that provides for such an amnesty and creates a tribunal for adjudication. This mandate was fulfilled in July 26, 1995, when the Parliament passed the "Promotion of National Unity and Reconciliation Act"[115] as part of the Interim Constitution. The amnesty provision in the Interim Constitution was eventually transformed into the Promotion of National Unity and Reconciliation Act, which was passed by a democratically elected parliament[116] and signed by President Nelson Mandela, whose personal history as a victim of the apartheid regime gave him unique credibility to institute an amnesty. The process of developing the Truth and Reconciliation Commission involved extensive consultation with individuals, community groups, and political parties, culminating in forty-seven hearings across South Africa in 1996.[117] This combination of strong grassroots involvement and support

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112. Many states that enacted Blanket Amnesties also created truth commissions. These commissions, however, although successful at documenting some abuses suffered, did not provide meaningful redress and reparations for victims. *See generally* HAYNER, *supra* note 43, at 107–69.

113. As numerous authors have considered the South African Truth and Reconciliation Commission [hereinafter the Commission] in extensive detail, this Article will not provide a comprehensive treatment. Rather, it looks at how the Commission fits into this Article's framework. For detailed analysis of the historical background and work of the Commission, see generally S. AFR. TRUTH AND RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMM'N OF SOUTH AFRICA REPORT (1999); S. AFR. TRUTH AND RECONCILIATION COMM'N, SOUTH AFRICA'S HUMAN SPIRIT: AN ORAL MEMOIR OF THE TRUTH AND RECONCILIATION COMMISSION (2000); ALEX BORAINE, A COUNTRY UNMASKED: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2001); KENNETH CHRISTIE, THE SOUTH AFRICAN TRUTH COMMISSION (2000); ALLY RUSSELL, THE TRUTH AND RECONCILIATION COMMISSION: LEGISLATION, PROCESS, AND EVALUATION OF IMPACT (1999); DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA (Alex Boraine et al. eds., 1997).

114. S. AFR. INTERIM CONST. (Act 200, 1993), National Unity and Reconciliation Provision.

115. Promotion of National Unity and Reconciliation Act, No. 34 (1995) (S. Afr.) [hereinafter Truth and Reconciliation Act], http://www.truth.org.za (visited Apr. 21, 2001).

116. *See* MINOW, *supra* note 34, at 53; HAYNER, *supra* note 43, at 41.

117. *See* Peter A. Schey et al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Am-*

from legitimate domestic authorities suggests a greater degree of local legitimacy than that found in Blanket Amnesty. The Freedom House scores support this assessment, giving South Africa a 1, 2 (free) in its 1996–97 study.[118] The South African amnesty is also noteworthy for its coherence. The amnesty applies equally to crimes of apartheid and anti-apartheid, crimes by the government, and crimes by ordinary citizens.[119]

Analyzing the Truth and Reconciliation Commission and its underlying legislative framework, which sets forth the Commission's duties and obligations, reveals the more limited scope of the immunity. The Reconciliation Act created the Commission, the functions of which include facilitating inquiry into "gross violations of human rights," "the identity of . . . persons . . . involved in such violations," and the "accountability . . . for any such violation."[120] The Reconciliation Act created a Committee on Human Rights Violations, to which it granted a clear investigative mandate.[121] Likewise, a Committee on Amnesty with both investigative and adjudicative powers was created.[122]

The Reconciliation Act provides functional guidelines for the Committee on Amnesty, ensuring strict substantive and temporal limits on the scope of amnesty. Crimes must be "associated with a political objective" and committed between March 1960 and December 1993. Individuals seeking amnesty must apply to the Committee on Amnesty, which, in turn, decides based on a case-by-case inquiry whether the crime was committed in furtherance of a political objective.[123] The Committee on Amnesty must exclude any acts committed for personal gain or out of personal malice.[124] While this limitation may exclude common crimes or personal crimes, it does allow the Committee on Amnesty to grant amnesty, even for gross violations of human rights and of international humanitarian law linked to political objectives.[125]

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west), 19 WHITTIER L. REV. 325, 329 (1997); HAYNER, *supra* note 43, at 41; MINOW, *supra* note 34, at 55 (noting "the value of the process of public deliberation in creating legitimacy for the undertaking").

118. *See* FREEDOM HOUSE, *supra* note 26. After the transition of power to the African National Congress (ANC) government, South Africa's Freedom House score improved from a 5,4 to a 1,2. *See id.*

119. *See, e.g.*, Truth and Reconciliation Act, *supra* note 115; MINOW, *supra* note 34.

120. Truth and Reconciliation Act, *supra* note 115, at ch. 2, art. 4.

121. *Id.* at ch. 3, art. 12.

122. The Commission consisted of sixteen members, most of whom are "relatively impartial figures" from academia and the human rights community, among other areas. *See* Schey et al., *supra* note 117, at 326.

123. In making this determination, the Committee on Amnesty should look to the motive, context, factual nature, objective and command authority of the act. *See* Truth and Reconciliation Act, *supra* note 115, at ch. 4., art. 20.

124. *See id.* at ch. 4, art. 20(3)(f).

125. To date more than 4500 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 De Kock was granted amnesty for counts of assault, abduction, and murder. *See De Kock Granted Amnesty*, TRUTH AND RECONCILIATION COMM'N PRESS RELEASES, June 2, 2000, http://www.truth.org.za/media/prindex.html (visited Mar. 10, 2001).

Significant to the South African example is the mandatory confession requirement.[126] Applicants must make "full disclosure of all relevant facts" to the Committee on Amnesty before it begins to consider amnesty.[127] This mandatory confession process ensures that, at a minimum, a record of past atrocities is kept.[128] Significantly, disclosure requirements may provide a built-in structural limit on the amnesty's scope, since only crimes specifically confessed are included. The potential humiliation from public admissions of personal culpability may discourage individuals from seeking amnesty for some heinous crimes not directly related to political crimes.

The Reconciliation Act does not totally bar victims from redress. In cases where amnesty is denied, standard criminal or civil cases may ensue.[129] If amnesty is granted, both criminal and civil liability of the perpetrator and the state are extinguished.[130] Victims may still apply, however, to the Committee on Reparation and Rehabilitation for relief. The goal of such relief is neither to impose criminal sanctions on the persecutors nor to provide economic compensation to the victim, but rather to "restore the human and civil dignity of [the] victim."[131] Such relief may come in a variety of forms, including non-pecuniary alternatives to reparations, but has rarely been available in any form.[132]

A second example of Locally Legitimized, Partial Immunity is the amnesty enacted in Fiji during the summer of 2000. After gaining independence in 1987, a government dominated by Fijians of Indian descent assumed power. The new government was toppled two weeks later by the ethnic-Fijian army. Enactment of a new constitution in 1997, which "granted equal rights to the large minority of Fijian citizens who are of ethnic Indian descent,"[133] increased ethnic tensions.[134] Elections in 1999 brought to power a multi-racial government under Mahendra Chaudhry,[135] but tensions between Indo-Fijians and ethnic Fijians increased. George Speight, a "failed" businessman, became well known for protests in favor of an ethnic-Fijian dominated government.[136]

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126. Truth and Reconciliation Act, *supra* note 115, at ch. 4, art. 20(c).

127. *Id.* at ch. 4, art. 20(1)(c).

128. *See* TRUTH AND RECONCILIATION COMM'N OF SOUTH AFRICA REPORT, *supra* note 113 (providing a comprehensive report of the work of the Commission). *See* MINOW, *supra* note 34, at 60 (arguing that one of the goals of truth commissions is to "write the history of what happened" and to establish an authoritative account of the events). *Cf.* HAYNER, *supra* note 43, at 6–7 (noting that there may be no definitive truth).

129. Truth and Reconciliation Act, *supra* note 115, at ch. 4, art. 21(2)(a).

130. *Id.* at ch. 4, art. 20(7).

131. *Id.* at ch. 4, art. 26(3). For a discussion of restorative justice, see Kiss, *supra* note 35, at 79.

132. *See* HAYNER, *supra* note 43, at 45, 171.

133. Gwynne Dyer, *Speight in Jail. But His Ideas Still Figure in Post-Coup Fiji*, SOUTHLAND TIMES (N.Z.), Aug. 17, 2000, at 6.

134. *See* Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L. L.J. 287, 369 (2000).

135. Dyer, *supra* note 133.

136. *See* Elizabeth Feizkhah, *Fiji Takes a Shot at Peace*, TIME (South Pacific), Aug. 7, 2000, at 59.

On May 19, 2000, Speight and members of his Counter-Revolutionary Warfare Movement stormed the parliament in Suva, taking Prime Minister Chaudhry and his cabinet hostage and abrogating the Fijian Constitution.[137] Demanding that "a new government be installed in which all powers are reserved for ethnic Fijian[s]," Speight held twenty-seven members of the government hostage in the parliament for fifty-six days,[138] in violation of the International Convention Against the Taking of Hostages.[139] While Speight's acts differed from those of the South African apartheid regime or the terror in Pinochet's Chile, his detention of government personnel was, nonetheless, an international crime. After nearly two months of negotiations, during which the Chaudhry government was dismissed, Speight released his hostages on July 13, 2000 as part of an overall political settlement.[140] The corresponding settlement agreement calls for the release of hostages,[141] the "restoration of law and order,"[142] and a return of arms to the military, in exchange for an amnesty to Speight and his accomplices.[143]

Specifically, the Speight amnesty "grant[ed] immunity to all persons who allegedly commit[ted] the offence of treason in connection with the actions of the GSG [George Speight Group]."[144] The Muanikau Accord called upon the government to extend immunity to "other persons who allegedly committed offences covered by the meaning of 'political offences.'"[145] The actual amnesty decree, which came after the release of the hostages on July 13, 2000, granted broad civil and criminal immunity to Speight and his followers for a wide range of political and common crimes connected with "the unlawful seizure of government powers."[146]

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137. *See* Fiji Constitution Revocation Decree 2000, Interim Military Government Decree No. 1 (2000) (Fiji), *reprinted in* FIJI GOVERNMENT GAZETTE, vol. 1, no. 26, May 29, 2000 (revoking the Constitution Amendment Act 1997) (on file with Harvard International Law Journal); Constitution Abrogation—Interim Military Government and Finance Decree 2000, Interim Military Government Decree No. 3 (2000) (Fiji), *reprinted in* FIJI GOVERNMENT GAZETTE, vol. 1, no. 26, July 13, 2000, *supra* (granting power to the military government) (on file with Harvard International Law Journal).

138. *Amnesty Thrown Out as Speight and Henchmen Charged with Treason*, AGENCE FR. PRESSE, Aug. 11, 2000, *available at* LEXIS, News Library, Agence Fr. Presse File [hereinafter *Amnesty Thrown Out*].

139. International Convention Against the Taking of Hostages, Dec. 18, 1979, art. 1, 1316 U.N.T.S. 205. Article 1 criminalizes, *inter alia*, the detention of "another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage." *Id.*

140. *See Amnesty Thrown Out*, *supra* note 138.

141. *Fiji's New Peace Accord Gives Coup Plotters Total Amnesty*, AGENCE FR. PRESSE, July 9, 2000, *available at* LEXIS, News Library, Agence Fr. Presse File [hereinafter *Fiji's New Peace Accord*].

142. *Id.* This is further facilitated by the appointment of an interim civilian government, led by an interim president and vice president, who are nominated and elected by the Great Council of Chiefs for a twenty-four-month term.

143. *See* Immunity Decree 2000, Decree No. 18 of 2000 (2000) (Fiji), *reprinted in* FIJI GOVERNMENT GAZETTE, vol. 1, no. 26, July 13, 2000 (on file with Harvard International Law Journal); *Fiji's New Peace Accord*, *supra* note 141.

144. The Muanikau Accord For the Release of Hostages Held at the Parliament Complex Veiuto, July 9, 2000, art. 3 [hereinafter Muanikau Accord] (on file with Harvard International Law Journal).

145. *Id.*

146. Immunity Decree 2000, *supra* note 143, section 3 reads in part:

Since the Fijian government was incapacitated at the time of the amnesty and the amnesty was demanded as a ransom for the release of the hostages, there is strong evidence that the Fijian amnesty lacks local legitimacy.[147] The will of the people does not appear to have been the basis for the authority of government at the time the laws were enacted. Nor has the will of the international community been used as a source of authority; in fact, the amnesty has been widely condemned.[148] Yet, the Fijian amnesty theoretically fits within this category because of the significant restrictions on the scope of the amnesty.

The scope of the Fijian amnesty is limited to a narrow subset of political crimes. The Muanikau Accord grants amnesty to "all persons who allegedly commit[ted] the offence of treason in connection with the actions of the GSG (George Speight Group) on 19th May 2000 [to] [sic] 13th July 2000 (both dates inclusive) and also to cover other persons who allegedly committed offences which are covered within the meaning of 'political offences.'"[149] This clause first grants amnesty only for acts of treason committed by members of Speight's group. It then broadens the scope to include all political offences. Significantly, it excludes common crimes and any serious crimes against human life that are not politically motivated or connected to the acts of the Speight group. As such, the taking of hostages by Speight and his followers is included in the immunity, but numerous other offences are excluded.[150] In addition to these standard limits on scope, the amnesty also contains a contractual limit on its application. Two specific conditions must

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> George Speight, the Leader of the Civilian Group, and members of his Group who took part in the unlawful takeover of the Government democratically elected under the 1997 Constitution on the 19th of May, 2000 and the subsequent holding of the hostages until the 13th day of July 2000 shall be immune from criminal prosecution under the Penal Code or the breach of any law of Fiji and civil liability of any damage or injury to property or person connected with the unlawful seizure of Government powers, the unlawful detention of certain members of the House of Representatives and any other person and no court shall entertain any action . . . make any decision or order, or grant any remedy or relief in any proceedings instituted against George Speight or any member of his Group . . . The decree does not extend to any other person who committed an offence under any law . . . .

Id. § 3.

147. Though Freedom House, in its 1999–2000 study, rated Fiji a 2, 3 (a free state, though barely), this score is not reflective of the actual level of freedom in Fiji during the summer of 2000 because it was generated before the coup. The amnesty agreement was signed during this coup by the Commander and Head of the Interim Military Government of Fiji, Commodore J. Voreqe Bainimarama, who had assumed executive authority on May 29, 2000, after President Ratu Sir Kamisese Mara declared a state of emergency and dismissed the Chaudhry government. *See Amnesty Thrown Out*, *supra* note 138.

148. *Britain "Dismayed" at Amnesty for Fiji Hostage-Takers*, AGENCE FR. PRESSE, July 13, 2000, *available at* LEXIS, News Library, Agence Fr. Presse File (quoting a foreign office statement that Britain was "dismayed" that the hostage takers appeared to have been granted immunity); *New Zealand World Offer Refuge to Fiji Coup Victim Chaudhry*, DEUTSCHE PRESSE-AGENTUR, July 14, 2000, *available at* LEXIS, News Library, News Group File (noting that Australia, New Zealand, and the United States had condemned the situation in Fiji). While these countries condemned the amnesty and the Commonwealth temporarily suspended Fiji's membership, there was no direct international involvement in the amnesty.

149. *Fiji's New Peace Accord*, *supra* note 141.

150. Telephone interview with J.R. Konrote, Permanent Secretary of Home Affairs, Republic of Fiji (Sept. 27, 2000).

be met for amnesty to attach: first, the hostages must be released on July 13, 2000 and, second, Speight and his followers must disarm.[151] The narrow scope of the Fijian amnesty, which is restricted only to cover political crimes and is inapplicable to serious international crimes, places the Fijian amnesty in the Locally Legitimized, Partial Immunity category.

The South African and Fijian Amnesties map as Locally Legitimized, Partial Immunity. The South African amnesty has greater domestic legitimacy, but leaves questions of scope open for ex-post determination by the Committee on Amnesty. The Fijian amnesty has only the most limited forms of domestic legitimacy but has a significantly restricted scope inherent in the text of the amnesty decree.

C. Internationally Legitimized, Partial Immunity

Internationally Legitimized, Partial Immunity is characterized by enhanced legitimacy conferred through international involvement, as well as further restrictions on the scope of immunity. On the axis of legitimacy, Internationally Legitimized, Partial Immunity usually, but not always, embodies the kinds of local legitimacy discussed previously and, in addition, carries the support of a politically significant coalition of states, regional powers,[152] and/or the international community.[153] On the axis of scope, such immunity is either limited to "political" crimes adjudicated by a quasi-judicial organ (as in the case of Locally Legitimized, Partial Immunity) or restricted to certain defined crimes, often through reference to international treaties and/or customary law.

An example of Internationally Legitimized, Partial Immunity is the amnesty afforded to the Haitian military as part of the return to power of President Jean-Bertrand Aristide in 1994. The political background of the Haitian amnesty demonstrates strong international support and, at least, quasi-domestic legitimacy for the measure. In December 1990, Jean-

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151. *Fiji's New Peace Accord*, *supra* note 141.

152. The potential for the support of regional powers to confer legitimacy on an amnesty grant should not be interpreted as a reversion to realist power politics. The support of a regional power should merely be viewed in a liberal sense, as the expression of the preferences of the citizens in that state for collectively formulated international norms. Due to their proximity, regional powers are often more likely to engage in determinations of the legitimacy of an amnesty grant.

153. Such involvement of the international community can come in many forms, including non-binding UN resolutions, involvement of significant regional organizations such as the Organization of Security and Cooperation in Europe (O.S.C.E.), the Organization of American States (O.A.S.), or the Association of South East Asian Nations (A.S.E.A.N.). However, if a binding UN Security Council resolution under a Chapter VII mandate is involved, the amnesty would likely move into the category of International Constitutional Immunity. It is important to note that the various forms of international support confer markedly different degrees of legitimacy. A UN Security Council resolution, for example, carries a different weight from that of the statement of one or even a small group of foreign states. For the purposes of this Article, for international support to be significant, a qualitative judgment will be made based on (1) the form of international involvement; (2) the number of states supporting the amnesty; and (3) evidence that those states represent the preferences of the international community.

Bertrand Aristide became Haiti's first democratically elected president.[154] His overwhelming popularity indicates that, despite the inadequacies of the Haitian political system, Aristide was a "man of the people."[155] 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 3000 civilians[156] and extensive deportations, arrests, and disappearances.[157] 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 (O.A.S.), responded by applying significant pressure on the *de facto* Haitian government, including a freeze on all assets and an embargo on oil and arms.[158] After nearly two years in exile, from June 27, 1991 to July 3, 1993, Aristide, with the assistance of the United Nations, forced the junta to negotiate on Governors Island, New York. The negotiation led to a proposed power transfer based on a U.S. agreement calling, *inter alia*, for an "amnesty granted by the President of the

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154. After temporary rule by a transitional government, the Haitian Council of State set presidential and parliamentary elections for December 16, 1990. *See* ALEX DUPUY, HAITI IN THE NEW WORLD ORDER: THE LIMITS OF THE DEMOCRATIC REVOLUTION 68 (1997). Aristide's popularity was evidenced by the marked increase in voter registration from 25% to 90% of eligible voters in the days after he had declared his candidacy. As one commentator indicates, "there is no doubt that this [increase] was caused by Aristide entering the race for the presidency." *Id.* at 85. Aristide, who cast himself as a prophet and his candidacy as divinely ordained, *see id.* at 88–89, won the popular vote with 67.5%. *See* Robert Pastor, *A Popular Democratic Revolution in a Predemocratic Society: The Case of Haiti*, *in* HAITI RENEWED: POLITICAL AND ECONOMIC PROSPECTS 118, 121 (Robert I. Rotberg ed., 1997) [hereinafter HAITI RENEWED]. The election marked a moment when "the popular will triumphed—momentarily—with little violence or repression." Kim Ives, *The Lavalas Alliance Propels Aristide to Power*, *in* HAITI DANGEROUS CROSSROADS 41, 45 (Deirdre McFayden & Pierre LaRamée eds., 1995).

155. *See* J.P. Slavin, *Aristide: Man of the People*, *in* HAITI DANGEROUS CROSSROADS, *supra* note 154, at 47, 47–49. This Article does not seek to engage in the debate of whether Aristide was a "good" or even "benign" leader. Evidence to the contrary abounds. *See* Greg Chamberlain, *Haiti's "Second Independence": Aristide's Seven Months in Office*, *in* HAITI DANGEROUS CROSSROADS, *supra* note 154, at 51, 52. Nor does it claim that Haiti was an ideal model of democratic government. Rather, this Article claims only that Aristide achieved significant popular support and a sufficiently robust electoral victory to be considered legitimate and capable of enacting legitimate legislation. His ability to engage the Haitian people is indicative thereof: "Aristide's election as president gave most Haitians a rare and exhilarating sense of participation in their savagely divided country's political life." Chamberlain, *supra*, at 51. In a speech before the United Nations on September 25, 1991, Aristide outlined "ten democratic commandments," which suggest a basis for legitimate rule. *See* DUPUY, *supra* note 154, at 94; *see also* Robert Fatton Jr., *The Rise, Fall, and Resurrection of President Aristide*, *in* HAITI RENEWED, *supra* note 154, at 136, 142 (arguing that "Aristide's brief first presidency marked the freest and most hopeful period of Haiti's political history").

156. John Shattuck, Assistant Secretary for Democracy, Human Rights, and Labor, Address at a State Department Press Briefing (Sept. 13, 1994), *in* Federal News Service, Sept. 13, 1994, *available at* LEXIS, News Library, News Group File. *See also* DUPUY, *supra* note 154, at 139 (indicating that between October 1991 and September 1994, "[a]n estimated 4000 people were killed, around 300,000 became internal refugees, . . . and more than 60,000 [sought] asylum in the United States").

157. *See generally* The Crisis in Haiti, U.S. Department of State Dispatch (Sept. 19, 1994), *available in* LEXIS, News Library, News Group File; J.P. Slavin, *The Elite's Revenge: The Military Coup of 1991*, *in* HAITI DANGEROUS CROSSROADS, *supra* note 154, at 57–61 (claiming that as many as 500 civilians were killed by the military in the week following the coup).

158. *See* Scharf, *supra* note 1, at 7; DUPUY, *supra* note 154, at 138.

Republic."[159] In addition to receiving direct U.S. support, the agreement, including the amnesty clause, was endorsed by the UN Security Council.[160]

Despite the Governors Island Agreement, the Haitian junta refused the Aristide/UN proposal to allow the peacekeeping force to land and President Aristide to return. Then the Security Council authorized a multilateral invasion of Haiti on July 31, 1994.[161] On September 18, 1994, the day before the planned invasion, a delegation, led by President Carter[162] and authorized by President Clinton, met with the Haitian military junta for discussions. These discussions culminated in the Carter-Jonassaint Agreement, which confirmed the plans for a "general amnesty" and averted the invasion.[163] The initial language of the amnesty clause, therefore, mirrored that contained in the Carter-Jonassaint Agreement and invoked the language of Security Council Resolution 940.[164] U.S. Secretary of State Warren Christopher provided an interpretation of this clause at a September 19, 1994 news briefing, praising it as "a broad amnesty for all the members of the military."[165] Even before the Haitian amnesty law was issued, it had received U.S. and UN support.[166] While such support does not alone relieve Haiti of any international obligations it may have faced, it differentiates the Haitian experience from that of the other examples. Direct involvement in the amnesty process by the United States and support by the United Nations suggest that the amnesty reflects the will of a significant portion of the international community as the basic source of international authority. Assistance provided by

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159. *See The Situation of Democracy and Human Rights in Haiti: Report of the Secretary General*, U.N. GAOR, 47th Sess., Agenda Item 22, U.N. Doc. A/47/975-S/26063 (1993) (including the text of the Governors Island Agreement). For a thorough discussion of the background to the Governors Island Agreement, see DAVID MALONE, DECISION-MAKING IN THE UN SECURITY COUNCIL: THE CASE OF HAITI, 1990–1997, 86–97 (1998).

160. *See* S.C. Res. 861, U.N. SCOR, 48th Sess., 3271st mtg., U.N. Doc. S/RES/861 (1993). In a number of resolutions immediately following the Governors Island Agreement, the UN Security Council signaled its support for the agreement, including the suspension of sanctions against Haiti. *See id.*; *see generally* MALONE, *supra* note 159, at 89–92.

161. *See* S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994). While this resolution did invoke a Chapter VII threat to international peace and security to authorize an invasion, it did not mention the inclusion of an amnesty in the peace agreement. For the political background to the adoption of Resolution 940, see MALONE, *supra* note 159, at 107–10.

162. Carter's negotiating team included, among others, the former Chairman of the Joint Chiefs of Staff and present Secretary of State, Colin Powell, as well as Senator Sam Nunn. *See* DUPUY, *supra* note 154, at 159.

163. Carter-Jonassaint Agreement, Sept. 18, 1994, U.S.-Haiti, art. 3, *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994–1995: LESSONS LEARNED FOR JUDGE ADVOCATES 182–83 (1995). *See also* MALONE, *supra* note 159, at 112.

164. *See* MALONE, *supra* note 159, at 112.

165. 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, News Group File, *cited in* Scharf, *supra* note 1, at 7.

166. A number of earlier peace agreements also included an amnesty grant. For example, Lawrence Pezszullo, Clinton's Special Envoy to Haiti, offered a deal to the junta in May 1993, which included "the resignation of the army high command and . . . a broad amnesty for the military." DUPUY, *supra* note 154, at 144.

the United States to the fleeing Cedras regime is further evidence of U.S. support for the amnesty.[167] Likewise, the involvement of the United Nations in resolving the crisis, albeit not directly in the amnesty process,[168] confers further international legitimacy.

The Haitian amnesty legislation also evidences domestic legitimacy. In its 1994–1995 benchmarking, Freedom House rated Haiti a 5, 5 (partially free). While this number does not suggest the same kind of domestic legitimacy seen in South Africa, it is a dramatic improvement from Haiti's 7, 7 (not free) score in 1993–94 during the Cedras junta.[169] The Haitian law was passed by the Haitian Parliament on October 6, 1994, after the insurgents were deposed.[170] Its origins can be traced back to a democratically elected body, the newly restored parliament.[171] The text of the amnesty legislation was drafted by President Aristide, Haiti's first democratically elected president. While there is evidence that the legislators may not have fully understood or analyzed the text of the law,[172] the fact that the law came from these two bodies—the office of the democratically elected President and the legislature—rather than from the outgoing regime, confers a degree of domestic legitimacy on the legislation. The amnesty legislation also demonstrates adherence, one of Franck's prerequisites for legitimacy.[173] It was written to comply with Article 147 of the 1987 Haitian Constitution, which limits amnesty to political crimes.[174]

The scope of the Haitian amnesty law is restricted such that the grant of immunity applies only to certain political crimes and associated acts. Staying within constitutional bounds, the law limits any amnesty to "crimes and misdemeanors against the state, internal and external security, crimes and misdemeanors affecting public order, and accessory crimes and misdemean-

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167. President Clinton and the O.A.S. sought assistance from Panamanian President Ernesto Perez Balladares to grant asylum to Cedras, and a U.S. military aircraft provided transportation for the former regime to Panama. *See* MALONE, *supra* note 159, at 115. The concessions the Clinton administration was willing to make in order to secure the junta's departure from Haiti, beyond mere verbal support for the amnesty, included a stipend and unfreezing of over $79 million in assets held by the military. *See* DUPUY, *supra* note 154, at 160.

168. The Carter-Jonassaint Agreement proved controversial in part because it was enacted beyond the auspices of United Nations and led to the resignation of Dante Caputo, the UN Special Envoy for Haiti. *See* MALONE, *supra* note 159, at 112. The agreement may well have circumvented the United Nations because the Haitian junta trusted "Washington more than the U.N. (which they believed was more supportive of Aristide)." DUPUY, *supra* note 154, at 142.

169. *See* FREEDOM HOUSE, *supra* note 26.

170. The Chamber of Deputies voted 50–2 in favor of the legislation that had been drafted by President Aristide. *See* Scharf, *supra* note 1, at 15.

171. The Chamber of Deputies passed the law on October 6, 1994 and the Senate on October 7. *See* MALONE, *supra* note 159, at 114.

172. *See* Scharf, *supra* note 1, at 16 (noting the legislators' ambivalence and even confusion about the text of the amnesty).

173. Franck, *supra* note 18, at 41.

174. Article 147 of the 1987 Constitution "stipulates that amnesty can only be granted 'in the political field and in keeping with the law.'" *See* MALONE, *supra* note 159, at 114. The amnesty was specifically drafted to meet these requirements.

ors."[175] The first three clauses provide for a narrow, circumscribed grant of immunity. Amnesty is conferred upon political crimes "against the state," such as treason, of which the former junta was likely guilty.[176] As these crimes were committed "against the state," rather than particular individuals, the state appears to have appropriate standing to grant amnesty for them without infringing on the rights of individuals or breaching international obligations.

While these first clauses were drafted to avoid a grant of amnesty for crimes committed against third parties, as opposed to the state, the final clause, leaves more room for interpretation and potentially expands the scope of immunity, as it extends amnesty to "accessory crimes and misdemeanors," without providing specific guidance as to which crimes should be deemed "accessory." The question for a court 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."[177] It seems likely that most non-political criminal acts,. such as serious crimes against human life (rape, torture, and murder), would not have sufficient nexus to a political act. While this nexus test may include certain serious crimes against human life, it does provide the judiciary a margin of appreciation to determine which crimes are political.

The Haitian amnesty law seeks to balance the immediate need of political transition with the goal of providing for the accountability of those who committed non-political crimes.[178] The end-result of the final clause is to leave to the judiciary, and to remove from the political debate, the future determination of liability for quasi-political and accessory crimes. Given the dearth of case-law related to the amnesty, the judiciary's independence and effectiveness is still questionable.[179] Nonetheless, even with the widest possible judicial interpretation, its scope remains limited. Such limited scope, together with the law's international support and reasonable level of domes-

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175. Law Relative to Amnesty (1994) (Haiti), *published in The Monitor, Official Journal of the Republic of Haiti*, Oct. 10, 1994.

176. It is significant to note here the language of "against the state." Whereas numerous amnesties, such as that in South Africa, have required crimes to be linked to political objectives, the Haitian amnesty requires that political crimes be committed against the state. Crimes against third parties, even if political, are excluded.

177. Scharf, *supra* note 1, at 16.

178. The most grievous offenders were insulated from prosecution as they were given asylum in Panama. Nonetheless, interpreting the law in light of statements by Aristide, such as, "Yes to reconciliation, No to violence, No to vengeance, No to impunity, Yes to Justice," suggests an intention to favor prosecution. DUPUY, *supra* note 154, at 144.

179. There have been relatively few prosecutions attempted after the amnesty was enacted and the exact scope of the amnesty has, therefore, yet to be determined. For example, President Aristide declared that he had 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 paramilitary groups for the murders of his supporters. *See* Scharf, *supra* note 1, at 17; *see also Judge Sentences 14 Haitians to Life*, BOSTON GLOBE, Sept. 27, 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).

tic legitimacy, places the Haitian amnesty legislation in the category of Internationally Legitimized, Partial Immunity.

The provision of alternative means of recourse for victims also typifies amnesties categorized as Internationally Legitimized, Partial Immunities. In Haiti, this alternate recourse took two forms. First, President Aristide established the National Truth and Justice Commission, whose mandate was to "investigate and document" crimes committed during his exile.[180] The Commission is empowered to gather evidence in relation to alleged crimes and to issue reports, indicating particular perpetrators and violations.[181] The Commission, while not as influential as its South African counterpart, helped ensure that, although many political criminals were pardoned, limited immunity would not become Blanket Amnesty. In addition, Aristide created a fund for the compensation of victims.[182] Though lacking adequate resources and poorly coordinated, this fund provided civil redress for some victims.[183]

A second example of a country enacting an Internationally Legitimized, Partial Immunity is Guatemala. The Guatemalan amnesty law ("the Guatemalan Law") evidences all three characteristics of this type of immunity. First, it has some domestic legitimacy. Second, the Guatemalan peace process received significant international support. Third, the Guatemalan Law itself provides for a significant-ly restricted scope of immunity.

On December 29, 1996, the Guatemalan government, led by President Alvaro Arzu and the Guatemalan National Revolutionary Union (U.R.N.G.), signed a peace accord, ending thirty-six years of violent civil war. This extended period of violent conflict took a severe toll on Guatemalan society. One report discusses over 52,000 human rights and humanitarian law violations, including over 25,000 murders, 4000 victims of torture, and an equal number of forced disappearances.[184]

The domestic legitimacy of the Guatemalan Law rests in part on the 1996 election of Alvaro Arzu as president of Guatemala and the victory of his Party for National Achievement [PAN] in congressional elections, marking the beginning of reconciliation. While Arzu only narrowly prevailed in the runoff election against Rios Montt, with 51.2% of the vote, he in fact re-

180. Scharf, *supra* note 1, at 18. In December 1994, Aristide initiated an "investigation into the murders of thousands of Haitians committed during the military reign." IRWIN P. STOTZKY, SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY 50 (1997). Thereafter, he appointed the National Truth and Justice Commission and even sought international assistance in the prosecution of some paramilitary leaders. *Id.*

181. Claudio R. Santorum & Antonio Maldonado, *Political Reconciliation or Forgiveness for Murder—Amnesty and its Application in Selected Cases*, 2 HUM. RTS. BRIEF 15, 15 (1995).

182. *See* Scharf, *supra* note 1, at 18.

183. *See* Santorum & Maldanado, *supra* note 181, at 15.

184. *See* REMHI, Guatemala Never Again!: The Official Report of the Human Rights Office, Archdiocese of Guatemala 289–90 (1999); *see generally* GUATEMALA: MEMORY OF SILENCE, REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION (2000).

ceived a majority of the votes in the election.[185] These elections have been described as free and fair,[186] though voter turnout was relatively low, with only 47% of registered voters casting ballots.[187]

In a strict sense, this election indicates the existence of a procedural democracy. There were free and fair elections contested by at least seven different parties.[188] However, given the extraordinarily close results of the election, the low voter turnout, and the lack of an overwhelming popular mandate for the Arzu government, closer scrutiny of the state of Guatemalan democracy along lines dictated by the positive liberal international relations theory is warranted. The 1995 elections represented an important shift in the dynamics of government-civil society relations, signaling the opening of new popular discourse and growing interaction between the government and the people. For example, this election was the first during which nongovernmental organizations "carried out civic education and supervision of the polling" and local organizations mobilized.[189] This new civic engagement was accompanied by the creation of "new spaces" for citizen-government dialogue empowering civil society.[190] "[T]he expansion of political participation and a democratic political culture in Guatemala" during the mid-1990s, gave rise to opportunities for a bottom-up consolidation of democracy.[191] This expansion has, in turn, "broaden[ed] political participa-

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185. On November 12, 1995, the first round of the election did not give an absolute majority to any candidate, leading to a run-off on January 7, 1996, in which Arzu prevailed with 51.2% of the vote. In the November 12 balloting, Arzu's Party of National Achievement (PAN) took an absolute majority of seats in Congress (43 of 80). Montt's Guatemalan Republican Front won only twenty-one seats. A number of smaller parties took the remaining seats. *See Guatemala: Democracy and Human Rights* 10, http://www.unige.ch/humanrts/ins/guatemala_demochumrts_97.html (visited Feb. 20, 2001). It is worth noting that Arzu owed his victory primarily to a sweep of the capital, winning only 4 of the 22 voting departments across the country. TANIA PALENCIA PRADO & DAVID HOLIDAY, TOWARDS A NEW ROLE FOR CIVIL SOCIETY IN THE DEMOCRATIZATION OF GUATEMALA 40 (Peter Feldstein trans., 1996).

186. *See Guatemala: Democracy and Human Rights*, *supra* note 185, at 10.

187. *Id.* (describing the election as "clean").

188. *See* PRADO & HOLIDAY, *supra* note 185, at 40 (noting the seven political parties winning seats in the 1995 congressional election).

189. *See id.* at 39. While a 53% voter abstention rate appears high, it was actually "less than expected," due in part to a new civic engagement. This new engagement was further suggested by an over 60% increase in the number of registered civic committees to 160 between 1993 and 1996. *Id.* at 38. Commentators have described this new civic engagement as "one of the most positive developments in this electoral process. It gave civic organizations an opportunity to reassert their right to influence public decisions." *Id.* at 39.

190. *See* SUSANNE JONAS, OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS 44, 103 (2000). Jonas notes that

> the peace process . . . reflected the interactions between the negotiations per se and the opening of democratic spaces in Guatemalan society as a whole. Ultimately, the peace process became the political terrain on which competing agendas about the country's future were being played out . . . The beginning of the peace negotiations opened up new spaces outside the electoral arena, and eventually a *sui generis* interaction developed between elections and negotiations that democratized political transition.

Id.; *see also* Marco Fonseca, *Paradigms of Negotiation and Democratization in Guatemala*, *in* JOURNEYS OF FEAR, 57, 68 (Lisa L. North & Alan B. Simmons eds., 1999).

191. JONAS, *supra* note 190, at 109–10 (noting that by 1997, 78% of respondents participated in at least one organization of civil society (educational, religious, and community development groups)).

tion in the country."[192] These processes of expanding civil society and consolidating proto-democratic institutions bolster the legitimacy of the 1996 election and suggest an ongoing seam of civil-governmental interaction. This seam of interaction is further reflected in Freedom House's score on Guatemala for 1996–97 of 3, 4, finding it partially free and noting a meaningful increase in freedom from the previous year's score of 4, 5 (partially free). While Guatemalan democracy is far from ideal, it demonstrates the legitimacy characteristic of procedural democracy and suggests that preferences of the citizens were, in fact, determining government policy.

The legislative history of the Guatemalan Law indicates that the law's enactment respects the will of the people as the source of governmental authority. The Guatemalan Law was the final act in a series of accords signed between the government and the rebel forces. Each of these accords, beginning with the Comprehensive Human Rights Accord of March 1994 and including the 1996 Accord on Strengthening of Civil Power and the Function of the Army in a Democratic Society, moved Guatemala back into the community of democratic nations, limiting the role of the armed forces and creating room for civil dialogue.[193] These accords "laid the basis for fulfillment of the basic rights that had existed on paper since the 1985 Constitution and, in this sense, were the necessary counterpart to the Constitution."[194] Once these rights were instituted and reforms undertaken, the legitimacy of the Guatemalan government, and specifically its congress, to enact an amnesty was enhanced.[195]

After the signing of the final accords between the Arzu government and the U.R.N.G., the congress passed the National Reconciliation Law on December 18, 1996. Though members of the New Guatemala Democratic Front walked out of the debate before the vote,[196] the National Reconciliation Law passed by sixty-five to eight, with seven abstentions.[197] Despite its

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192. RACHEL M. MCCLEARY, DICTATING DEMOCRACY: GUATEMALA AND THE END OF VIOLENT REVOLUTION 194 (1999).

193. *See* Hugh Byrne, *The Guatemalan Peace Accord's: Assessment and Implications for the Future*, WOLA BRIEF, March 2–3, 1997. While it is true that these accords were in the immediate term "more a promise than a reality," they contained "important and necessary provisions to move toward a democratic, law-based society." *Id.* at 3.

194. JONAS, *supra* note 190, at 84. Important reforms included strengthening the justice system, professionalizing the civil service, and improving the "legitimacy" and "transparency" of congress. *Id.*

195. *Id.* at 89 (noting that the constitutional reforms "involved profound changes in the state apparatus and its relation to Guatemalan society").

196. *See* Larry Rohter, *Guatemalan Amnesty is Approved Over Opponents' Objections*, N.Y. TIMES, Dec. 19, 1996, at A13, 1.

197. *See Facts on File*, WORLD NEWS DIG., Dec. 31, 1996, at 969, A1. The law was supported by Arzu's New Guatemala Democratic Front, the Guatemalan Republican Front, and the Christian Democrats. Celina Zubietsa, *Congress Approval of Amnesty Greeted with Jeers*, INTER PRESS SERVICE, Dec. 19, 1996. 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. *See Guatemalan Assembly Approves Amnesty Law*, FT. WORTH STAR TELEGRAM, Dec. 19, 1996, at 5.

detractors,[198] the law demonstrates adherence, as it was passed through legal processes and in conformity with the Guatemalan Constitution.[199]

The Guatemalan Law also demonstrates significant international legitimacy. Throughout the 1990s, the so-called "Group of Friends"—Mexico, Norway, Spain, the United States, Venezuela, and Colombia—facilitated the peace process, including the eventual amnesty grant.[200] The United Nations also played an important role in the process.[201] By the beginning of 1994, "both parties [the Guatemalan government and the U.R.N.G.] . . . had become convinced that a high level U.N. role was essential," a role which the organization accepted in part.[202] The parties themselves agreed that the peace process and the amnesty would not have been possible without international support.[203] The Acuerdo Marco (Framework Accords) granted the United Nations the official role of "moderator" and formalized the facilitation role of the Group of Friends.[204] Eventually, the peace treaty, which incorporated the grant of amnesty, was signed in Oslo and witnessed by UN Secretary General Boutros Boutros-Ghali and visiting presidents of several states, conferring on the entire process international support and enhanced legitimacy.[205]

On the axis of scope, the act contains important limitations that place the law within the category of Internationally Legitimized, Partial Immunity. Article 2 of the law "extinguishes penal responsibility for political crimes committed in the internal armed conflict"[206] and instructs the justice minis-

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198. *See, e.g.*, Francisco Goldman, *In Guatemala All is Forgotten*, N.Y. TIMES, Dec. 25, 1996, at A15 (arguing that the law "is essentially a political act sealed by a few individuals concerned with their own reputations and perquisites, not to mention their possible legal vulnerability").

199. *See* Guatemalan Law of National Reconciliation of December 16, 1996 (Erika Abrahamsson trans., on file with Harvard International Law Journal) [hereinafter Guatemalan Law] ("[I]n conformity with the Political Constitution of the Republic of Guatemala, it is within the power of the Congress of the Republic, when demanded by public convenience, to exempt political and related crimes from penal responsibility."). *Id.* art. 1.

200. *See* JONAS, *supra* note 190, 43, 63 n.8 (discussing the role of each contry in the process). Mexico, for example, convened numerous meetings. Norway served as an "honest broker" and hosted the 1994 accords. Spain served as a "liaison to Western Europe." The United States acted as a "heavy-weight," pushing the army to accept civilian control. *Id.* at 63–64, n.8.

201. On September 19, 1994, through U.N. General Assembly Resolution 48/267, MINUGUA was established and the first team of UN officials, led by Leonardo Franco, began operations in Guatemala. Over the next two years more than U.S.$35 million was invested in operations in Guatemala. *See* Stephen Baranyi, *Maximizing the Benefits of UN Involvement in the Guatemalan Peace Process*, *in* JOURNEYS OF FEAR 74, 78 (Liisa L. North & Alan B. Simmons eds. 1999).

202. JONAS, *supra* note 190, at 57 (indicating that the United Nations too "became convinced that it should become more seriously involved in Guatemala").

203. The leader of the U.R.N.G. has commented that "[w]e couldn't have kept it alive among Guatemalans. . . . Without the persistence of the United Nations the peace process would have been impossible." Julia Preston, *A U.N. Success Story, Guatemalan Abuses Fall*, N.Y. TIMES, Mar. 27, 1996, at A8; *see also* JONAS, *supra* note 190, at 58.

204. *See* JONAS, *supra* note 190, at 71.

205. *Id.*

206. The pertinent part, as amended, reads:

> Penal responsibility will be totally extinguished for political crimes committed in the internal armed conflict which originated 36 years ago, until the effective date of this law, and it will be un-

tries to abstain from action in these cases. Likewise, Article 5 extinguishes penal responsibility for any potentially criminal acts by government authorities committed to suppress the crimes amnestied in Articles 2 and 4.[207] Amnesty is thereby granted to both citizens and government officials for political and related crimes, meeting the test of coherence previously articulated. While Articles 2 and 5 may appear to give broad immunity, the scope of this amnesty is nonetheless curtailed; crimes must be political and committed in the internal armed conflict.

Article 4 of the Guatemalan Law provides amnesty for certain related crimes.[208] While this grant expands the scope of the amnesty, two important limitations are included. First, related criminal acts must correspond to a series of crimes in the Guatemalan penal code, primarily common and petty crimes.[209] Second, the text of the law itself provides a strict definition of the related crimes as "those acts committed in the internal conflict, which directly, objectively, intentionally or coincidentally have any relation to the commission of political crimes and in respect to matters for which personal motive can not be demonstrated."[210] Article 3 places the burden of proving personal motives on the prosecution. The mere existence of superior orders

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derstood that the authors, accomplices, or conspirators, of the crimes against the security of the State, against the institutional order, and against the public administration, referred to in Articles 359, 360, 367, 368, 375, 381, 385–399, 408–410, 414–416, of the Penal Code are included . . . In these cases the Public Minister will abstain from exercising the penal action and the judicial authority will decree the procedure to be followed.

Guatemalan Law, *supra* note 199, art.2.

207. Article 5 reads in its entirety:

Penal responsibility will be totally extinguished for crimes motivated by the internal armed conflict which, prior to the effective date of this law, authors, accomplices or conspirators, the authorities of the State, members of its institutions, or any other involvement by the Ministry of Justice would have been committed to prevent, impede, pursue or repress the political crimes and related crimes to which Articles 2 and 4 of this Law refer. The crimes for which penal responsibility is extinguished by the current article also are considered of a political nature. In these cases the judicial authority will declare the definite procedure to be followed, within the procedure established in Article 11 of this law, unless it can be established that the political nexus between the supposed illegal act and the referred ends does not exist or that the act followed a personal motive.

Id. art. 5. This article is significant because it grants a wide amnesty to government officials who committed even common crimes in an attempt to suppress the rebel movement. The text of the law suggests that this amnesty to government officials is broader than the amnesty granted the rebels.

208. Article 4 reads:

Penal responsibility will be totally extinguished of the related crimes, which in conformity with this law are related to political motions in the second article committed prior to the effective date of this law and which correspond to those crimes typified by Articles 214–216, 278, 279, 282–285, 287–289, 292–295, 321, 325, 330, 333, 337–339, 400–402, 404, 406–407 of the Penal Code.

Id. art. 4.

209. *See generally* CÓDIGO PENAL [C.P.] (Guat.).

210. Guatemalan Law, Article 3, reads in its entirety:

Related crimes will be defined for the effects of this Law as those acts committed in the internal conflict, which directly, objectively, intentionally or coincidentally have any relation to the commission of political crimes and in respect to matters for which personal motive can not be demonstrated. The connection will not be applicable if the nonexistence of the indicated relation is demonstrated.

Guatemalan Law, *supra* note 198, art. 3.

or a political connection to the crime is insufficient to remove liability. As long as the prosecution shows some personal motive, even as a secondary motive, amnesty will not be granted.

The Guatemalan Law goes beyond the procedural limits on amnesty indicated above and dictates strict substantive limits based on the country's international legal obligations. The first version of the law drafted in congress had a broader scope, especially in relation to crimes committed by army officers. However, significant pressure from human rights organizations led to substantive restrictions on amnesty incorporated in Article 8.[211] The original version of Article 8 denies amnesty for those crimes "for which the extinction or exemption of penal responsibility is not permitted by internal law or international treaties approved or ratified by Guatemala."[212] This would have precluded amnesty for war crimes,[213] genocide,[214] and torture.[215] The Guatemalan legislature amended the law at the time of its initial passing to further restrict the grant of amnesty for international crimes. The revised version of Article 8, amended under pressure from international civil society, adds specific language indicating that the amnesty is not "applicable to the crimes of genocide, torture, and forced disappearance."[216] The resultant article makes explicit that amnesty will not apply where Guatemala is under an international obligation to prosecute the crime. Nor will amnesty attach to the crimes of genocide, torture, and forced disappearances. By invoking international law and international treaties generally, the Guatema-

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211. *See id.*

212. *Id.* art. 3 (before amendment).

213. *See, e.g.*, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287. Guatemala ratified the Geneva Conventions on August 3, 1954. Given that the Geneva Conventions require the prosecution or extradition of those who commit grave breaches, see, for example, *id.* art. 50, Article 8 of the Guatemalan Law must be read not to grant amnesty for grave breaches of the Geneva Conventions. *See, e.g.*, Geneva Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 7, 1987, 1125 U.N.T.S. 609. Guatemala ratified both additional protocols on April 12, 1989. For an argument that the Additional Protocols and the Geneva Conventions require prosecution of crimes even in non-international armed conflict, see, for example, WELLER & BURKE-WHITE, *supra* note 44, at ch. 2. *See also* Submission of the Government of the United States Concerning Certain Arguments Made by Council for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadic, July 17, 1995; Prosecutor v. Dusko Tadic, 1999 ICTY No. IT-94-1, at 80 (July 15).

214. Convention for the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277. Guatemala acceded to the Genocide Convention on January 7, 1952. Guatemala has implemented this convention in its domestic law. *See* CÓDIGO PENAL, *supra* note 209, art. 376 (implementing portions of the Genocide Convention into the Guatemalan Criminal Law).

215. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment [hereinafter Torture Convention], Jun. 26, 1987, 1465 U.N.T.S. 85. Guatemala ratified the Torture Convention on April 15, 1987. Article 5 of the Torture Convention imposes a prosecute or extradite requirement and bars amnesty.

216. Guatemalan Law, Article 8, as amended, reads in its entirety:

> The extinction of penal responsibility to which this law refers will not be applicable to the crimes of Genocide, Torture, and Forced Disappearance, just as it will not apply to those crimes which are inalienable or for which the extinction or exemption of penal responsibility is not permitted in conformity with the internal law or international treaties approved or ratified by Guatemala.

Guatemalan Law, *supra* note 199, art. 8.

lan Law ensures that the most serious violations of human rights and international humanitarian law can still be prosecuted in Guatemala, an international forum, or a third state. Likewise, the general reference to international law leaves room for future development and expansion of international criminal law norms.

Taken collectively, the limitations contained in Articles 3, 4, and 8 of the Guatemalan Law ensure that, while amnesty is granted for political crimes committed during the armed conflict, the amnesty will be construed extremely narrowly. Amnesty only applies to related crimes if they are common crimes and no personal motives can be demonstrated. A per se rule, forbidding amnesty for torture, genocide, and forced disappearance, ensures that the most serious international crimes will not be amnestied. In case of further doubt, the Guatemalan Law concludes with an instruction that those crimes to which amnesty does not apply "will be prosecuted."[217] Despite potential for judicial interpretations that broaden the amnesty, the law appears to have been narrowly interpreted.[218]

In both Haiti and Guatemala, the involvement of the international community in the amnesty processes has accorded those processes international legitimacy. Likewise, both countries' laws have a significantly restricted scope, complying with most international obligations.

D. International Constitutional Immunity

International Constitutional Immunity is the most narrowly tailored form of amnesty and has the greatest legitimacy, both domestic and international. Three defining elements of Internationally Constitutional Immunity are: first, that the legislation conforms with a state's status as an international constitutional entity (i.e. that it is enacted through legitimate governmental processes representing the voice of the people); second, that the legislation complies with the scope limitations imposed by the international constitution (i.e. that it applies only to those crimes which a state does not have an international duty to prosecute); and third, that the legislation be approved by the international community, either through a UN Security Council resolution or a widely subscribed multi-lateral treaty. This most restrictive class of amnesty is an extremely recent development, and to date, no states have fully conformed to this model. The amnesty laws enacted in Bosnia &

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217. Guatemalan Law, article 11 states:

> The crimes which fall outside the scope of the current law or those that are inalienable or that for which the extinction of penal responsibility is not permitted in conformity with the internal law or international treaties approved or ratified by Guatemala will be prosecuted in conformity with the method established by the Code of Penal Procedure.

Id. art. 11.

218. President of the Guatemalan Congress, Alvaro Arzu, described the law as "not call[ing] for a general amnesty and . . . not provid[ing] protection for common crimes." Edward Hegstrom, *Guatemala Amnesty Plan Appalls Foes*, HOUSTON CHRON., Dec. 18, 1996, at A1.

Herzegovina and Croatia do, however, approximate the requirements of International Constitutional Immunity.

To place the Bosnian amnesty laws in context, it is important to note that, since the Dayton Peace Accords of 1995 [hereinafter Dayton Accords], the state of Bosnia & Herzegovina has been comprised of two constituent entities—The Federation of Bosnia & Herzegovina and the Republika Srpska. Each of these entities has a separate legislative process. Therefore, the Bosnian amnesty legislation consists of two separate laws, the Amnesty Law of the Federation of Bosnia & Herzegovina and the Amnesty Law of the Republika Srpska.[219] (Pre-existent amnesty laws, each legally invalid, inapplicable, and discussed herein only in the footnotes, further complicate the contextual background to these two laws.)[220] The Federation and Srpska Laws only grant immunity for a narrow subset of crimes linked to specific provisions in the penal code, namely crimes against the military forces, propagation of false information, and possession of weapons.[221] Thus, in ef-

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219. Amnesty Law, 1996, *reprinted in Official Gazette of Bosnia & Herzegovina* (Bos. & Herz., Federation of Bosnia & Herzegovina) (on file with Harvard International Law Journal) [hereinafter Federation Law]; Amnesty Law, 1996, *reprinted in Official Gazette of Republika Srpska* (Bos. & Herz., Republika Srpska) (on file with Harvard International Law Journal) [hereinafter Srpska Law]. For a discussion of the constitutional status of the constituent entities of Bosnia & Herzegovina, see generally THE YUGOSLAV CRISIS IN INTERNATIONAL LAW (Daniel Bethlehem & Marc Weller eds., 1997).

220. The first invalid, pre-existing law, the Decree with the Power of Law on Amnesty, was passed by the authorities of the Croatian Republic of Herzeg-Bosnia. However, Article I(3) of the Constitution of Bosnia & Herzegovina does not recognize the "Croatian Republic of Herzeg-Bosnia" and "therefore the laws adopted by its organs are null and void." U.N.H.C.R. Sarajevo, *Amnesty Laws in Bosnia and Herzegovina*, http://www.refugees.net/en/doc/amnesty.html (visited Mar. 22, 2001). This law poses problems for two groups: 1. "[I]ndividuals living in Croat administered areas but amnestied under the Federation Law" and 2. Individuals amnestied under the Croatian Republic of Herzeg-Bosnia "but staying in other parts of the Federation." *Id.* Theoretically, individuals falling in the former category should be immune from prosecution as the Federation Law has validity in Croat-controlled areas, but individuals in the second category would be subject to prosecution as the Croatian Republic of Herzeg-Bosnia had no law making power at the time the legislation was passed. *Id. See also* The Dayton Peace Accords, Annex III (Constitution of Bosnia & Herzegovina) art. I(3) (listing the constituent entities of Bosnia and Herzegovina), http://www.state.gov/www/regions/eur/bosnia/bosagree.html (visited Mar. 22, 2001). The second invalid, pre-existing law is the Republic of Bosnia and Herzegovina Law on Amnesty [hereinafter Republic Law]. It was passed by the Assembly of the Republic of Bosnia & Herzegovina on February 12, 1996, and was initially intended to apply throughout the territory of Bosnia & Herzegovina. However, the text was adopted after the signing of the Dayton Accords on December 14, 1995 at the Paris Conference. That agreement made the Republic of Bosnia & Herzegovina a legal nullity. As the UN High Commissioner's office explains: "The law adopted in February 1996 by the Parliament of the R BH [Republic of Bosnia & Herzegovina] is unconstitutional since it was adopted by a legislative body not competent to pass such legislation." *Id. See also* The Dayton Peace Accords, *supra*, at Annex III, art. III(1), (3)(a), (reserving to the constituent entities all non-enumerated legislative powers). While the Constitutional Court of Bosnia & Herzegovina has not removed this earlier law from the statutes by deeming it unconstitutional, amnesty has been granted based on the Federation Law rather than the Republic Law since June 1996.

221. Federation Law, Article 1, reads:

> Amnesty is applied to all persons who have by December 22, 1995 committed criminal acts against the foundations of social system and security of Bosnia and Herzegovina—Chapter 15, against the military forces—Chapter 20 of the Criminal Act taken over from SFRJ, call on resistance as per Article 201, propagation of false information as per Article 203, illegal possession of weapons and explosives as per Article 213 foreseen in the corresponding Criminal Act applied in the territory of the Federation of Bosnia and Herzegovina [hereinafter "the Federation"], as well as the criminal act of

fect, the Federation and Srpska Laws reverse the exclusionary wording of all amnesty laws previously considered in this Article. Previous amnesty laws granted general immunity and then provided a list of exception crimes to which amnesty does not apply. The Federation and Srpska Laws never grant a general amnesty, instead enumerating an exclusive list of crimes in relation to which amnesty does apply.

The two laws impose an additional substantive limitation. Amnesty is only granted to "criminal acts against the foundations of the social system."[222] The crime must have been committed against the state, encompassing both the social system and the military.[223] Amnesty is not granted to crimes against individuals and thus, serious violations of international humanitarian law directed at particular persons are excluded. While these serious international crimes are not explicitly excluded from the two amnesty laws (as they are in the case of the Guatemalan Law), the fact that the Federation and Srpska laws grant amnesty only in relation to an exclusive, enumerated list of crimes excludes international crimes from immunity. These laws thus comply with Bosnia & Herzegovina's international obligations and demonstrate legitimizing coherence.[224]

The 1996 Croatian amnesty law ("the Croatian Law") provides a second example of an International Constitutional Immunity. The Croatian Law achieves similar scope restrictions to that of its Bosnian counterparts, though through a different textual mechanism. The Croatian Law begins with a "general amnesty . . . to the perpetrators of criminal acts committed during . . . armed conflicts . . . in the Republic of Croatia.[225] Article 3 of the

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not responding to a military call and avoiding of military service by making himself incapable or by imposture and voluntary leaving and escape from armed forces foreseen in Article 8 of Application Act of Criminal Act of the Republic of Bosnia and Herzegovina and Criminal Act ("Official Gazette of RBH, No 6/92, 11/92, and 21/92), if the publishment [sic] of these persons is foreseen by this Act or other Application Act applied on the territory of the Federation.

Federation Law, *supra* note 219, art. 1. Srpska Law, Article 1, reads:

> This Law shall grant the immunity from a prosecution, or wholly or partially acquittal of a sentence [sic] or a non-enforced part of sentence [hereinafter the amnesty], to all persons who have, between January 1, 1991 and December 14, 1995 committed criminal acts against the foundations of social system of Republika Srpska under Chapter XV, or criminal acts against the military forces of Republika Srpska foreseen in the Criminal Code of Republika Srpska, and criminal acts of propagating of false information as per Article 203 and illegal possession of weapons and explosives as per Article 213 of the Criminal Code of Republika Srpska—special part.

Srpska Law, *supra* note 219, art. 1.

222. Federation Law, *supra* note 219, art. 1. The Srpska Law is similar to the Federation Law in this respect. Srpska Law, *supra* note 219, art. 1.

223. U.N.H.C.R. Sarajevo, *Commentary: Amnesty Laws in Bosnia and Herzegovina*, http://www.refugees.net/en/doc/amnesty.html (visited Mar. 22, 2001).

224. The Srpska Law has been inconsistently applied. The public prosecutor of Banka Luka, the capital of the Republika Srpska, has noted that cases not covered by the law, though reported, are often not prosecuted, a position seconded by the prosecutor of Visegrad. *See Amnesty Laws in Bosnia and Herzegovina*, *supra* note 220. The Srpska Law does, however, include an explicit exemption for "criminal acts that resulted in premeditated murder." Srpska Law, *supra* note 219, art. 2.

225. Law on General Amnesty 1996 (Croatia), *Official Gazette of the Republic of Croatia no. 80* (on file with Harvard International Law Journal) (typographical corrections from unofficial translation not indicated) [hereinafter Croatian Law]. The operative Articles 1 and 2 of the law read:

law then provides an extensive list of exemptions from amnesty, which includes "the most flagrant violations of international humanitarian law" and "war crimes."[226] These exceptions are each tied to articles of the Croatian Penal Code[227] and range from genocide to slavery, and discrimination to terrorism. This extensive list of exceptions brings the Croatian Law into compliance with most international obligations. Nonetheless, a general amnesty followed by a list of exceptions it is not as effective a scope limitation as an explicit, enumerated list of crimes to which amnesty attaches, such as that in the Bosnian Law. For example, emerging international crimes, such as rape as a war crime and as a crime against humanity,[228] are notably missing from the list of exceptions in the Croatian Law. While Croatia may not bear specific obligations to prosecute these crimes, a true International Constitu-

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By this Law a general amnesty is granted to the perpetrators of criminal acts committed during the aggression, armed rebellion or armed conflicts, or in relation to the aggression, armed conflicts, or armed rebellion in the Republic of Croatia.

The amnesty shall also apply to the execution of a valid verdict pronounced to the perpetrators of criminal acts from paragraph 1 of this Article.

The Amnesty from criminal prosecution and proceedings shall apply to the acts committed during the period of August 17, 1990 to August 23, 1996.

Article 2: No criminal prosecution shall be undertaken and no criminal proceedings shall be instituted against the perpetrators of criminal acts referred to in Article 1 of this Law.

Criminal prosecution already undertaken shall be cancelled and criminal proceedings already underway shall be terminated *ex officio* by the court's ruling.

An arrested person to whom the amnesty under paragraph 1 of this Article applies shall be released free by the court's ruling.

Id. arts. 1–2.

226. Article 3 of the Croatian Law reads:

Exempted from the amnesty referred to in Article 1 of this Law shall be perpetrators of the most flagrant violations of humanitarian law having the character of war crimes, specifically; Acts of Genocide (Article 119), War Crimes Against the Civilian Population (Article 120;1) War Crimes Against the Wounded and Sick (Article 121;1) War Crimes Against Prisoners of War (Article 122); Organization and Instigation of Genocide and War Crimes (Article 123), Unlawful Killing and Wounding of the Enemy (Article 124), Illegal Seizure of Possessions from Killed and Wounded on the Battlefield (Article 125); Use of Prohibited Combat Means (Article 126); Violation of Envoys (Article 127); Cruel Treatment of the Wounded, Sick and Prisoners of War (Article 128), Unjustified Delay in Repatriation of the Prisoners of War (Article 129); Destruction of Cultural and Hisroric Heritage (Article 130), Instigation of the War of Aggression (Article 131); Abuse of International Signs (Article 132); Racial and other Discrimination (Article 133); Imposition of Slavery and Transport of Enslaved Persons (Article 134); International Terrorism (Article 135); Endangerment of Persons Under International Protection (Article 136); Taking Hostages (Article 137); of the Basic Penal Code of the Republic of Croatia (Official Gazette No. 31/93–revised text, 35/93, 108/95, and 16/96) and criminal acts of terrorism pursuant to the provisions of international law.

Perpetrators of other criminal acts defined in the Basic Criminal Law of the Republic of Croatia (Official Gazette No. 31/93—revised text, 35/93, 108/95, and 16/96), not committed during the aggression, armed rebellion or armed conflicts or in relation to the aggression, armed rebellion or armed conflicts in the republic of Croatia shall be exempted from amnesty.

Id. art. 3.

227. *See* Penal Code of the Republic of Croatia, *cited in* WELLER & BURKE-WHITE, *supra* note 44, at ch. 2.

228. A recent decision of the International Criminal Tribunal for Yugoslavia has found rape a war crime and a crime against humanity. *See* Prosecutor v. Dragoljub Kunarac, et al, 2001 ICTY No. IT-96-23, at 436–464 (Feb. 22). It is unclear, however, whether rape would qualify as a war crime against the civilian population under Article 120 of the Croatian Penal Code and thereby be exempt from the amnesty.

tional Amnesty would not allow immunity for such universally condemned and internationally prosecuted crimes. Paragraph 2 of Article 3 of the Croatian Law is also noteworthy. It exempts crimes not committed "during the aggression, armed rebellion, *or* armed conflicts *or* in relation to the aggression." The use of the "or" conjunction allows amnesty to apply if even the least restrictive contemporaneity test is met, rather than requiring the more restrictive relation test to be met. Therefore, while the Croatian Law includes significant restrictions on the scope of immunity, it is too inclusive to qualify perfectly as an International Constitutional Amnesty. Nonetheless, on its face the law demonstrates coherence as it applies equally to everyone within its jurisdiction.[229]

The domestic legitimacy of the Bosnian and Croatian Laws approach, but do not meet, the requirements of International Constitutional Immunity. Freedom House gave Bosnia a score of 5, 5 (partially free) for 1996–97. While this represents an improvement from previous scores of 6, 6 (not free), it suggests that Bosnia & Herzegovina lacked the kind of free discourse and political expression that characterizes International Constitutional Immunity.[230] Nonetheless, at least procedural democracy existed in Bosnia when the amnesty laws were passed. The Federation Law was passed by the Federation of Bosnia & Herzegovina on June 30, 1996 pursuant to the Constitution of the Federation of Bosnia & Herzegovina, and the Srpska Law was passed by the Srpska parliament pursuant to the Republika Srpska Constitution.[231] The parliament of the Federation, which promulgated the Federation Law, "included representatives elected in the 1990 elections for the Parliament of Republic of Bosnia and Herzegovina from the territory of the Federation."[232] On September 14, 1996, after the passage of the two laws, new elections were held pursuant to the Dayton Accords, further indicating a successful democratic transition.[233] Furthermore, at the time the laws were

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229. It must be noted, however, that the law is not always applied in a coherent manner and "Serbs have complained that some of them have been arrested . . . under charges which should be amnestied under the law." *Western Officials Visit Vukovar to Oversee Peace Agreement*, AGENCE FR. PRESSE, May 20, 1998, *available at* LEXIS, Nexis Library, Agence France Presse File. The law has, however, been applied successfully to some Serbs, such as Dragan Lapcevic, who was released pursuant to the amnesty after being taken into custody on war crimes charges. *OSCE Gives Reserved Welcome to Zagreb's Refugee Plans*, AGENCE FR. PRESSE, Apr. 1, 1998, *available at* LEXIS, Nexis Library, Agence Fr Presse File. According to the Republic of Croatia, by September 15, 1996, ninety-four Serbs had been released pursuant to the law. *Further Report on Situation of Human Rights in Croatia Pursuant to Resolution 1019* (1995), M2 PRESSWIRE, Dec. 10, 1996, *available at* LEXIS, Nexis Library, News File.

230. *See* FREEDOM HOUSE, *supra* note 26.

231. This section focuses predominately on the domestic legitimacy of laws enacted by the Federation. While progress tended to be slower in the Republika Srpska, the elections and election certification described *infra* apply to both constituent entities of Bosnia & Herzegovina.

232. *Federation of Bosnia and Herzegovina*, http://www.bosnianembassy.org/fbih.html (visited Mar. 22, 2001). While these elections have been considered a "failure of democracy" in that nationalist parties prevailed, they were "the only free elections in Bosnia" before Dayton. DAVID CHANDLER, BOSNIA: FAKING DEMOCRACY AFTER DAYTON 29 (1999).

233. *See* CAROLE ROGEL, THE BREAKUP OF YUGOSLAVIA AND THE WAR IN BOSNIA 71 (1998). While these elections occurred after the passage of the laws in question, they do serve as evidence of the

passed, the OSCE certified that "conditions existed for the effective holding of elections."[234] This finding indicates that there existed in Bosnia & Herzegovina a political climate "in which ideas could be openly contested and in which independent opposition groups were encouraged."[235] This is not to say that democracy in Bosnia & Herzegovina was ideal or fully entrenched in 1996, or even today. The point is merely that by mid-1996, Bosnia & Herzegovina was moving toward the kind of representative democracy which respects the will of the people as the ultimate source of governmental authority.

The Croatian Law carries a similar level of domestic legitimacy. Freedom House gave Croatia a score of 4, 4 (partially free) in its 1996–97 survey.[236] Like Bosnia & Herzegovina, this score does not suggest that open and free discourse existed. But again, Croatia was at least a procedural democracy. Instead of simply being dictated by a presidential decree, the Croatian amnesty law was passed by both houses of the Croatian Parliament on September 20, 1996.[237] Though Tudjman's government has been criticized for its "authoritarian style of rule,"[238] the parliament that promulgated the Croatian Law was elected in open elections in October 1995. During those elections, the opposition cooperated and was able to put forward a meaningful agenda.[239] The quality of these elections confirm the existence of procedural democracy at the time the Croatian Law was passed.

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strengthening of democratic institutions and governmental responsiveness to the public will. It must be noted that, due to the fragile peace, local elections had to be postponed and voting irregularities, such as ballot box stuffing, were reported. *Id.* at 71–72. Nonetheless, these elections stand as evidence that "the contours of an institutional framework for Bosnia and Herzegovina [were] emerging." ECONOMIST INTELLIGENCE UNIT, THE ECONOMIST INTELLIGENCE UNIT COUNTRY REPORTS 4TH QUARTER 1996, BOSNIA-HERZEGOVINA, CROATIA, SLOVENIA 6 (1996). The most significant of the six separate elections of December 1996, for our purposes, were the election of 140 members to the House of Representatives of the Federation of Bosnia & Herzegovina and of eighty-three members to the National Assembly of the Republika Srpska, as these are the two entities which passed the amnesty laws. *See* HANS SCHMEETS AND JEANET EXEL, THE 1996 BOSNIA-HERZEGOVINA ELECTIONS: AN ANALYSIS OF THE OBSERVATIONS 15 (1997) (noting the breakdown of the vote amongst the parties in these two elections).

234. SCHMEETS AND EXEL, *supra* note 233, at 11; *see also* The Dayton Peace Agreement, Nov. 21, 1995, Bosnia & Herz.-Croat., at Annex 3, http://www.state.gov/www/regions/eur/bosnia/dayann3.html (visited Mar. 22, 2001) (noting the role of the O.S.C.E. as a monitor).

235. CHANDLER, *supra* note 232, at 119.

236. *See* FREEDOM HOUSE, *supra* note 26.

237. *Croat Parliament Ratifies Accord with Belgrade, Passes Amnesty Law*, DEUTSCHE PRESSE-AGENTUR, Sept. 20, 1996. Nonetheless, the ratifying act of a parliament, if not perfect, is of great significance.

238. ECONOMIST INTELLIGENCE UNIT, ECONOMIST INTELLIGENCE UNIT COUNTRY PROFILES 1997–98, BOSNIA-HERZEGOVINA AND CROATIA, 34 (1999). Tudjman's government was far from a model democracy and the parliament in question was not necessarily representative. In fact, numerous war crimes were committed in Croatia before the Amnesty, some quite possibly with Tudjman's knowledge or acquiescence. Moreover, numerous allegations throughout 1996 suggested that Tudjman may have been guilty of "abuse of power" for, *inter alia*, failing to confirm the assembly's appointments of mayors. ECONOMIST INTELLIGENCE UNIT, THE ECONOMIST INTELLIGENCE UNIT COUNTRY REPORTS 1ST QUARTER 1996, BOSNIA-HERZEGOVINA, CROATIA, SLOVENIA 16 (1996).

239. *See* ECONOMIST INTELLIGENCE UNIT, THE ECONOMIST INTELLIGENCE UNIT COUNTRY REPORTS 1ST QUARTER 1996, *supra* note 238, at 16.

The central reason for placing the Bosnian and Croatian Laws under the category of International Constitutional Immunity is that both demonstrate a high degree of international approval and legitimacy. Each law traces its source to a multi-lateral peace treaty, the Dayton Accords, to end the war in the Balkans, with explicit UN Security Council approval. This international approval serves two purposes: (1) limiting the scope of immunity and (2) enhancing international legitimacy. As noted, these laws first took shape in the Dayton Accords, which called upon the parties to grant amnesty to any "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 Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict."[240] States-Parties were thereby required to include within their amnesty 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 (ICTY), namely genocide, crimes against humanity, and war crimes.[241] The need for careful drafting of amnesty legislation was further reinforced by UN Security Council Resolutions establishing the Yugoslav Tribunal[242] and the Statute of the Tribunal itself, 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."[243] Any grant of amnesty that included crimes within the jurisdiction of the Tribunal would have been in violation of the Dayton Accords and the Security Council Resolutions.

The fact that the Bosnian and Croatian Laws originated from an internationally supervised peace process enhances their international legitimacy. The Dayton Accords, which include amnesty provisions of Annex VII, were initialed by the Presidents of Bosnia & Herzegovina, Croatia, and Serbia[244]

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240. The Dayton Peace Agreement, *supra* note 234, at Annex VII, art. 6. Article 6 reads in full:

> Any 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 Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty.

Id. art. 6.

241. Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), *republished in* BASIC DOCUMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA 1 (1998) [hereinafter ICTY Statute].

242. U.N. SCOR, 4175th mtg. at 1, U.N. Doc. S/Res/808 (1993), (affirming that "all parties are bound to comply with obligations under international humanitarian law"); U.N. SCOR 3217th mtg. at 1, U.N. 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").

243. ICTY Statute, *supra* note 241, art. 1.

244. The accords were initialed by President Izetbegovic, for the Republic of Bosnia & Herzegovina, President Tudjman, for the Republic of Croatia, President Milosevic, for the Federal Republic of Yugoslavia and for the Republika Srpska, and President Zubak, for the Federation of Bosnia & Herzegovina.

and witnessed by members of the Contact Group: Britain, France, Russia, the United States, Germany, and Italy. The Accords received explicit support from the Dayton Conference's three co-chairmen, U.S. Secretary of State Warren Christopher, EU representative Carl Bildt, and Russian Deputy Foreign Minister Igor Ivanov, as well as from Presidents Clinton and Yeltsin.[245] Soon after the signing of the Accords, the UN Security Council, acting under Chapter VII of the UN Charter, issued a resolution "[a]ffirm-[ing] the need for the implementation of the Peace Agreement in its entirety," and calling "upon the parties to fulfil, in good faith, the commitments entered into in that Agreement."[246] The Security Council similarly called upon Croatia to implement its amnesty law.[247] The extensive international involvement in the Dayton peace process and the explicit UN support for the peace agreements, including the amnesty provisions, imbue the Bosnian and Croatian Laws with international legitimacy. International involvement is sufficient to conclude that the will of the transnational polity as the ultimate source of authority has approved the amnesties in these cases.

The goal of the Bosnian and Croatian Laws appears to have been to ensure protection of minorities from arbitrary prosecution, while simultaneously facilitating accountability for severe violations of international humanitarian law. The Croatian and Bosnian Laws balance the dual dictates of the Dayton Accords—a guaranteed amnesty for most crimes and liability for violations 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.[248] Yet, the legislation has not prevented the ICTY from prosecuting the perpetrators of serious violations of

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245. *See* RICHARD HOLBROOKE, TO END A WAR 311–12 (Modern Library 1999) (1998); Remarks at the Initialing of the Balkan Proximity Peace Talks Agreement: Remarks by U.S. Secretary of State Warren Christopher and President Milosevic of Serbia, President Tudjman of Croatia, President Izetbegovic of Bosnia-Herzegovina, Representatives of the European Union, the Contact Group and Negotiating Team Members, Nov. 21, 1995, http://www1.umn.edu/humanrts/icty/dayton/daytonremarks.html (visited Mar. 22, 2001)

246. U.N. SCOR 3607th mtg. at 1, U.N. Doc. S/RES/1031 (1995). Resolution 1031 further stressed "the parties' commitment to the right of all refugees and displaced persons freely to return to their homes of origin in safety" through a limited amnesty decree to prevent retaliatory prosecution of refugees.

247. U.N. SCOR 3801th mtg. ¶ 7, U.N. Doc. S/Res/1120 (1997) The Resolution

> [u]rges the Government of the Republic of Croatia to eliminate ambiguities in implementation of the amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings against all individuals against whom there is insufficient evidence.

Id.; *see also* Statement of the U.N. Security Council President, Sept. 20, 1996, *cited in Further Report on Situation of Human Rights in Croatia Pursuant to Resolution 1019*, *supra* note 229.

248. Dragan Lapcevic, for example, was released on April 1, 1998 after invoking the law and having his arrest warrant annulled. OSCE *Gives Reserved Welcome to Zagreb's Refugee Plans*, *supra* note 229. 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, Mar. 18, 1998.

international humanitarian law.[249] Croatia and Bosnia & Herzegovina have secured international support and legitimacy by finding the middle ground of amnesty for some and accountability for others.

By examining legitimacy and scope, this Article has developed a framework for analyzing amnesty legislation within four clearly distinguishable categories. The boundaries of these theoretical categories are permeable. While not every amnesty law fits perfectly into a category, the two-axes framework highlights important systematic differences between the laws. Part II has essentially constructed a framework. Part III begins the process of operationalizing the framework by suggesting how courts have implicitly applied it in the past.

III. Challenging Immunity

The effect of these four categories of amnesty—Blanket Amnesty; Locally Legitimized, Partial Immunity; Internationally Legitimized, Partial Immunity; and International Constitutional Immunity—depends as much on their application as on the actual text of the laws. So far, this Article has focused predominantly on a purely textual reading of amnesty legislation. Part III turns to the application of these laws by examining recent challenges to them in a variety of forums. Legal challenges to the validity of amnesty legislation generally have taken two forms: petitions to the Inter-American Commission on Human Rights [hereinafter the Inter-American Commission] and cases brought before the high courts of the states that enacted the legislation. This Part supplements the analytical framework developed in Part II by evaluating the judicial interpretation and applications of these amnesty laws.

A consideration of the jurisprudence of courts enforcing amnesty laws is of particular significance, as it allows us to test the analytical framework developed in Part II. While available case law is still limited, the results are clear. Blanket Amnesty is accorded no extraterritorial validity and only some recognition by subsequent regimes in enacting states. Locally Legitimized, Partial Amnesty likewise receives little international recognition, though it is more often accorded domestic authority. Internationally Legitimized, Partial Immunity tends to be upheld both domestically and internationally. Unfortunately, the body of case law in this area remains small and is neither broad nor consistent enough to provide precedential value. It does indicate, however, that courts have, even if unknowingly, applied a framework not unlike that developed in this Article.

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249. *See Government so far Pardoned Thousands of Serbs from War-Related Charges*, *supra* note 248 (noting that by 1998 the ICTY had indicted twenty-five Croatian suspects specifically exempted from amnesty).

A. Application of Blanket Amnesties

Blanket Amnesty has been the subject of considerable judicial attention by the Inter-American Court and the Inter-American Commission. Because many of the Blanket Amnesty laws promulgated during the 1970s and 1980s were of Latin American origin, these two inter-American institutions have been well situated to conduct judicial inquiry.[250] The majority of this body of case-law has not dealt with the actual validity of amnesty legislation, but rather the rights of victims to adequate means of redress for grave human rights violations. However, there have been a few exceptions.[251] In each of the following cases, an international tribunal found Blanket Amnesty laws invalid and unenforceable. The tribunal condemned the enacting states and found each amnesty to be a fundamental violation of international law. These cases support the proposition that Blanket Amnesty lacks validity and should not be enforced domestically or extraterritorially.

The vast majority of petitioners before the two Inter-American institutions have based their claims on rights enshrined in the Inter-American Convention on Human Rights ("the Inter-American Convention"),[252] which requires states to uphold the "rights and freedoms recognized" in the Inter-American Convention, including the right to judicial personality, the right to a fair trial, and the right to judicial protection. In front of the Inter-American Court and Commission, these treaty-based rights have given rise to claims that Blanket Amnesty laws enacted in Latin America violate state obligations to victims. While the Court's and the Commission's scope of inquiry are admittedly limited, these cases provide the only significant and systematic consideration of these issues by an international tribunal to date.

The Inter-American jurisprudence begins with the *Velásquez Rodríguez Case*, brought against Honduras before the Inter-American Court in 1988. *Velásquez Rodríguez* was not, however, a direct challenge to an amnesty law, but rather a complaint on behalf of the relatives of Manfredo Velásquez, who had been illegally detained by members of the State Information Service and eventually became one of the "disappeared." Referring to Article 1(1) of the Inter-American Convention, 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."[253] 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 pro-

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250. *See* Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 3, at ch.3, art. 4.

251. 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 B.U. Int'l L.J. 321 (1994).

252. American Convention on Human Rights, July. 18 1978, 1144 U.N.T.S. 143, at ch.2, art. 8.

253. Velásquez-Rodríguez Case, Judgment of July 29, 1988, Inter-Am. C.H.R. (Ser.C) No.4 (1988), ¶ 175 *reprinted in* 28 I.L.M. 291 (1989).

tected" in the Convention.[254] 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."[255] States-Parties to the Convention thus have an affirmative duty to their citizens to prevent and punish serious human rights violations.[256]

The Inter-American system also considered the validity of Blanket Amnesty in cases before the Inter-American Commission, a "quasi-judicial body" with the authority to issue recommendations, but without enforcement power.[257] The cases before the Commission fall into two categories—the early jurisprudence of 1993–94 and the more recent Chilean case of 1997. Development of this jurisprudence indicates a growing condemnation of Blanket Amnesty.

The 1992–93 cases before the Inter-American Commission all found that states have a duty to investigate human rights violations and to ensure compensation for victims.[258] In its October 1992 report in *Consuelo v. Argentina*,[259] the Commission confronted an amnesty law,[260] which allowed for the prosecutions of top military commanders and created an investigatory mechanism to record past atrocities. Nonetheless, the Commission found the amnesty law incompatible with the state's obligations under the Inter-American Convention, interpreting the right to a fair trial under Article 8.1 to apply to victims and perpetrators alike.[261] With respect to "access to judicial protection" under Article 25.2 of the Inter-American 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."[262] Finally, the Commission cited the *Velásquez Rodríguez* judgment: "states must prevent, investigate and punish any violation of the rights recognized by the Convention."[263] In a similar report for *Mendoza v. Uruguay*,[264] the Commission reached a nearly identical conclusion, finding

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254. *Id.* ¶ 176.

255. *Id.* ¶ 178.

256. Relevant States-Parties to the Convention and their respective dates of ratification of the Convention are: 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).

257. Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 865 (1995).

258. *See* Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. & CONTEMP. PROBS. 197, 212 (1996).

259. Case 10.147, Inter-Am. C.H.R. 41, OEA/ser.L/V/II.83, doc. 14 (1993).

260. Final Act (Arg.) and Due Obedience Law, *supra* note 91.

261. *See* Consuelo v. Argentina, Case 10.147 Inter-Am. C.H.R. 41, ¶ 33 (noting "the effects of the disputed measures was to weaken the victim's right to bring a criminal action in a court of law").

262. *Id.* ¶ 38(a).

263. *Id.* ¶ 40 (quoting Velásquez-Rodríguez Case, Judgment of July 29, 1988, Inter-Am. C.H.R. (Ser. C) No. 4, ¶ 166.)

264. Mendoza v. Uruguay, Case 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, which barred all criminal prosecutions but left civil remedies intact. *See* Cassel, *supra* note 258, at 211. Four petitioners had denounced Uru-

the involved amnesty legislation to have violated the victim's right to a fair trial and the state's obligation to investigate. The Commission did not deem all amnesty laws de facto violations of the Inter-American Convention, but rather indicated the need to "weigh the nature and gravity of the events with which the law concerns itself."[265]

From these three cases, one can conclude that the Commission was dismayed by the amnesty laws in Argentina and Uruguay. Yet, due to both its non-binding authority and its awareness of the political realities of Latin America,[266] the Commission was not in a position to make a definitive statement on the invalidity of all Blanket Amnesty laws under the Inter-American Convention. Rather, the Commission identified certain aspects of the legislation that were in breach of the Convention and proposed alternate acceptable solutions. The Commission's final recommendations focused on neither the inherent illegality of amnesty laws nor on the obligation to punish perpetrators, but rather on the right of victims to "just compensation for the violations."[267] The Commission was in the awkward position of simultaneously condemning amnesty laws while giving guidance as to what could legitimize such a law. This difficulty arises because the Commission based its analysis on victims' rights to redress rather than on the legitimacy of the legislation. This may be understandable on the grounds that, since the laws had been passed by effective, recognized governments, the Commission found itself unable directly to question the laws' validity. Had the Commission been willing to disaggregate the state and base its considerations directly on the legitimacy of the legislation, it might have reached far more coherent and jurisprudentially consistent results.

The Inter-American Commission took a step in this direction in a more recent report of October 15, 1996 in the case of *Hermosilla v. Chile*.[268] This report affirms an obligation to prosecute perpetrators of serious violations of the Convention and condemns the Chilean legislation. The Commission notes that Chile has "recognized its obligations to investigate previous viola-

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guayan law No. 15.848 as applied, arguing that it violated rights enshrined in the Inter-American Convention. Mendoza, Case 10.029, Inter-Am. C.H.R. 154.

265. *Id.* ¶ 38. In the third case from the early 1990s, the Commission considered the amnesty legislation in El Salvador and again reached a similar conclusion, but noted that an amnesty not preceded by an individual acknowledgment of responsibility was particularly problematic. *See* Report on the Situation of Human Rights in El Salvador, Inter-Am. C.H.R. OEA/Esr/L/V/II.86 (1994).

266. *See* Cassel, *supra* note 258, at 209.

267. *See* Consuelo, Case 10.147 Inter-Am. C.H.R. 41, at Recommendations, ¶ 2; Mendoza, Case 10.029, Inter-Am. C.H.R. 154, at Recommendations, ¶ 2. One commentator suggests that the Commission would likely approve of an amnesty that 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." Weiner, *supra* note 257, at 871.

268. Case 10.843, Inter-Am. C.H.R. 156, OEA/ser./L/V/II.95 doc. 7 rev. (1996). This case considered the problem of impunity in Chile for those responsible for the arrest and disappearance of seventy 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 47–67.

tions of human rights" through a truth commission.[269] Nonetheless, the Commission boldly states: "the application of amnesties renders ineffective and worthless the obligations that States-Parties have assumed under . . . the Convention."[270] The Chilean government is not merely instructed to compensate victims, but is also condemned for a "failure to amend or revoke the de facto Decree Law."[271] Moreover, Chile is instructed to "identify the guilty parties, establish their responsibilities and . . . prosecute . . . and punish . . . them."[272] *Hermosilla* thus clarifies the extent of a state's duty under the Inter-American Convention to investigate violations, identify perpetrators, and punish the guilty.[273] No amnesty law, no matter how carefully tailored, could conform to the dictates of *Hermosilla*.

While the Commission considered the actual amnesty legislation involved in *Hermosilla*, it went too far by claiming that no amnesty law could be permissible. According to this Article's analysis, Chile may be unable to pass a valid amnesty law because its government does not reflect the kind of legitimacy developed in Part II, not because any amnesty, no matter how narrowly tailored or how legitimately enacted is per se invalid. By taking a different starting point—the legitimacy of the legislation, rather than victims' rights—the analytical framework developed in this Article provides conclusions more subtle and nuanced than those offered by the Inter-American Commission, under which amnesty legislation is either per se valid or invalid. This framework accounts for the varying degrees of legitimacy and the range of possible scopes of amnesty legislation. Nonetheless, the Commission's jurisprudence indicates that Blanket Amnesties, such as those adopted in Latin America, are invalid and will not be enforced by international tribunals. While the Commission was correct to invalidate these laws, its reasoning may have been self-limiting, rather than standard setting.

Blanket Amnesty has also been challenged in domestic forums, namely in the high courts of the various states in which the laws were enacted. On the whole, these courts have been far more likely to recognize and enforce amnesty laws, even Blanket Amnesty. The most recent cases, however, suggest that domestic courts may be moving toward non-enforcement of Blanket Amnesty.

The cases of domestic recognition and enforcement share a few common trends. First, petitioners before the high court of a state have generally claimed that the amnesty law in question violates a right established in the constitution of that state, rather than in a treaty obligation or customary international norm. Unlike the Inter-American Commission, national courts do have binding authority and have tended to uphold amnesty laws. Judici-

269. Hermosilla, Case 10,843, Inter-Am. C.H.R. 156, ¶ 41.
270. *Id.* ¶ 50.
271. *Id.* ¶ 61.
272. *Id.* at Recommendations, ¶¶ 111, 77.
273. *See* Cassel, *supra* note 258, at 216–17.

aries have often yielded to legislative and executive authority, citing important policy reasons behind the amnesty laws. As is the case in the Inter-American system, domestic courts have rarely considered legislation in light of international criminal obligations. Domestic challenges, therefore, do not resolve questions of international legal validity of amnesty legislation, but merely provide guidance as to the application of amnesty laws by enacting states. The most significant domestic challenges to Blanket Amnesty have occurred in Argentina,[274] Chile,[275] and El Salvador, which will be analyzed below.[276]

In 1987, the Argentine Due Obedience Law was challenged in the Argentine Supreme Court. The petitioners claimed that the Due Obedience Law, which created an irrefutable presumption that soldiers acted pursuant to command orders, "prevented courts from examining issues which are of their exclusive competence."[277] Without confronting the question, or providing any meaningful reasoning, the Court determined that the Argentine Congress has the power to enact laws and policies that it deems reasonably necessary. In the eyes of the Court, the Due Obedience Law was such a reasonable measure. In a concurring opinion, Justice Carlos Fayt breaks with Nuremberg traditions of command responsibility, which held superiors liable for the acts of their inferiors while still holding inferiors liable for their own illegal acts even if following orders.[278] Justice Fayt argues 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."[279] The Court thereby upheld the Due Obedience Law, affirming immunity for most members of the military and state services and even questioning command responsibility.

The challenge to immunity in El Salvador sought to invalidate a Blanket Amnesty. The judicial decision invoked questionable legal principles to

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274. Decision on the Law of Due Obedience, Case No. 547, June 22, 1987 (Supreme Court of Argentina) *reprinted in* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 509 (Neil J. Kritz ed., 1995) [hereinafter TRANSITIONAL JUSTICE].

275. 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.

276. Decision on the Amnesty Law, Proceedings No. 10–93, May 20, 1993. (Supreme Court of Justice of El Salvador) *reprinted in* TRANSITIONAL JUSTICE, *supra* note 274, at 349, 349.

277. Decision on the Law of Due Obedience, Case No. 547, June 22, 1987, ¶ 21, *reprinted in* TRANSITIONAL JUSTICE, *supra* note 274, at 509, 511.

278. *See, e.g.*, Prosecutor v. Zejnil Delalic (Celibici Case) Judgment of Nov. 16, 1998, ¶¶ 333–43, Case No.IT-96-21, (discussing "the [l]egal [c]haracter of [c]ommand [r]esponsibility and its [s]tatus [u]nder [c]ustomary [i]nternational [l]aw"). For an excellent review of command responsibility, see generally MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR (1999). *See also* 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 U.S. 1 (1946). *See also* The High Command Case, UNITED NATIONS WAR CRIMES COMM'N, XII LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 76 (1948).

279. Decision on the Due Obedience Law, *supra* note 274, at 511.

deny jurisdiction over the challenged law. When 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."[280] In a convoluted discussion of sovereignty, the Court determined amnesty to be a right of the sovereign, conferred by "divine grace," and therefore an "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 logic of divine grace appears outdated. Even if amnesty is solely political, it need not be beyond judicial review. As an apparent afterthought, the Court turned to the merits of the case, invoking an often misconstrued passage in Article 6(5) of Additional Protocol II of the Geneva Conventions [hereinafter Additional Protocol II] to justify immunity.[281] In its cursory treatment, the Court inaccurately interpreted the Geneva Conventions. The Court did not consider the fundamental obligations of the Geneva Conventions, in light of which the amnesty clause of Additional Protocol II must be interpreted, nor did it mention the Red Cross Commentaries, which limit the reading of Article 6(5). The Court yielded to perceived political necessity and denied itself jurisdiction.

Both of these domestic challenges to Blanket Amnesty failed to consider the legitimacy of the enacting government and the scope of the legislation. These courts also failed to give any convincing reasons for upholding the amnesties in question. These cases do not undermine this analytical framework. Rather, the Argentine and Salvadoran examples reveal the continuing illegitimacy of the governments enacting the overreaching amnesty laws in question.

B. Locally Legitimized, Partial Immunity in Application

Two of the Locally Legitimized, Partial Amnesties analyzed in Part II have been subject to challenge in domestic courts. While the challenge to the South African National Unity and Reconciliation Act has been decided, the Fijian case is still pending at the time of publication.[282] These two do-

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280. Decision on the Amnesty Law, Proceedings No. 10-93, May 20, 1993, (El Sal.), Part I, *reprinted in* TRANSITIONAL JUSTICE, *supra* note 274, at 349.

281. Article 6(5) calls upon states 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." *See* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II], 1977, art. 6(5), 1125 U.N.T.S. 3. "The *travaux 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." Letter from Dr. Toni Pfanner, Head of the Legal Division, ICRC Geneva, to The Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Apr. 15, 1997, *cited in* Cassel, *supra* note 258, at 218.

282. Michael Field, *British Legal Guns Hired to Defend Fiji Government*, AGENCE FR. PRESSE, Aug. 4,

mestic judiciaries, apparently enjoying greater independence than their Argentine and Salvadoran counterparts, have applied far stricter scrutiny. These two amnesty laws have been upheld in large part because they have greater legitimacy and more restricted scope than do Blanket Amnesties.

In South Africa, a law herein categorized as a Locally Legitimized, Partial Immunity was found constitutional and therefore enforceable by the Constitutional Court.[283] In this challenge to the National Unity and Reconciliation Act [hereinafter National Reconciliation Act], petitioners, represented by the Azanian People's Organisation, 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," 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."[284] The Court found that the Interim Constitution of 1993 itself mandated an amnesty law. Like the Argentine Court, the South African Court places great emphasis on the historical background to the amnesty, opening its decision by noting "decades [of] deep conflict."[285]

The South African Court, however, did apply a model similar to this Article's analytical framework. The Court first turns to legitimacy, questioning the law's adherence, or its conformity with other legislation and with the Constitution in particular. The Court acknowledges that "an amnesty undoubtedly impacts on fundamental rights" protected by the Constitution,[286] but observes that Section 33(2) of the Constitution allows the Constitution itself to limit the rights it guarantees.[287] Determining that the epilogue of the Constitution,[288] which explicitly calls for an amnesty, is an equal part of the Constitution, the Court upholds the validity of the National Reconciliation Act.

The South African Court then turns to questions of scope vis-à-vis international law. While this approach conforms to this Article's recommended framework, the Court's international law arguments are circular and its conclusions flawed. According to the 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

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2000, *available at* 2001 WL 2322535.

283. *See* 1996 (8) BCLR 1015 (CC).

284. S. AFR. INTERIM CONST. (Act 200, 1993) ch. III, § 22.

285. 1996 (8) BCLR 1015 ¶ 1 (CC).

286. *Id.* ¶ 9.

287. *Id.* ¶ 10.

288. The epilogue instructs the parliament to "'adopt a law providing,' *inter alia*, for the 'mechanisms, criteria, and procedures . . . through which . . . amnesty shall be dealt with.'" *Id.* ¶ 14.

> any law which might constitute a breach of the obligations of the state in terms of international law.[289]

The Court claims that constitutional lawmakers can infringe upon international law, but they should not be easily permitted to do so. Yet, the Court fails to decide whether 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 be casually read to contradict international law, why is a domestic law exempt from such a more stringent reading? The Court cites the Constitution itself for the proposition that courts "should have regard to public international law applicable to the protection of rights entrenched in this Chapter."[290] Yet, the Court argues that such scrutiny is not necessary because the Constitution itself mandates the grant of amnesty.

The Court fails to acknowledge South Africa's treaty or customary obligations. Even a constitutional court decision does not absolve South Africa of those obligations. The Court ignores 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 state and other dissident armed forces."[291] The Court therefore finds there to be "no obligation . . . to ensure the prosecution."[292] At the very least, the Court should have considered whether Additional Protocol II obligates states to prosecute crimes in non-international armed conflicts. While it is true that apartheid South Africa was not party to most conventions imposing a prosecute or extradite requirement,[293] with respect to genocide and crimes against humanity, it still bore customary law obligations.[294] By failing to consider potential limits on the National Reconciliation Act, the Court abrogates its international obligations and fails to fulfill its duties both to the international community and to the citizens of South Africa. While the Court failed to take full account of the role of the country's international obligations, its actions demonstrate how the analytical framework based on legitimacy and scope developed in this Article could have been effective and will be applicable as a powerful tool for analysis in the future.

The most recent challenge to a Locally Legitimized, Partial Amnesty, which is still ongoing, is the judicial proceedings against George Speight and his followers in Fiji. Like the Azanian People's Organisation case in

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289. *Id.* ¶ 26.

290. SOUTH AFR. INTERIM CONST. (Act 200, 1993), ch. III, § 35(1).

291. 1996(8) BCLR 1015 ¶ 50 (CC).

292. *Id.*

293. South Africa did not accede to the Convention on the Prevention and Punishment of the Crime of Genocide and the Torture Convention until October 12, 1998, and therefore would not be under a treaty-based obligation to prosecute these crimes before those dates.

294. *See* WELLER & BURKE-WHITE, *supra* note 44, at ch. 1.

South Africa, the Fijian situation suggests that domestic courts may apply a strict standard of scrutiny to Locally Legitimized, Partial Immunity through a framework similar to that suggested in Part II. While a final decision from the Fijian High Court is still months away at the time of publication, preliminary proceedings have involved heightened judicial scrutiny and indicate a strong likelihood of invalidating amnesty.

On July 26, 2000, only two weeks after releasing his hostages and signing the amnesty agreement, Speight and his compatriots were arrested.[295] They made an initial appearance in court in Suva on August 5, 2000, charged with, *inter alia*, "consorting with people carrying fire arms and ammunition between 19 May and 27 July."[296] In the proceedings before Chief Magistrate Salesi Temo, Assistant Prosecutor Rachel Olutimayim argued that the amnesty "agreement was null and void because the weapons had not been returned and the agreement itself was signed by [sic] military under duress."[297] Before the chief magistrate could render a decision, the charges against Speight were amended to include treason[298] "'for intending to levy war' against the president."[299] After numerous postponements, Justice Daniel Fatiaki granted *habeas corpus*, removing from the purview of the magistrate's court any consideration of the validity of the amnesty agreement, and ensuring that "the question of whether the Immunity Decree stands . . . will be decided by the High Court."[300]

While the High Court has yet to rule on Speight, a test case against Isoa Raceva Karawa,[301] one of Speight's associates, has gone to trial. In the appeal

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295. *Amnesty Thrown Out*, *supra* note 138.

296. Robin Sullivan, *Army Out in Force as Fiji Coup Chief Taken to Court*, INDEPENDENT (London), Aug. 5, 2000, *available in* LEXIS, Nexis Library, Independent (London) File.

297. *Urgent: George Speight Arrives Outside Fiji Court*, AGENCE FR. PRESSE, Aug. 4, 2000, *available at* LEXIS, Nexis Library, Agence Fr. Presse File; Konrote, *supra* note 150. According to the Muanikau Accords, amnesty was conditional on the return of arms to the Fijian Army. *See supra* text accompanying notes 140–151. Assistant Prosecutor Rachel Olutimayim is a Nigerian lawyer called to assist Prosecutor Jo Naiguleva in the case. Speight and his associates are defended by Rabo Matebaluvu, a Fijian lawyer. *Urgent: George Speight Arrives Outside Fiji Court*, *supra*.

298. Treason is a capital offense in Fiji, though no one has been executed since Fiji achieved independence in 1970. *See* Dyer, *supra* note 133.

299. *Fiji Coup Plotter Speight and Henchmen Remanded on Treason Charges*, AGENCE FR. PRESSE, Aug. 25, 2000, *available at* LEXIS, Nexis Library, Agence Fr. Presse File (noting that Chief Magistrate Temo delayed a decision until September 4, 2000 and remanded Speight et al. to their Nukulau Island detention facility until that time).

300. *Id.* The question of the validity of the immunity arose simultaneously in a parallel case also before the High Court. Raceva Karawa was acquitted in the Magistrate's Court in July on charges of shooting two soldiers outside Fiji's parliament on May 27, 2000. The Magistrate found his acts to be covered by the immunity grant. The State then appealed the judgment, arguing that the immunity was no longer valid as Speight had not met the requirement of surrendering his weapons. High Court Justice Peter Surnam has yet to rule on whether evidence of the amnesty is admissible, but he has made clear that "the test case has implications for all other cases," namely that of Speight himself. Asha Lakhan, *Test Case in Fiji Court This Week Could Decide Speight's Fate*, AGENCE FR. PRESSE, Sept 19, 2000, *available at* LEXIS, Nexis Library, Agence France Presse File (quoting High Court Justice Peter Surnam).

301. Karawa was charged, *inter alia*, with the attempted murder of Lieutenant Aseri Rokoura, James Harbes, and Private Atunaisa Qereı, as well as the possession of firearms. Petition of Appeal, at 2, 3, State v. Isoa Raceva Karawa (2000) Criminal Jurisdiction (Fiji Magistrate's Court) (on file with Harvard Inter-

proceedings before the chief magistrate, Karawa asserted the affirmative defense of the Immunity Decree No. 18 of 2000.[302] In reply, the State argued that the defendant's acts were not within the scope of the decree and requested more time for considering the scope of the decree.[303] The magistrate found that

> this Court is commanded by Section 3(1) and 3(2) of the Immunity Decree No. 18 of 2000 to discontinue these proceedings forthwith. The accused in these cases was acting on the direction of George Speight. Section 3(1) above says 'no Court shall entertain any proceedings against him.' On that ground, the accused is to be released forthwith.[304]

In a subsequent appeal, however, the High Court took a notably different approach, looking to the scope of the amnesty law itself to question its validity, rather than merely asking whether the acts of the accused fell within the decree's scope. Justice Serman argued that "I cannot accept the proposition that the alleged crimes of Attempted Murder and the Possession of Firearms without lawful excuse can be described as 'Political Offences.' This would be a distorted and entirely inappropriate description."[305] As the amnesty only applies to political offences, the Court's finding that murder can not be a political offence narrows the scope of the amnesty.

The High Court also questions the validity of the law itself on the grounds that the terms of the Muanikau Accord were not met and therefore the amnesty was never conferred.[306] The Court's invalidation of the amnesty shows that what this Article categorizes as Locally Legitimized, Partial Immunity may not always be upheld.

While the *Karawa* test case is certainly important, the more significant decision will be in the Speight case itself. In the Speight case, the prosecutor has challenged the amnesty on the grounds that Speight failed to comply with the requirements for amnesty agreement and that the amnesty was illegitimate on its face.[307] The first argument of non-compliance gives the High Court legal footing to strike down a Locally Legitimized, Partial Am-

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national Law Journal).

302. *See* Legal Submission by the Defendant, at 3, State v. Isoa Raceva Karawa (Fiji Magistrate's Court).

303. *See* State's Submission in Reply, at 2–3, State v. Isoa Raceva Karawa (Fiji Magistrate's Court).

304. *See* Dir. of Pub. Prosecutions v. Isoa Raceva Karawa (2000) Criminal Case Nos. 1492–95, 5 (Fiji Resident Magistrate's Court) (on file with Harvard International Law Journal).

305. State v. Isoa Raceva Karawa (2000) Criminal Appeal No. HAA 061, 11 (Fiji) (on file with Harvard International Law Journal).

306. The Court found that the

> Muanikau Accord and the Immunity Decree are inextricably linked . . . the failure to return the Arms and Ordinance . . . negated or nullifies the Immunity Decree. . . . If there has been a failure by the Speight Group to return all the weapons . . . then . . . this will indicate a fundamental breach of the Conditions of the Accord and will mean the provisions of the Immunity Decree will not operate.

Id. at 11.

307. Konrote, *supra* note 149.

nesty. The second argument, that the military only signed the accord under duress, goes straight to the question of domestic legitimacy.[308]

The High Court appears to be giving priority to the question of legitimacy and should continue to do so. In particular, it should continue to ask whether the Fijian people would have chosen the amnesty. As the Speight Case proceeds, the Court should also look at the scope of the law, as Justice Serman did,[309] to determine not just whether the acts of the accused fall within the scope of the law, but also whether the scope of the law itself complies with Fiji's international legal obligations. Assuming the High Court strikes down the Speight amnesty on grounds of scope and legitimacy, as the test case suggests it may, it would signal a trend away from enforcing Locally Legitimized, Partial Immunity in domestic courts and toward a higher threshold of legitimacy for the acceptance of amnesty legislation. Such a precedent could have far reaching consequences for redefining the standards for domestic enforcement of amnesty legislation, along lines proposed by this Article.

IV. Conclusion

Part I created a normative liberal international law theory. The powerful potential of this theory as a model with which to build a two-axes framework for analysis comprised of legitimacy and scope was then demonstrated. Part II applied this two-axis framework to a number of case studies to categorize amnesty legislation and to determine its validity. Part III, while noting the inconsistencies in judicial considerations of amnesty legislation, presented evidence of correlation between this two-axis framework and recent amnesty decisions. This conclusion briefly considers research possibilities. How do state obligations limit the scope of amnesty legislation? How can judges apply this Article's framework to determine the validity of such legislation? What implications do the recent trends in amnesty legislation have on state sovereignty?

As noted at the outset, states may face customary law- and treaty law-based obligations to prosecute certain crimes.[310] These obligations serve as a ceiling for each particular state, limiting the scope of any amnesty grant. Where such obligations exist, amnesty laws are fundamentally inapplicable. While certain obligations to prosecute (in relation to, at a minimum, genocide, war crimes, crimes against humanity, and torture)[311] are applicable to

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308. *Id.*

309. State v. Isoa Raceva Karawa, Criminal Appeal No. HAA 061 of 2000, at 11.

310. *See, e.g.*, Int'l Law Ass'n, Comm. on Int'l Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences (2000).

311. *See* Weller & Burke-White, *supra* note 44, at ch. 2; Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 Cornell Int'l L.J. 297, 314–20, 323 (2000) (suggesting that states have obligations to prosecute crimes against humanity, genocide, and torture).

all states through customary international law and are enshrined in the emergent international constitution, many crimes that are often the subject of amnesty grants are not so clearly within the scope of this emergent international constitutional order.[312] Moreover, many obligations to prosecute are derived from international treaties, as well as or instead of, customary international law. It is beyond the reach of this Article to determine the extent of state obligations to prosecute and thus to determine the ceiling on amnesty. Such research would require a careful consideration of the norms of the emerging international constitution and a specific country-by-country review of treaty-based obligations as applied to each state. Even leaving a case-by-case determination of the compatibility of amnesty laws with state obligations for future study, significant conclusions have already emerged as to how each category of amnesty legislation measures up to state obligations.

Blanket Amnesties, with their extraordinarily broad scope, deny the judiciary the potential to prosecute, and consequently render actual prosecution impossible for crimes that are generally regarded as requiring prosecution under customary international law. The enactment of Blanket Amnesty legislation in Chile, Argentina, and Peru violated these customary international legal norms. Questions of legitimacy aside, the international constitution intervenes to deny these amnesties validity on substantive grounds. Therefore, domestic and extraterritorial courts alike should invalidate any parts of these laws exceeding the internationally authorized scope. Politicians in states considering amnesties and drafters of new amnesty laws would be well advised to exclude from their laws crimes that require prosecution under customary international law.

Whether Locally Legitimized, Partial Immunity and Internationally Legitimized, Partial Immunity conform to the then-prevailing international consensus depend on both a state's particular obligations and an adjudicatory body's determination of the scope of the amnesty. In order for such amnesties to meet international obligations, the adjudicatory body cannot include genocide, war crimes, crimes against humanity, and torture. Depending on the state's ratification of particular treaties, amnesty for other crimes, such as apartheid, crimes against internationally protected persons, and grave breaches in non-international armed conflicts, may also be prohibited. Locally Legitimized, Partial Immunities and Internationally Legitimized, Partial Immunities with more restrictive scope are more likely to comply with the enacting state's international obligations.

International Constitutional Amnesties, by definition, conform to the mandates of the international constitutional order. They exempt from immunity crimes that the state is obligated to prosecute under international law. By specifically excluding from the amnesties the most serious crimes

312. Such crimes include, for example, grave breaches of the Geneva Conventions in non-international armed conflicts, crimes against internationally protected persons, and egregious environmental crimes. *See* WELLER & BURKE-WHITE, *supra* note 44, at ch. 1.

requiring prosecution under customary international law, states ensure that the amnesty laws, however applied by the judiciary, will comply with the dictates of the international constitutional order. For instance, such laws cannot grant impunity for grave breaches of the Geneva Conventions, crimes against humanity, genocide, torture, and other additional crimes requiring prosecution. Operating within the restricted scope and heightened standards of domestic and international legitimacy of International Constitutional Immunity, states can balance the obligation to prosecute the most serious crimes with the need to grant amnesty to promote reconciliation and political transition.

Determinations of the legitimacy of a state's government have been criticized as subjective and beyond the competency of the judiciary. Admittedly, the application of this Article's framework depends on the ability of judges and policy-makers to engage in such determinations. While it is true that tests which look to whether the will of the people is the ultimate source of a state's authority are somewhat subjective, such an inquiry is well within the realm of judicial competency.

This Article argues that only International Constitutional Amnesties and their closest equivalents should be given extraterritorial effect. This Article's framework, however, provides flexibility to the judiciary of the enforcing state to determine exactly where the enforcement line should be drawn. Both domestic and international constitutions place limits on the scope of the laws, but an enforcing judiciary may make its own determinations of what level of legitimacy is needed before an amnesty will be recognized.

Admittedly, judges are rarely trained political scientists, but they have often made such determinations of legitimacy. For example, in *Bi v. Union Carbide Chemicals and Plastics*, the U.S. Court of Appeals for the Second Circuit addressed the issue of whether to "give effect to the statute of a foreign government that purports to grant that government exclusive standing to represent" mass tort victims.[313] Such a statute, which may deny individuals a right of redress, is not dissimilar to an amnesty grant. In declining the victims' challenge of the settlement, the Second Circuit reasoned that "India is a democracy. Its Constitution, which took effect in 1950, provides for a republican form of parliamentary government and guarantees the fundamental rights of the people, including equal protection and procedural due process."[314] As India "decided in an act passed by its democratic parliament to represent exclusively all the victims in a suit," that decision should be honored.[315] In *Bi*, when the court considered whether India was a democracy, whether the act was passed by a legitimate parliament, and whether the act demonstrated adherence to the state's constitution, it made determinations similar to those suggested in this Article. Numerous other courts have en-

313. Bi v. Union Carbide Chemicals and Plastics Co., 984 F.2d 582, 585 (2d Cir. 1993).
314. *Id.*
315. *Id.* at 586.

gaged in similar fact-specific determinations of governmental type and legitimacy, especially in relation to *forum non conveniens* determinations[316] and asylum claims.[317] Non-U.S. courts have also engaged in similar determinations of governmental legitimacy.[318] In making such fact-specific and political determinations, judges may seek assistance from the executive branch, non-governmental organizations, and even political scientists, through amici briefs to the court or introduction into evidence of State Department documents and similar reports.[319]

A complete analysis of the ways courts engage questions of legitimacy of foreign governments, the sources on which they draw, and the resultant jurisprudence is a topic well worth further study. For the purpose of this Article, it is sufficient to show that courts can and do make determinations about legitimacy, indicating that this Article's framework can be effectively utilized.

The application of this Article's framework also suggests the possibility of a trans-judicial dialogue, leading to a convergence of norms and practices in the enforcement of amnesty laws.[320] When a court decides on the validity of an amnesty law using this framework, it is simultaneously communicating with courts in other states.[321] Such communication signals to other judici-

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316. Forum *non conveniens* considerations often involve a determination of whether "plaintiffs are highly unlikely to obtain basic justice" in the potentially inconvenient forum. Vaz Borralho v. Keydril Co., 696 F.2d 379, 393–94 (5th Cir. 1983). Such a determination may depend on direct political analysis of the governments in question. *See, e.g.*, Can v. U.S., 14 F.3d 160 (2d Cir. 1994) (examining the nature of the South Vietnamese government, but eventually denying relief on political question grounds); Bhatnagar v. Surrendra Overseas, Ltd., 820 F.Supp. 958, 960 (E.D. Pa. 1993) (affirming the proposition of "deferring to the statute of a democratic country," but distinguishing on grounds of possible judicial delay); McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 346 (8th Cir. 1985) (considering the lack of U.S. diplomatic relations with Iran and finding that litigation in Iran would deprive the parties of their "day in court"); American Bell Inter. Inc. v. Islamic Republic of Iran, 474 F.Supp. 420, 423 (S.D.N.Y. 1979) (finding that the government of the "Islamic Republic is xenophobic" and thus would not honor American contracts); Rasiylzadeh v. Associated Press, 574 F.Supp. 854, 861 (S.D.N.Y. 1983) *aff'd* 767 F.2d 908 (2d Cir. 1985) (considering the justice available in courts "administered by Iranian mullahs"); *see also* GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 412–13 (3d ed. 1996).

317. *See, e.g.*, Melendez-Flores v. INS, 165 F.3d 35 (9th Cir. 1998) (seeking State Department Reports and Freedom House Reports to judge the political situation in El Salvador); Gonzales-Neyra v. INS, 122 F.3d 1293, 1295–96 (1997) (considering the political situation in Peru and basing determination of asylum claim of a Peruvian national on a State Department report); Mazariegos v. Office of U.S. Attorney General, 2001 WL 117479 (11th Cir. 2001) (considering in detail the political situation in Guatemala in 1994).

318. *See, e.g.*, Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3) 1 A.C. 147 (H.L. 2000) (U.K) (analyzing the political situation in Chile, and noting that the Home Secretary's determination of the applicability of Pinochet's immunity should depend in part on whether, given the current government, justice can be done in Chile).

319. *See, e.g.*, Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala, *reprinted in* 19 I.L.M. 585 (1980); Martirosyan v. INS, 229 F.3d 903, 911 (9th Cir. 2000) (noting that the "state department Report and the Armenian Country Report [were] incorporated into the record by reference").

320. Slaughter, *supra* note 10, at 524.

321. Joseph Weiler has studied and documented the possibilities of an inter-judicial dialogue in the European Union. *See, e.g.*, J. H. H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Inter-*

aries how questions of similarly situated amnesties should be decided in the future.[322] There also exist possibilities of judicial-legislative dialogues, through which the courts of enforcing states would communicate with legislatures in states enacting or contemplating amnesties. Through such communication, drafting legislatures could develop an understanding of judicial reasoning and could construct their legislation to comply with developing norms. These trans-judicial and judicial-legislative dialogues may eventually lead to convergence of standards on amnesty scope and legitimacy. Theoretically, with such standards, legislatures and executives would cease to enact invalid amnesties, as they would know *a priori* that such laws would not be accorded extraterritorial respect and would not, therefore, further their goal of immunity.[323]

This normative liberal international law theory has important implications for the evolution from traditional notions of Westphalian state sovereignty.[324] The restrictions on amnesty and the limits on the scope of potential immunity "erod[e] the content of sovereignty and restrict[ ] the rights, derived from sovereignty, that states were free to exercise at home."[325] While dilution of unlimited sovereignty is well documented, this Article suggests a new interpretation. Based on this normative theory, the extent of a state's sovereignty depends, in part, on the legitimacy of its government. States that respect the will of the people as the ultimate source of governmental authority have a different degree of sovereignty in enacting certain types of legislation. While the emergent international constitution restricts the scope of that sovereignty even for the most legitimate governments, under this normative theory, a state's sovereign authority is directly correlated to the legitimacy of its government.

The implications may go well beyond the validation of amnesty legislation. The emergent international constitution, created by the will of the transnational polity, places objective limits on the behavior of all states. An internationally minded judiciary may solidify and enforce these emerging norms of limited state power. In this new world of restricted sovereignty, dictators cannot impose their own immunity. Legitimate democracies, however, can utilize limited amnesty as a tool for post-conflict reconciliation.

Incentives, 26 COMP. POL. STUD. 510, 521–22 (1994). Similarly, Mary Ann Glendon has demonstrated that courts may borrow solutions across borders. *See* MARY ANN GLENDON, RIGHTS TALK 158–59 (1991).

322. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1111 (2000).

323. *See* Simmons, *supra* note 9, at 852 (finding, based on a study of compliance with international monetary law, that when a state is bound by international obligations and understands those rules, and its neighbors comply with these obligations, there is a direct influence "on commitment and compliance").

324. *See, e.g.*, STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 125–26, 237–38 (1999).

325. STANLEY HOFFMANN, WORLD DISORDERS: TROUBLED PEACE IN THE POST-COLD WAR ERA 155 (1998).