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# ALL THE TRUTH AND AS MUCH JUSTICE AS POSSIBLE

Gwen K. Young\*

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## I. INTRODUCTION

Since the end of World War II, states moving toward democracy from dictatorial or repressive regimes granted some form of amnesty for human rights abuses committed by members of the preceding regime. In Latin America, a region marked by military dictatorships, states

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commonly granted blanket amnesties.<sup>1</sup> Chile granted amnesty to Augusto Pinochet Ugarte.<sup>2</sup> The arrest of Pinochet and extradition battle in the United Kingdom,<sup>3</sup> however, has brought the Chilean amnesty under scrutiny. Likewise, in calling for the establishment of a tribunal to try war crimes in Sierra Leone, U.N. Secretary-General Kofi Annan denounced the amnesty granted to rebel leader Foday Sankoh in the Lome Agreement.<sup>4</sup> Amnesties, then, are no longer uncontroversial, and are an open question in international law. This paper will focus on the steps a domestic state interested in granting amnesty should take to ensure that it comports with international law.

Granting amnesty to former government officials requires looking not only at international law obligations, but also at political realities, and individual and societal needs for justice and reconciliation. In designing an appropriate amnesty, the granting state must resolve the conflict between its duty to prosecute certain international crimes and its own issues of national sovereignty and societal reconciliation. Resolution will require balancing the legal, political, and social objectives and realities surrounding the grant of amnesty.

This paper will address the proper scope of amnesty. Ultimately it will propose a framework that a state can use to carry out its duty to investigate and prosecute certain human rights crimes in light of political and social realities. Part I addresses problems related to domestic grants of amnesty by looking at the history, types, and goals of amnesty. Specifically, it examines and contrasts the Chilean and South African grants of amnesty. Part II addresses the applicable law. It discusses a state's international law obligations, in terms of both treaty and customary international law, to investigate and prosecute someone suspected of international crimes. It then proceeds to discuss the role of

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<sup>1</sup> Naomi Roht-Arriaza, *Truth Commission and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. PROC. 313, 314 (1998). (noting many Latin American countries military passed self-amnesties for giving up power or blanket amnesty) [hereinafter Roht-Arriaza, *Truth Commission*].

<sup>2</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 3 W.L.R. 1456, 4 All E.R. 897, *reprinted in* 37 I.L.M. 1302, 1317 (H.L. 1998-99) (Nov. 25, 1998) (opinion of Lord Lloyd of Berwick).

<sup>3</sup> *See U.K. Bow Street Magistrates' Court: The Kingdom of Spain v. Augusto Pinochet Ugarte*, 37 I.L.M. 135 (Oct. 8, 1999); *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M. 581, (May 1999); *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M. 430, 2 W.L.R. 827 (H.L. 1999) (March 24, 1999); United Kingdom House of Lords: *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*; 37 I.L.M. 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (opinion of Lord Lloyd of Berwick).

<sup>4</sup> *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, U.N. Security Council, at 7, U.N. Doc. S/1999/836 (July 30, 1999).

amnesty in international law. Part III proposes a framework that can be used to design a grant of amnesty appropriate in light of obligations to investigate, prosecute and provide justice to the victims of human rights violations. The analysis ultimately involves considering both international legal concerns and national realities.<sup>5</sup>

## II. EVOLUTION OF AMNESTY

Answering the question of whether granting amnesty violates international law requires a definition of amnesty.

### A. *What is Amnesty?*

Black's Law Dictionary defines "amnesty" as an act of forgiveness that a sovereign grants to people to have committed offensive acts.<sup>6</sup> It involves an abolition or forgetting of offenses.<sup>7</sup> Amnesty is typically granted to a group or class of persons, unlike a pardon, which is granted to an individual.<sup>8</sup> Related to but distinct from amnesty is the idea of impunity.<sup>9</sup> Impunity, defined as an "exemption or protection from penalty or punishment," prevents an entity from prosecuting offenses.<sup>10</sup>

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<sup>5</sup> Curtis A. Bradley, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2130 (1999); Michael P. Davis, *Accountability and World Leadership: Impugning Sovereign Immunity*, 1999 U. Ill. L. Rev. 1357, 1370-71.

<sup>6</sup> BLACK'S LAW DICTIONARY 82-3 (6th ed. 1990); 59 AM. JUR. 2D Pardon and Parole § 3 (1987). See also, Ronald C. Slye, *Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process*, in TRUTH V. JUSTICE, 171 (Robert I. Rotberg and Dennis Thompson eds., 2000).

<sup>7</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 31, 35 (concluding amnesty equals a sovereign act of oblivion and involves a complete forgetting of past); 59 AM. JUR. 2D Pardon and Parole § 3 (1987); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 507 (1999) (noting amnesty derives from the Greek word *amnestia* meaning forgetfulness).

<sup>8</sup> BLACK'S LAW DICTIONARY 82-3 (6th ed. 1990); 59 AM. JUR. 2D. Pardon and Parole § 3 (1987); Naomi Roht-Arriaza, *Punishment, Redress and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 13, 22 (Naomi Roht-Arriaza ed., 1995) [hereinafter Roht-Arriaza, *Punishment*].

<sup>9</sup> BLACK'S LAW DICTIONARY 758 (6th ed. 1990) (defining impunity as "[e]xemption or protection from penalty or punishment").

<sup>10</sup> BLACK'S LAW DICTIONARY 758 (6th ed. 1990); *The Administration Of Justice And The Human Rights Of Detainees, Question Of The Impunity Of Perpetrators Of Human Rights Violations (Civil And Political)*, report of special rapporteur Louis Joinet, U.N. Commission on Human Rights Sub-commission on the Promotion and Protection of Human Rights, 56th Sess., Annex, Agenda Item 11(d), U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (defining impunity as "impossibility, de jure or de facto, of bringing the perpetrators of human rights violation to account") [hereinafter Joinet Report].

Impunity does not acknowledge, forgive or forget an offense.<sup>11</sup> Amnesty operates like impunity, however, in that it renders a perpetrator unaccountable for his or her crimes.<sup>12</sup> Both, moreover, act as shields from prosecution.<sup>13</sup> A related component of impunity is sovereign immunity, the idea that a state does not exercise jurisdiction over another.<sup>14</sup> Amnesty, like sovereign immunity, can immunize an individual from criminal prosecution for past offenses.<sup>15</sup> To understand exactly what amnesty is, and its role in impunity, it is necessary to look at the goals and reasons for granting amnesty.

### B. *Why States Grant Amnesty*

Historically, states in conflict considered amnesty a necessary means to end wars, to maintain tranquility in society, and to establish democracy or, at least, civilian rule.<sup>16</sup> Political actors often used amnesty as a bargaining tool to induce dictators to relinquish power and to promote a peaceful transition from military to civilian governments.<sup>17</sup> Often, a leader would relinquish power in exchange for amnesty that

<sup>11</sup> Noting that amnesty is just one form of impunity.

<sup>12</sup> Slye, *supra* note 6, at 171 (noting that amnesty involves forgetting facts and unaccountability).

<sup>13</sup> ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 96 (Times Books 1998); Douglas Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons From The Americas: Guidelines for International Response to Amnesties For Atrocities*, 59 *LAW & CONTEMP. PROBS.* 197, 198 (1996); Naomi Roht-Arriaza, *Addressing Human Rights Abuses: Truth Commissions and The Value of Amnesty*, 19 *WHITTIER L REV.* 325, 339-41 (1997) [hereinafter Roht-Arriaza, *Value of Amnesty*].

<sup>14</sup> See *The Schooner Exchange v. McFaddon & Others*, 11 U.S. (7 Cranch) 116 (1812) (concluding that "sovereign states waive the exercise of jurisdiction over one another in the interest of peaceful and mutually beneficial relations"); *RESTATEMENT (3d) OF FOREIGN RELATIONS LAW* § 702 (1986); Neil Boister & Richard Burchill, *The Implications of the Pinochet Decisions for the Extradition or Prosecution of Former South African Heads of State for Crimes Committed Under Apartheid*, 11 *AFR. J. INT'L & COMP. L.* 619, 619 (2000) (defining sovereign immunity as norm that sovereign state does not adjudicate on conduct of another).

<sup>15</sup> Scharf, *supra* note 7, at 508.

<sup>16</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 37 *I.L.M.* 1302, 1317 – 1322 (H.L. 1998-99) (Nov. 25, 1998); *Azanian Peoples Organization v. The President of the Republic of South Africa*, 1996 (4) *SALR* 637 (CC), ¶ 32 (concluding amnesty a tool for effective constructive transitions towards democratic order); *Rodriguez v. Uruguay*, *Hum. Rts. Comm.*, U.N. Doc. CCPR/C/51/D/322/1988, ¶ 12.2 (1994) (stating amnesty granted to consolidate democracy and assure peace). See also, Naomi Roht-Arriaza, *Conclusion: Combating Impunity*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 281, 299 (Naomi Roht-Arriaza ed., 1995) [hereinafter Roht-Arriaza, *Combating Impunity*].

<sup>17</sup> Roht-Arriaza, *Combating Impunity*, *supra* note 16, at 299-302 (noting amnesty is a bargaining chip available to mediators attempting to bring an end to international

would leave him immune from prosecution.<sup>18</sup> As an example, the United States helped broker an amnesty deal in Haiti, first to get President Raoul Cedras to step down and second, to restore the former elected President, Jean-Bertrand Aristide to power.<sup>19</sup> The international community<sup>20</sup> historically recognized even blanket amnesties, covering all types of crimes, in order to encourage the cessation of violence.<sup>21</sup> In Latin America, specifically, large numbers of declining military dictatorships, anxious to arrange their own impunity, proclaimed blanket amnesties during the 1970s and 1980s.<sup>22</sup> The United States remained silent regarding these grants of amnesty in order to encourage reconciliation and transition to democracy.<sup>23</sup> Outside of Latin America, states like South Africa, Germany, and Turkey have generally viewed amnesty as a necessary component of transition, national reconciliation, and peace.<sup>24</sup>

In addition, newly installed regimes, or those in transition, considered amnesty a viable option to handle human rights atrocities

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or internal conflict); Scharf, *supra* note 7, at 508-09; Roht-Arriaza, *Truth Commission, supra* note 1, at 314.

<sup>18</sup> Scharf, *supra* note 7, at 508.

<sup>19</sup> Emily W. Schabacker, *Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offenses*, 12 N.Y. INT'L L. REV. 1, 1 n.7 (1999).

<sup>20</sup> International community here is defined as States, and international actors such as the United Nations, and regional actors including the Inter-American Commission on Human Rights and the European Commission on Human Rights.

<sup>21</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *entered into force*, Dec. 7, 1978, U.N. Doc. A/32/144, Annex II (1977), *reprinted in* 16 I.L.M. 1442 (1977), article 6(5) (stating "[a]uthorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in armed conflict"); Roht-Arriaza, *Combating Impunity, supra* note 16, at 299-302; Michael Vickery and Naomi Roht-Arriaza, *Human Rights in Cambodia, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 246-248 (Naomi Roht-Arriaza ed., 1995) (describing attempts to broker amnesty in order to bring Khmer Rouge to peace agreement).

<sup>22</sup> Joinet Report, *supra* note 10, at 3; Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59-AUT LAW & CONTEMP. PROBS. 93, 93-4 (1996) (noting that South African and Guatemalan amnesty laws moved away from blanket pre-conviction amnesties that Latin American governments typically passed during 1970s and 1980s) [hereinafter Roht-Arriaza, *Thoughts on the Way Forward*].

<sup>23</sup> See U.S. Delegation Draft (rev.) to the ICC PrepCom (Aug. 1997) at 1 (suggesting to balance closing door on past conflict and encourage reconciliation and transition to democracy with U.S. obligation to prosecute. Also stating that amnesties are in interest of international peace and national reconciliation); NEIER, *supra* note 13, at 100; Scharf, *supra* note 7, at 508.

<sup>24</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 31, 35; Scharf, *supra* note 7, at 508 (noting U.N. brokered amnesties in Cambodia and South Africa were means of restoring peace and democratic government).

when a lack of judicial resources and experience made prosecutions impossible.<sup>25</sup> Regimes in transition or emerging from conflict often had fragile judiciaries with little experience overseeing the constitutionality of governmental policy.<sup>26</sup> Granting amnesty allowed newly created regimes to focus on building judicial and political structures, rather than straining those bodies with the prosecution of suspects.<sup>27</sup> Amnesty also became an important expression of self-determination and national sovereignty,<sup>28</sup> representing an expression of a political will to break with the atrocities of the past regimes. Domestic actors considered amnesty as the act of a sovereign, political body and thus a political question or concern, often not reviewable by the judiciary.<sup>29</sup>

Furthermore, governments assuming power after conflict considered amnesty a critical component of societal reconciliation.<sup>30</sup> Newly installed regimes often granted amnesty to former leaders to preserve the peace, or to prevent further hostilities between factions.<sup>31</sup> Many emerging regimes did not want to prosecute former repressors and human rights

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<sup>25</sup> HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1198 (Oxford Univ. Press 2000) (discussing how amnesty is often term of transfer from government in charge during period of massive violations to successor, and precluded trial for those responsible [using Chile as example]); Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 17 B.U. INT'L L.J. 269, 276 (1999) (noting that politically, lack of resources may make amnesty preferable to prosecution).

<sup>26</sup> Roht-Arriaza, *Truth Commissions*, *supra* note 1, at 314 (discussing how domestic court difficulty to stand against political decision of executive or legislature to enact amnesty due to judicial fragility and lack of experience).

<sup>27</sup> Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in TRUTH V. JUSTICE 235, 237-38 (Robert I. Rotberg & Dennis Thompson eds., 2000) (noting that building social institutions is critical in aftermath of mass atrocity).

<sup>28</sup> Naomi Roht-Arriaza, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 870-74 (1998) (discussing how amnesties were expression of legislative and executive power placing sovereign authority above international law) [hereinafter Roht-Arriaza, *Developing Jurisprudence*]; Schabacker, *supra* note 19, at 3 (discussing reluctance of international community to become involved with state's decision to grant amnesty domestically).

<sup>29</sup> Davis, *supra* note 5, at 1370 (concluding that immunities are fundamental characteristic of sovereign states in international system); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 878-79 (analyzing Latin American grants of amnesty and judicial challenges noting rulings that amnesties are political question).

<sup>30</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 17-18 (concluding that amnesty is seen as necessary to restore peace and democratic government in South Africa).

<sup>31</sup> Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet, 37 I.L.M. 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998); Diane F. Orentlicher, *Swapping Amnesty for Peace and The Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 713 (concluding that amnesties have implications for peace in countries emerging from conflict) [hereinafter Orentlicher, *Swapping Amnesty*]; Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict:*

abusers for fear of creating political backlash and increasing social tensions.<sup>32</sup> A newly installed regime, rather, wanted to distance itself from the atrocities of the prior regimes and provide a common starting point for the future.<sup>33</sup> Amnesty, then, allowed newly installed regimes to reconcile with previous leaders and opponents and put crimes in the past, paving the way for social reconciliation and construction.<sup>34</sup>

Notwithstanding these aims, the effect of and many states' ever-increasing use of amnesties has been to create impunity. This is in part because amnesties stifle the investigation and prosecution of crimes.<sup>35</sup> By preventing identification and investigation of perpetrators, amnesties may contradict democratic notions of accountability.<sup>36</sup> In 1985, the U.N. special rapporteur for impunity concluded that specific amnesties might aid destruction of democracy by impeding the establishment of a rule of law.<sup>37</sup> Neither the U.N. Commission for Human Rights nor states themselves any longer view blanket and sweeping amnesties favorably.<sup>38</sup> Article 10 of the proposed statute for the Special Court for Sierra Leone states that amnesty granted for crimes against humanity, serious

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*Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L. L. 316, 317 (1998) (concluding amnesties necessary in some instances to bring end to bloody conflict).

<sup>32</sup> Roht-Arriaza, *Combating Impunity*, *supra* note 16, at 299-302.

<sup>33</sup> Slye, *supra* note 6, at 183 (describing amnesty as providing clean break with past and providing common starting point for better future); Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L. L., 267, 274-75 (1994) (explaining need for amnesty provisions in ICTY statute).

<sup>34</sup> Joinet Report, *supra* note 10, ¶ 27; Minow, *supra* note 27, at 238-39.

<sup>35</sup> Joinet Report, *supra* note 10, ¶¶ 27-32; NEIER, *supra* note 13, at 96; Cassel, *supra* note 13, at 198-200 (discussing link between impunity and amnesty); Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 340-41 (analyzing relation between duties to prosecute and amnesty).

<sup>36</sup> Slye, *supra* note 6, at 179 (noting that accountability is critical part of reconciliation and preventing feelings that perpetrators are getting away and amnesty procedures must be designed to ensure accountability).

<sup>37</sup> Annual Report of the Human Rights Committee, U.N. GAOR, 51st Sess. Supp. No. 40, U.N. Doc. A/51/40 (1997). *See also*, Joinet Report, *supra* note 10, ¶ 5; *Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights*, Preliminary Report by Louis Joinet, Special Rapporteur, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/16 (1985) [hereinafter Joinet Amnesty Study]. *See also* Boister & Burchill, *supra* note 14, at 636 n.90.

<sup>38</sup> 1999 Report on Chile, Human Rights Watch at [www.hrw.org/press/2000/08/Pinochet.html](http://www.hrw.org/press/2000/08/Pinochet.html) (last visited 11/29/00), sec. IV & n.98 (noting that Inter-American Commission on Human Rights and U.N. bodies criticized a Peruvian amnesty for violating "the prohibition against amnesty laws covering crimes against humanity"); Roht-Arriaza, *Thoughts on the Way Forward*, *supra* note 22, at 94 n.6 (noting that Peruvian and Chilean lower courts found amnesties violated Geneva Conventions of 1949, Convention Against Torture and International Covenant on Civil and Political Rights; also stating that these treaties prohibited application of Chilean amnesty Decree 2191 of 1978).



violations of international law and the Geneva conventions “shall not bar prosecution by the Special Court.”<sup>39</sup> Today, then, states and the United Nations no longer unequivocally accept amnesty that prevents investigation and prosecution of crimes.

Amnesty, furthermore, can violate a state’s duties, spelled out in international and regional conventions, to afford victims a fair trial.<sup>40</sup> The U.N. Commission for Human Rights, in the 1994 case of *Rodriguez v. Uruguay*, ruled that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court.<sup>41</sup> The Human Rights Committee, the authoritative interpreter of the International Covenant for Civil and Political Rights (ICCPR), stated that the “right to an effective remedy” as set forth in ICCPR Article 2(3) requires effective judicial processes, prosecutorial mechanisms, and compensation.<sup>42</sup> A state must therefore consider amnesty in light of both legal and political realities. As these realities vary from state to state, so do the types of amnesties granted.<sup>43</sup>

### C. *Types of Amnesty*

There are three types of amnesty, self amnesty, amnesties granted to end political or military conflict, and amnesty in exchange for facts and information surrounding specific crimes. One type of amnesty is self-amnesty, which occurs when a head of state grants amnesty to herself,

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<sup>39</sup> *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000) (acting pursuant to Resolution 1315 establishing special court).

<sup>40</sup> Cassel, *supra* note 13, at 198; Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 862 (discussing how amnesties apply specifically to failure to provide judicial remedies or reparations for victims spelled out in treaties and customary international law principles).

<sup>41</sup> *Rodriguez v. Uruguay*, Hum. Rts. Comm., U.N. Doc. CCPR/C/51/D/322/1988, ¶ 12.2 (1994) (holding that Uruguay’s amnesty incompatible with ICCPR obligations to provide remedy); Vienna Declaration and Programme of Action A/CONF/157/24, Part II, para. 91 part 1 at 20; Joinet Report, *supra* note 10, principle 18.

<sup>42</sup> Roht-Arriaza, *Punishment*, *supra* note 8, at 33 n.63 (discussing provisions of ICCPR and UDHR requiring that concern with accountability and government authorities interpret remedy as prosecution). Article 2(3) of ICCPR states that each party undertakes “[t]o 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, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>43</sup> LOUIS HENKIN ET AL., *HUMAN RIGHTS* 631 (1999) (concluding that whether state punishes or grants amnesty involves political choices); Kent Greenawalt, *Amnesty’s Justice*, in *TRUTH V. JUSTICE* 189, 195-96 (Robert I. Rotberg & Dennis Thompson, eds., 2000) (discussing political and societal dimensions and resulting spectrum of amnesties).

typically just before leaving office.<sup>44</sup> The executive often issues this type of amnesty to ensure that when she is out of power she will not face prosecution.<sup>45</sup> Self-amnesties generally cover only specific individuals and immunize those individuals from prosecution of many or all of their crimes.<sup>46</sup> A self-amnesty is difficult to overturn, as it is a political grant, usually incorporated in the constitution, and often viewed as necessary to governmental transition.<sup>47</sup>

For example, in 1978, former Chilean head of state General Augusto Pinochet granted himself and other military leaders amnesty, via Decree 2191<sup>48</sup>, for crimes committed between 1973 and 1978.<sup>49</sup> Decree 2191

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<sup>44</sup> Jodi Horowitz, *Comment: Regina V. Bartle And The Commissioner Of Police For The Metropolis And Others Ex Parte Pinochet: Universal Jurisdiction And Sovereign Immunity For Jus Cogens Violations*, 23 FORDHAM INT'L L.J. 489, 489 (December 1999).

<sup>45</sup> *Id.*

<sup>46</sup> Decree Law No. 2191 (Apr. 18, 1978) (Chile), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978) (granting blanket amnesty for all crimes committed during the rise and rule of Pinochet); Lome Agreement, *supra* note 12, at (covering all crimes committed by the RUF). See Scharf, *supra* note 7, at 509 (describing amnesty in Haiti); Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti*, 31 TEX. INT'L L. J. 24 (1998); Slye, *supra* note 6, at 172 (concluding that contemporary amnesties apply to classes of people); Greenawalt, *supra* note 43, at 195 (discussing types of amnesty include blanket amnesties regarding crimes, automatic covering all individuals, and, in contrast, application by individuals for amnesties).

<sup>47</sup> In the case of Chile, President Patricio Aylwin could not overturn this amnesty, as he did not have support from Parliament nor the constitutional powers to overrule the amnesty. In this case, Pinochet was already out of power, Chile was in transition and Parliament approved the amnesty granted by the executive. "The Government has sought to have the Decree Law repealed, but the relevant constitutional provision requires that any initiatives concerning matters of amnesty be tabled from the Senate (Article 62 (2) of the Constitution), where a majority in favor does not exist because of the number of persons in that Chamber who were not elected by popular vote. Furthermore, the democratic government has called upon the Supreme Court to declare that the amnesty cannot be an obstacle to the investigation and punishment of crimes". Article 13 of Inter.-Am. Ct. H.R. REPORT N° 25/98 Cases 11.505; 11.532; 11.541; 11.546; 11.549; 11.569; 11.572; 11.573; 11.583; 11.585; 11.595; 11.652; 11.655; 11.657; 11.675 y11.705 CHILE\* April 7, 1998; Garay Hermosilla et al., cse no. 10.843, 1996 Inter.-Am. Ct. at 163-676 pp. 26-39 (1996). Instead, he left the amnesty decree in place, established an investigative commission, and apologized officially. Roht-Arriaza, *Truth Commissions*, *supra* note 1, at 313 (stating that President Aylwin set up Rettig Commission to investigate deaths and disappearances, under a policy of "all the truth and as much justice as possible"). See e.g., Cassel, *supra* note 13, at 208-217; Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 339-41, & nn.64-65 (discussing General Leopoldo Galtieri case where illegal domestic amnesty held it cannot bind courts of another state); Slye, *supra* note 6, at 184 (discussing how Argentinean amnesty law passed by military regime shortly before leaving power reversed by democratic legislature); Schabacker, *supra* note 19, at 10.

<sup>48</sup> Decree Law No. 2191 (Apr. 18, 1978) (Chile), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978).

covered the opposition as well as the military.<sup>50</sup> The military benefited most, however, as its personnel were responsible for most of the torture, disappearances and killings during Pinochet's rise to power.<sup>51</sup> Decree 2191, further, was a blanket amnesty, meaning that it covered all crimes committed by those who it protected,<sup>52</sup> and all proceedings against such crimes.<sup>53</sup> In the case of Chile, President Patricio Aylwin could not have overturned this amnesty, because he did not have support from Parliament nor the constitutional powers to overrule the amnesty.<sup>54</sup> Instead, he left the amnesty decree in place, established an investigative

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<sup>49</sup> *Id.* (granting amnesty to individuals who committed criminal acts between September 1973 and March 1978); *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (stating that in April 1978 the parliament passed a decree granting amnesty to all persons involved in criminal acts from September 11, 1973 to March 10, 1978). See Horowitz, *supra* note 44, at 489 (December 1999).

<sup>50</sup> Decree Law No. 2191 (Apr. 18, 1978) (Chile), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978); *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (stating that in April 1978 the parliament passed a decree granting amnesty to all persons involved in criminal acts from September 11, 1973 to March 10, 1978); Schabacker, *supra* note 19, at 10 n. 56.

<sup>51</sup> Jorge Mera, *Chile: Truth and Justice Under the Democratic Government, in IMPUNITY and HUMAN RIGHTS in INTERNATIONAL LAW and PRACTICE* 171, 180-181 (Naomi Roht-Arriaza ed., 1995); Schabacker, *supra* note 19, at 10 n.56.

<sup>52</sup> Current Dispatches from Sebastian Brett, Human Rights Watch at [www.hrw.org/campaigns/chile/98/dispatches.html](http://www.hrw.org/campaigns/chile/98/dispatches.html) (last visited 11/29/2000); Horowitz, *supra* note 44, at p. 494 & n.40. See also *Pinochet Hearings Resume, with Change of Tack*, Agence France-Presse, Jan, 19, 1999, available at 1999 WL 2531079.

<sup>53</sup> Decree Law No. 2191 (Apr. 18, 1978) (Chile), published in *Diario Oficial*, No. 30,042 (Apr. 19, 1978). Amnesties may be partial covering only civil or criminal proceedings, leaving other avenues open.

<sup>54</sup> In this case, Pinochet was already out of power, Chile was in transition and Parliament approved the amnesty granted by the executive. "The Government has sought to have the Decree Law repealed, but the relevant constitutional provision requires that any initiatives concerning matters of amnesty be tabled from the Senate (Article 62 (2) of the Constitution), where a majority in favor does not exist because of the number of persons in that Chamber who were not elected by popular vote. Furthermore, the democratic government has called upon the Supreme Court to declare that the amnesty cannot be an obstacle to the investigation and punishment of crimes". Article 13 of Inter.-Am. Ct. H.R. REPORT N° 25/98 Cases 11.505; 11.532; 11.541; 11.546; 11.549; 11.569; 11.572; 11.573; 11.583; 11.585; 11.595; 11.652; 11.655; 11.657; 11.675 y11.705 CHILE\* April 7, 1998; Garay Hermosilla et al., cse no. 10.843, 1996 Inter.-Am. Ct. at 163-676, pp. 26-39 (1996). See also, Cassel, *supra* note 13, at 215 & n.112 (concluding that self-amnesties granted by extra constitutional regimes are legal nullities); Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 341 nn.64-65 (discussing General Leopolo Galtieri case where illegal domestic amnesty held it cannot bind courts of another state); Schabacker, *supra* note 19, at 10.

commission, and apologized officially.<sup>55</sup> The Chilean government maintained that amnesty Decree 2191 was necessary to preserve fragile political stability during its transition to democracy.<sup>56</sup> Looking at how and why Pinochet came to power and granted his regime amnesty will bring the issues surrounding self-amnesty into clearer focus.

### 1. Chile: Amnesty Decree 2191

In 1973, as Commander-in-Chief of the army Pinochet led a junta of conservative military officers who overtook President Salvador Allende's elected socialist government.<sup>57</sup> Pinochet ruled as President of Chile for the next seventeen years.<sup>58</sup> For political reasons, Pinochet's government and military eliminated subversives and leftists, detaining and killing several thousand people.<sup>59</sup> Human rights abuses include disappearances, executions, the use of undue force, torture, and terrorist acts.<sup>60</sup> Between 1977 and 1980, Pinochet's government no longer considered itself in a state of siege, and human rights violations declined.<sup>61</sup> In 1978, Pinochet

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<sup>55</sup> Roht-Arriaza, *Truth Commissions*, *supra* note 1, at 313 (stating that President Aylwin set up Rettig Commission to investigate deaths and disappearances, under a policy of "all the truth and as much justice as possible"); Schabacker, *supra* note 19, at 10.

<sup>56</sup> *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (noting amnesty was to maintain "general tranquility, peace and order"); Schabacker, *supra* note 19, at 11 & n.64 (noting that the amnesty in Chile was necessary to preserving fragile political stability during transition to democracy).

<sup>57</sup> *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M 430, 432-33, 2 W.L.R. 827 (H.L. 1999) (March 24, 1999); Bradley, *supra* note 5, at 2132; Davis, *supra* note 5, at 1360. Current Biography Yearbook 312, 314 1974 edition.

<sup>58</sup> *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M 430, 432-33, 2 W.L.R. 827 (H.L. 1999) (March 24, 1999); Bradley, *supra* note 5, at 2130.

<sup>59</sup> Bradley, *supra* note 5, at 2132. It is estimated that over 3000 Chilean dissidents disappeared or were executed. See Davis, *supra* note 5, at 1359 & n. 27; 1999 REPORT CHILE, HUMAN RIGHTS WATCH at <http://www.hrw.org/hrw/reports/1999/chile> (stating that Rettig Commission documented 3,197 cases) (last visited Nov. 29, 2000); Laure Goering, *Chileans See a Monster and Miracle Worker: Pinochet's Arrest Reopens a Nation's Deep Wounds*, CHI. TRIB., Oct. 22, 1998, at 1; Diane F. Orentlicher, *Putting Limits on Lawlessness; From Nuremberg to Pinochet*, WASH. POST, Oct. 25, 1998, at C01 [hereinafter Orentlicher, *Limits on Lawlessness*]. For a discussion of the extraordinary levels of state sponsored violence and the Latin American dirty wars against subversives see Nehal Bhuta, *Justice without Borders? Prosecuting General Pinochet*. *R v. Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet Ugarte*, 23 MELB. U. L. REV. 499, 502 (1999).

<sup>60</sup> Current Dispatches from Sebastian Brett, Human Rights Watch at [www.hrw.org/campaigns/Chile/98/dispatches.html](http://www.hrw.org/campaigns/Chile/98/dispatches.html) (last visited 11/29/2000).

<sup>61</sup> *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*; 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99)

drafted Decree 2191 which provided blanket amnesty for criminal actions between 1973 and 1978.<sup>62</sup> Parliament passed this decree on April 19, 1978, incorporating it into the Chilean constitution.<sup>63</sup> Relinquishing his role as head of state in 1990, Pinochet appointed himself Commander-in-Chief of the Chilean military until March 1998; at that point he then appointed himself Senator for Life.<sup>64</sup>

In October 1998, Pinochet traveled to Great Britain on a diplomatic passport to have<sup>65</sup> British authorities arrested Pinochet subject to a provisional warrant issued by a British magistrate.<sup>66</sup> This warrant, based on an extradition warrant issued by Spanish Judge Balthasar Garzon, covered various crimes against humanity including kidnapping, torture, disappearances, and extralegal executions of Chilean and Spanish citizens in Chile.<sup>67</sup> On March 24, 1999, the House of Lords held that Pinochet was subject to extradition,<sup>68</sup> citing the Convention Against

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(Nov. 25, 1998) (stating that in April 1978 the parliament passed a decree granting amnesty to all persons involved in criminal acts from September 11, 1973 to March 10, 1978, at a time when peace and order were aims). *See also*, Bhuta, *supra* note 59, at 502, 508-09; Horowitz, *supra* note 44, at 492 and note 18.

<sup>62</sup> Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet; 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (stating that in April 1978 the parliament passed a decree granting amnesty to all persons involved in criminal acts from September 11, 1973 to March 10, 1978. The purpose was to maintain "general tranquility, peace and order"). *See also*, Bhuta, *supra* note 59, at 502.

<sup>63</sup> Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet; 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (opinion Lord Lloyd of Berwick); Horowitz, *supra* note 44, at 495 & n 46, 47.

<sup>64</sup> Bradley, *supra* note 5, at 2132; Davis, *supra* note 5, at 1360.; Bhuta, *supra* note 59, at 510-11.

<sup>65</sup> Davis, *supra* note 5, at 1361.

<sup>66</sup> Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet; 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998) (opinion Lord Lloyd of Berwick). *See also*, Davis, *supra* note 5, at 1357; Horowitz, *supra* note 44, at 498.

<sup>67</sup> Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet, 38 I.L.M 430, 42, 2 W.L.R. 827 (H.L. 1999) (March 24, 1999); *Spanish Judge Wages Campaign on Latin American Atrocities*, CHI. TRIB., Oct 21, 1998, at 4. *See Bradley, supra* note 5, at 2132; Orentlicher, *Limits on Lawlessness, supra* note 59 at C1 (noting that the inquiry broadened beyond simply victims of Spanish nationality).

<sup>68</sup> Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet, 38 I.L.M 430, 440, 446 2 W.L.R. 827 (H.L. 1999) (March 24, 1999). In October 1998 England's High Court found Pinochet immune from arrest and extradition due to his status as a former head of state. In re Pinochet Ugarte, 38 I.L.M. 68 (Q.B. Div'l Ct. 1998). In November 1998 the House of Lords overruled the High Court 3-2 and declared that Pinochet was not immune from extradition. Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet; 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>69</sup> as the ground for extradition.<sup>70</sup> The six-to-one ruling rejected sovereign immunity as a bar to extradition.<sup>71</sup>

On March 2, 2000, Pinochet returned to Chile.<sup>72</sup> In May 2000, Chile's lower courts abrogated Pinochet's parliamentary immunity.<sup>73</sup> On August 8, 2000, the Chilean government stripped Pinochet of the final vestige of impunity: his status as Senator for Life.<sup>74</sup> The former dictator now awaits trial in Chile.<sup>75</sup> His age and ailing health may prevent prosecution, but the fact that he awaits trial is a significant breakthrough in international law. Pinochet is the first former head of state arrested by another state and extradited for human rights crimes.<sup>76</sup> The question remains as to whether, if the trial takes place, the 1978 amnesty decree will protect Pinochet.

## 2. Internationally Brokered Amnesty

Another type of amnesty is that negotiated during peace agreements. Both parties to the dispute or international parties broker

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The House of Lords was forced to vacate this opinion when it learned that one of the law lords voting in favor of extradition had close ties with Amnesty international. *Ex parte Pinochet Ugarte* (No. 2) (1999) 2 W.L.R. 272 (Eng.). The House of Lords thus heard the case again in *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M 430, 2 W.L.R. 827 (H.L. 1999) (March 24, 1999).

<sup>69</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 [hereinafter *Convention Against Torture*].

<sup>70</sup> *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M 430, 2 W.L.R. 827, 839, 869, 875 (H.L. 1999) (March 24, 1999); Bhuta, *supra* note 59, at 519-22.

<sup>71</sup> *Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet*, 38 I.L.M 430, 2 W.L.R. 827 (H.L. 1999) (March 24, 1999); Bradley, *supra* note 5, at 2139 n 41.

<sup>72</sup> *The Pinochet Prosecution*, Human Rights Watch at <http://www.hrw.org/Campaigns/chile98/index.html> (last visited 11/29/2000).

<sup>73</sup> *Chilean Supreme Court Rejects Pinochet Immunity*, Human Rights Watch at <http://www.hrw.org/press/2000/08/Pinochet.html> (last visited Nov. 29, 2000).

<sup>74</sup> Tina Rosenberg, *In Chile the Balance Tips Toward the Victims*, N.Y. TIMES, Aug. 22, 2000, at A20.

<sup>75</sup> Clifford Krauss, *Pinochet's Arrest Ordered by Judge*, N.Y. TIMES, DEC. 2, 2000, at A1; Rosenberg, *supra* note 69, at A20; *Chilean Supreme Court Rejects Pinochet Immunity*, Human Rights Watch at <http://www.hrw.org/press/2000/08/Pinochet.html>.

<sup>76</sup> Reed Brody, *One year later, the Pinochet Precedent puts Tyrants on Notice*, THE BOSTON GLOBE, Oct. 14, 1999, at A19.

this type of amnesty.<sup>77</sup> Its purpose is often to induce human rights abusers to relinquish power or to stop committing atrocities.<sup>78</sup> The most recent example of this was the 1999 grant of amnesty to Foday Sankoh of Sierra Leone in exchange for his signature to the Lome Peace Agreement to cease hostilities.<sup>79</sup> Typically, these grants of amnesty cover all crimes.<sup>80</sup> Like self-amnesty, this amnesty grant is difficult to overturn, as it can have both domestic and international legitimacy and is a war termination device.<sup>81</sup>

### 3. South Africa: Amnesty and the TRC

Judicial or political bodies also may grant amnesty in exchange for confessions to crimes.<sup>82</sup> This type of amnesty is not brokered as an incentive to lay down weapons or cease hostilities, rather, it often occurs after the fact, in order to allow investigation of alleged human rights abuses in a country.<sup>83</sup> The model example is the South African truth and reconciliation regime.<sup>84</sup>

South Africa considered the role of amnesty in international law in 1996 when it created the Truth and Reconciliation Commission (TRC).<sup>85</sup> As Nelson Mandela assumed the Presidency, there was discussion of what to do with the former apartheid leaders.<sup>86</sup> The African National

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<sup>77</sup> Wiessner & Willard, *supra* note 31, at 317 (concluding amnesties necessary in some instances to bring end to bloody conflict); *See also* text accompanying note 31; Cassel, *supra* note 13, at 198.

<sup>78</sup> *Id.*; Scharf, *supra* note 46, at 508.

<sup>79</sup> ECOWAS: Peace Agreement between the Government of Sierra Leone and The Revolutionary United Front of Sierra Leon (RUF/SL), July. 7, 1999, *reprinted in* 11 AFR. J. INT'L & COMP. L 557 (1999) [hereinafter ECOWAS].

<sup>80</sup> Greenawalt, *supra* note 43, at 195-96 (discussing spectrum of amnesties); Cassel, *supra* note 13, at 198 (discussing amnesty and blanket impunity).

<sup>81</sup> *See* Roht-Arriaza, *Truth Commissions*, *supra* note 1, at 314; Scharf, *supra* note 46, at 507.

<sup>82</sup> Promotion of National Unity and Reconciliation Act 34 of 1995, Sub. 3 of sec. 8.

<sup>83</sup> Orentlicher, *Swapping Amnesty*, *supra* note 31, at 714.

<sup>84</sup> Minow, *supra* note 27, at 239; Slye, *supra* note 6, at 171 (concluding South African amnesty was sophisticated providing truth, reconciliation and accountability); Orentlicher, *Swapping Amnesty*, *supra* note 31, at 713-14.

<sup>85</sup> Republic of South Africa Promotion of National Unity and Reconciliation Bill, Bill 30-95, 1994. For discussion of TRC see generally Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563 (1999). *See also* Lynn Berat, *South Africa: Negotiating Change?* in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, 267, 271-74 (Naomi Roht-Arriaza, 1995) (discussing consideration of and discussion surrounding amnesty); Alex Boraine, *Truth And Reconciliation in South Africa*, in TRUTH V. JUSTICE, 141, 143-45 (Robert I. Rotberg and Dennis Thompson eds., 2000) (discussing process South Africa pursued in appointing TRC and its provision for limited amnesty).

<sup>86</sup> NEIER, *supra* note 13, at 104 (mentioning that some supporters of amnesty considered it critical component of peaceful transition); Greenawalt, *supra* note 43, at

Congress (ANC) wanted to provide a full account of atrocities, give justice to the victims, and punish the apartheid leaders.<sup>87</sup> However, those who had been security officials during the apartheid era wanted blanket amnesty.<sup>88</sup> Those officials had defended the negotiation process, and wanted amnesty in return for their continued loyalty to the emerging state.<sup>89</sup> Ultimately, South Africa chose an amnesty process<sup>90</sup> to help facilitate the difficult transition to democracy.<sup>91</sup>

The Truth and Reconciliation Act, in establishing the TRC,<sup>92</sup> contained a provision allowing amnesty in exchange for full disclosure of

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192 n.15 (noting that high officials in ruling national party said they would not surrender power without amnesty while Mandela feared no amnesty would be intensification of violent struggle); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 856 (noting that amnesty was discussed during 1993 negotiations with de Klerk government pushing for blanket amnesty); Sachs, *supra* note 85, at 1565-66 (commenting on each side's view in amnesty debate). *See generally* Berat, *supra* note 85 (tracing amnesty negotiations between government and political actors).

<sup>87</sup> Berat, *supra* note 85, at 272 (noting that ANC indicated "that any amnesty would have to be accompanied by a full disclosure of the past activities of the security forces, including their complicity in factional violence in the townships"); Boraine, *supra* note 85, at 143 (discussing how ANC wanted to both "call to account" those responsible, and according to Thabo Mbeki, then Deputy President of South Africa, "simultaneously prepare for a peaceful transition"); Sachs, *supra* note 85, at 1566.

<sup>88</sup> Berat, *supra* note 85, at 272 (discussing security officials' goals and desire for blanket amnesty); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 856 (noting how De Klerk government wanted blanket amnesty); Sachs, *supra* note 85, at 1566 (stating that former President de Klerk had promised security forces that they would get amnesty in new South Africa).

<sup>89</sup> Boraine, *supra* note 85, at 143-44 (noting that in interview then Deputy President of South Africa made it clear to President Nelson Mandela "that the senior generals of the security forces had personally warned him of dire consequences if members of the security forces had to face compulsory trials and prosecutions following the election" and that they "threatened to make a peaceful election totally impossible"); Sachs, *supra* note 85, at 1566 (observing how military wanted amnesty in exchange for loyalty to peace process); *see also* Berat, *supra* note 85, at 272-77 (discussing procedures surrounding proposals of amnesties for South Africa).

<sup>90</sup> Sachs, *supra* note 85, at 1566 (noting ANC was not in a position to defend the elections with no inside people in the security forces); *see*, Boraine, *supra* note 85, at 143 (quoting Richard Goldstone, a judge on Constitutional Court of South Africa, who called TRC amnesty as compromise and "bridge from the old to the new"); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 856 n.111 (stating that Parliament enacted Truth and Reconciliation Act of 1995 to deal with amnesty).

<sup>91</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶ 32 (stating that amnesty was tool for "effecting a constructive transition towards democratic order"); NEIER, *supra* note 13, at 104 (stating that proponents of amnesty in South Africa claimed that amnesty was price black majority had to pay for peaceful transition to democracy); Boraine, *supra* note 85, at 150 (discussing aims of South Africa's decision to adopt amnesty including reconciliation and to allow for a "free and fair election and a relatively peaceful transition").

<sup>92</sup> Promotion of National Unity and Reconciliation Act 34 of 1995; *see also* Berat, *supra* note 85, at 271-80 (discussing process of enacting TRC legislation); Boraine



the facts surrounding politically motivated crimes committed under the apartheid regime.<sup>93</sup> The TRC does not grant amnesty, however, for crimes committed for reasons of personal malice or gain.<sup>94</sup> In determining whether to grant amnesty, the Commission considers: (1) whether the act was proportional to political objectives, (2) whether individuals disclosed all facts fully, and (3) the nature of the atrocity.<sup>95</sup> The commissioners grant amnesty only in exchange for the truth.<sup>96</sup>

Amnesty in exchange for truth is different than self- or blanket amnesty. Unlike self-amnesty, in which the executive leads, in the South African model, the parliament drafted the truth-amnesty provision.<sup>97</sup> Further, unlike Chile's Decree 2191, the South African amnesty process

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*supra* note 85, at 144-46 (describing enactment and parliamentary legislation surrounding TRC).

<sup>93</sup> Promotion of National Unity and Reconciliation Act, *supra* note 11, Sub. 3 of § 20 (outlining amnesty criteria); *Id.*, Subs. 7-10 of § 20 (stating effect of amnesty include no criminal or civil liability); NEIER, *supra* note 13, at 104-05; Boraine, *supra* note 85, at 148 (outlining features in amnesty provisions to limit impunity including requiring "very detailed information relating to specific human rights violations" and full disclosure in order to qualify for amnesty); Boister and Burchill, *supra* note 14, at 620 (stating that those involved in South African conflict could seek amnesty "for human rights violations committed for political purposes"); Sachs, *supra* note 85, at 1566-67 (quoting amnesty provision "amnesty shall be granted in relation to crimes committed in the course of the political conflicts a of the past").

<sup>94</sup> Promotion of National Unity and Reconciliation Act, *supra* note 11, § 20(3) (outlining important relationship between act perpetrated and object pursued); *see also* NEIER, *supra* note 13, at 105 (noting TRC commission denied amnesty if it determined act was committed "for reasons of personal malice or for personal gain"); Boraine, *supra* note 85, at 149 (noting that amnesty criteria to determine if act is associated with political objective does not includes those acts done for personal gain or out of personal malice or spite).

<sup>95</sup> Promotion of National Unity and Reconciliation Act, *supra* note 11, preamble, §§ 4, 18 (empowering commission to consider whether to act in accordance with political objective); NEIER, *supra* note 13, at 105 (discussing judicial evaluation and aim of truth); Boraine, *supra* note 85, at 148-49 (outlining amnesty criteria to include consideration of legal and factual nature surrounding each act); Greenawalt, *supra* note 43, at 195 (noting that TRC amnesty "covers only crimes that have been fully disclosed"); Boister & Burchill, *supra* note 14, at 620 n.11 (noting that amnesty provision allowed amnesty for full disclosure of relevant facts); Sachs, *supra* note 85, at 1569 (stating how amnesty granted for acts proportional to political objective).

<sup>96</sup> Promotion of National Unity and Reconciliation Act, *supra* note 11, preamble (stating how South Africa recognizes that it is "necessary to establish the truth in relation to past events"); Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶ 32; *see* Boraine *supra* note 85, at 150-51 (discussing how TRC committed itself to truth); Sachs, *supra* note 85, at 1569 (stating that amnesty commission granted amnesty for telling whole truth). It is important to note that the amnesty committee was separated from the hearings, victims committee, and reparations.

<sup>97</sup> Promotion of National Unity and Reconciliation Act 34 of 1995; Sachs, *supra* note 85, at 1566-67.

is conditional on full disclosure of the truth.<sup>98</sup> Amnesty seeking-individuals must present themselves to the TRC and fully disclose all relevant facts in order for TRC to grant amnesty.<sup>99</sup> Persons who do not appear before the commission, such as ex-Presidents P.W. Botha and F.W. De Klerk, will not receive amnesty.<sup>100</sup> Unlike blanket amnesties, the South African model is individualized and covers only those crimes that furthered and were proportional to a political objective.<sup>101</sup> The disclosure of the truth both enables the TRC to identify other suspects and provides the families of those disappeared or killed with a sense of closure and acknowledgment.<sup>102</sup> A conditional amnesty, then, can meet peacekeeping, nation-building, and reconciliation objectives of amnesty as well as the requirements of international accountability.<sup>103</sup>

### III. INTERNATIONAL LAW AFFECTING DOMESTIC GRANTS OF AMNESTY

#### A. *International Legal Obligations to Prosecute*

In deciding whether to grant amnesty, a state must determine its obligations under international law to prosecute or investigate an individual suspected of international crimes. International law obligations arise primarily out of treaty obligations and customary international law.<sup>104</sup>

#### 1. Treaty Obligations

State obligations to prosecute international crimes arise from treaty provisions that require a state to extradite or prosecute.<sup>105</sup> An illustrative

<sup>98</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 sub. 3 of sec. 20.

<sup>99</sup> Boister & Burchill, *supra* note 14, at 1566.

<sup>100</sup> NEIER, *supra* note 13, at 104; Boister & Burchill, *supra* note 14, at 622. Chile's Decree 2191, however, covered the military and opposition leaders as well as Pinochet. Regina v. Bartle and the Comm'r of Police for the Metropolis and Others Ex Parte Pinochet; 37 I.L.M 1302, 1317, 3 W.L.R. 1456, 4 All E.R. 897 (H.L. 1998-99) (Nov. 25, 1998).

<sup>101</sup> Promotion of National Unity and Reconciliation Act 34 of 1995; Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶ 32.

<sup>102</sup> Sachs, *supra* note 85, at 1567; Minow, *supra* note 27, at 238 (concluding that Truth and Reconciliation Commission gave public acknowledgement and attention to survivors).

<sup>103</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 31-5 (discussing how amnesty can assist reconciliation and process in South Africa). For discussion of the TRC's ability to achieve reconciliation and accountability, see generally Boraine, *supra* note 85; Slye, *supra* note 6.

<sup>104</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102, 702 (1986).

<sup>105</sup> Aut judicare is Latin for the duty to prosecute. M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUD JUDICARE: THE DUTY TO EXTRADITE OR

example is the Convention Against Torture,<sup>106</sup> which requires a state “under whose jurisdiction a person alleged to have committed any offence” . either to extradite the person or to “submit the case to its competent authorities for the purpose of prosecution.”<sup>107</sup> Similar obligations exist in other treaties.<sup>108</sup> The Genocide Convention, for example, contains clauses outlining an obligation to investigate and bring to justice those committing specified crimes.<sup>109</sup>

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PROSECUTE IN INTERNATIONAL LAW , 3 (1995); See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 (1986) (stating that states accept treaty or customary international law obligations to respect international law); Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE at 25 (Naomi Roht-Arriaza ed., 1995) (defining one purpose of *aut dedere aut judicare* is to assure criminals will not be granted safe haven) (hereinafter Roht-Arriaza, *Sources*).

<sup>106</sup> Convention Against Torture, *supra* note 69.

<sup>107</sup> *Id.* art. 7 (also article 6 establishing a duty to detain alleged offenders and under article 2 to criminalize acts of torture). See also, Greenawalt, *supra* note 43, at 193 (noting that *Convention Against Torture* contains a duty to prosecute). Article 4 crimes include all acts of torture. However, commentators claim that the *Convention Against Torture* allows for amnesty, as it does not explicitly require prosecution but only to submit a case to authorities. Scharf, *supra* note 46; See Christopher Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT’L L. AND POL’Y 591, 606 (stating that *Convention Against Torture* does not explicitly mandate prosecution for all alleged cases of torture).

<sup>108</sup> I Geneva Convention, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31; II Geneva Convention, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85; III Geneva Convention, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 75; IV Geneva Convention, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article I of the Inter-American Convention to Prevent and Punish Torture requires states to punish torture in accordance with the convention and Article 13 requires parties to prosecute. Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser./L./V/II.82 doc.6 rev.1 at 83 (1992) arts. 1, 13. [hereinafter *Inter-American Torture Convention*]. Likewise, article 2 of the Organization of American States (OAS), for example, requires a state that does not extradite an accused to try to prosecute those crimes domestically. Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force Dec.3, 1951, amended 721 U.N.T.S. 324, entered into force Feb. 27, 1980, art. 2. In 1989, the U.N. Convention and Principles on the Effective Prevention and investigation of Extra Legal Arbitrary and Summary Executions, and the Declaration on Protection of all Persons from Enforced Disappearances contain clauses requiring extradition or prosecutions of offenders. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 133, U.N. GAOR, 47th Sess., Supp. No. 49 at 207, U.N. Doc. A/47/49 (1992). See also, Boister & Burchill, *supra* note 14, at 626-630 & n. 45 (2000) (discussing Convention Against Torture obligation to prosecute).

<sup>109</sup> BASSIOUNI & WISE, *supra* note 105, at 98-99. See also, Roht-Arriaza, *Some Thoughts on the Way Forward*, *supra* note 22, at 995 (noting that U.N. Human Rights

An obligation to prosecute may be inferred from specific provisions that require a right to remedy or judicial processes. Article IV of U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>110</sup>, for example, requires states party to the convention to remove domestic limitations “to the prosecution and punishment. . .[of] war crimes and crimes against humanity.”<sup>111</sup> The Inter-American Commission on Human Rights has interpreted the “right to remedy” language in the American Convention on Human Rights to include a duty to investigate and prosecute crimes.<sup>112</sup> Because a treaty only binds states that have ratified the treaty, however, the effect of these provisions is limited.<sup>113</sup>

## 2. Customary International Law

In contrast, principles of customary international law apply to all states.<sup>114</sup> It creates obligations to prosecute international crimes.<sup>115</sup> Customary international law is defined as those norms or customs that states generally and consistently follow<sup>116</sup> and are performed out of a sense of legal obligation.<sup>117</sup> The obligations to prosecute must be drawn, then, from state practice.<sup>118</sup> Evidence of state practice may be found in the treaty provisions discussed above, and also in states’ case law and in the practice of U.N. bodies.<sup>119</sup>

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Commission finds the ICCPR requires states to investigate allegations of human rights violations, bring to justice and ensure non-repetition).

<sup>110</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73, 8 I.L.M. 68.

<sup>111</sup> *Id.* See also, BASSIOUNI & WISE, *supra* note 105, at 288 (reprinting certain sections relating to obligation to prosecute).

<sup>112</sup> See Case 10.287, Inter-Am. C.H.R. 82, OEA/ser. L./V./II.83, doc. 14 (1993). See Case 10.029, Inter-Am. C.H.R. 82, OEA/ser. L./V./II.83, doc. 14 (1993). Case 10.147, Inter-Am. C.H.R. 82, OEA/ser. L./V./II.83, doc. 14 (1993). See also, Roht-Arriaza, *Sources*, *supra* note 105, at 34 (concluding that if human rights instruments do not specify how to protect rights or obligations to investigate or prosecute, monitoring authorities and courts may require investigation, prosecution and compensation).

<sup>113</sup> Naomi Roht-Arriaza, *Nontreaty Sources of the Obligation to Investigate and Prosecute*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 39 (Naomi Roht-Arriaza ed., 1995) [hereinafter Roht-Arriaza, *Nontreaty Sources*].

<sup>114</sup> BASSIOUNI & WISE, *supra* note 105, at 20. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, 702 (1986).

<sup>115</sup> BASSIOUNI & WISE, *supra* note 105, at 20-25 (discussing how *aut dedere aut judicare* became a principle of customary international law).

<sup>116</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986). See also, Roht-Arriaza, *Nontreaty Sources*, *supra* note 113, at 39 & n 2 (describing that state practice must be widespread although not universal).

<sup>117</sup> Roht-Arriaza, *Nontreaty Sources*, *supra* note 113, at 39.

<sup>118</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102, 702 (1986).

<sup>119</sup> Roht-Arriaza, *Nontreaty Sources*, *supra* note 113, at 40.

National and regional case law suggests that obligations to prosecute arise from duties to respect human rights. The Inter-American Court has stated that the duty to respect human rights includes duties to investigate and to prosecute those responsible for human rights violations.<sup>120</sup> In the leading case, *Velasquez-Rodriguez*<sup>121</sup> the court dealt with the detention and disappearance of a Honduran university student.<sup>122</sup> The Inter-American Commission of Human Rights had filed a petition alleging numerous violations of American Convention on Human Rights:<sup>123</sup> article 4, the right to life; article 5, the right to humane treatment; and article 7, the right to personal liberty.<sup>124</sup> The court held that the evidence was "sufficient to reject the Government's preliminary objection that the case is inadmissible because domestic remedies were not exhausted."<sup>125</sup>

Having accepting jurisdiction, the court next discussed whether the kidnappings and disappearances were systematic, attributable to the armed forces of Honduras, and tolerated by the government.<sup>126</sup> The court then, accepting testimony of three members of the armed forces, witnesses and press clippings<sup>127</sup>, held that the armed forces had carried out the kidnapping of the student, and that this kidnapping fell within the systematic practice of disappearances.<sup>128</sup> The court held that the government of Honduras had violated articles 4, 5, and 7 of the

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<sup>120</sup> *Velasquez-Rodriguez*, Inter-Am. Ct. H.R. (ser. C), No. 4, ¶ 174, at 325; Scharf, *supra* note 7, at 517-518 & n.74 (noting that the American Convention on Human Rights' obligation to ensure implies a duty to hold specific violators accountable. Also laying out five obligations include investigating identity of victims and perpetrators, taking affirmative steps to ensure human rights abuses do not recur, and providing reparation and compensation to victims and punish those guilty); Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 334 & n.34-35.

<sup>121</sup> *Velasquez-Rodriguez*, Inter-Am. Ct. H.R. (ser. C), No. 4, 28 I.L.M 291 (1989). See also, Roht-Arriaza, *Sources*, *supra* note 105, at 30-32.

<sup>122</sup> *Velasquez-Rodriguez*, 28 I.L.M ¶ 3, at 294.

<sup>123</sup> American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ser.L./V./II.82 doc.6 rev.1 at 25 (1992) [hereinafter American Convention].

<sup>124</sup> *Id.* ¶ 2, at 294.

<sup>125</sup> *Id.* ¶74, 81, at 307. The Inter-American Court in *Velasquez-Rodriguez* examined the evidence of three habeas corpus petitions filed, relatives filing complaints on two occasions. The response was nothing or the complaints dismissed. *Id.* ¶ 74, at 307. The court concluded earlier in the opinion that remedies must not only exist but be adequate and effective: "if a remedy is not adequate in a specific case, it obviously need not be exhausted." *Id.* ¶ 64, at 305.

<sup>126</sup> *Id.* ¶ 147-49, at 321.

<sup>127</sup> *Id.* ¶ 82, at 309.

<sup>128</sup> *Id.* The court acknowledged that in allegations of disappearances circumstantial evidence is important as this type of repression involves suppressing information regarding the whereabouts and fate of the victim. *Id.* ¶ 131, at 316. Accepting circumstantial evidence, testimony by military officials and witnesses the court held that the disappearances were carried out in a systematic manner and followed a

American Convention.<sup>129</sup> The court ruled that kidnapping was an arbitrary deprivation of liberty without the appropriate procedures to review the legality of arrest, and thus violated article 7, which ensures human dignity.<sup>130</sup> In the court's view, prolonged isolation and deprivation of communication constituted cruel and inhuman treatment and thus violated article 5 of the American Convention, which recognizes the right to integrity of the person.<sup>131</sup> The court also held that "the practice of disappearances often involves secret execution without trial" and thus violates the right to life recognized in article 4.<sup>132</sup> The court further held that the fact that the student remained disappeared seven years later "creates a reasonable presumption that he is dead," and thus violated article 4.<sup>133</sup>

The Inter-American Court ruled that the existence of a systematic practice of disappearances represented a state's violation of the right to guarantee rights recognized in the convention.<sup>134</sup> The court looked at Article 1(1) of the American Convention which provides that the states "undertake to respect the rights and freedoms recognized herein and to ensure to all persons. the free and full exercise of those rights and freedoms."<sup>135</sup> For the Inter-American Court, Article 1(1) was essential to determining if a violation of the American Convention on Human Rights could be imputed to a state party. For the court, the duty "to ensure" required the prevention, investigation, and punishment of any violation of rights recognized in the convention.<sup>136</sup> The court described these duties specifically: states must seriously investigate and identify those responsible, impose an appropriate punishment, and adequately compensate the victims.<sup>137</sup> These duties, the court ruled, made impunity a breach of the convention as well. The court unanimously held that Honduras had a duty to investigate and to punish human rights abuses.<sup>138</sup>

The European human rights system endorsed the duties laid out in *Velasquez*. In the 1998 case of *Kurt v. Turkey*,<sup>139</sup> the European Court of Human Rights ruled that states have an obligation to investigate,

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similar pattern, beginning as with Manfredo Velasquez, a kidnapping in broad daylight. *Id.* ¶ 147-48, 182, at 321.

<sup>129</sup> *Id.* ¶ 185, 194, at 328.

<sup>130</sup> *Id.* ¶ 155, at 322.

<sup>131</sup> *Id.* ¶ 156, at 322.

<sup>132</sup> *Id.* ¶ 157, at 323.

<sup>133</sup> *Id.* ¶ 147e, at 321.

<sup>134</sup> *Id.* ¶ 158, at 323.

<sup>135</sup> *Id.* ¶ 161, at 323; American Convention, *supra* note 123, art. 1(1).

<sup>136</sup> Velasquez-Rodriguez, 28 I.L.M., ¶ 166, at 324.

<sup>137</sup> *Id.* ¶ 174, at 326.

<sup>138</sup> *Id.* ¶¶ 185-194, at 328-29; Velasquez-Rodriguez, Judgment of July 21, 1989 Compensation, Inter-Am Ct. H.R. 7 (ser. C). ¶¶ 49-52 (1989) (holding that remedy involves lost income and moral damages).

<sup>139</sup> *Kurt v. Turkey*, 3 Eur. Ct. H.R. 1152, 27 E.H.R.R. 91 (1998).

prosecute and punish human rights violations.<sup>140</sup> The European Commission of Human Rights interpreted the ICCPR to require investigation, prosecution and redress.<sup>141</sup>

Additionally, the U.N. Human Rights Committee considering disappearances in light of the ICCPR, held that states have duties to investigate, punish, and compensate.<sup>142</sup> In the case of *Quinteros v. Uruguay*, the U.N. Human Rights Committee held that the authorities of Uruguay were responsible for a woman's disappearance.<sup>143</sup> Article 4(2) of the Optional Protocol to the ICCPR provides that after receiving an allegation of a breach of the ICCPR, "the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that state."<sup>144</sup> The Human Rights Committee thus held that under article 4(2) of the Optional Protocol, that "the Government of Uruguay should take immediate and effective steps" to establish what happened, bring to justice those responsible, to pay compensation for the wrongs suffered, and to ensure that similar violations do not occur in the future.<sup>145</sup> In two subsequent cases, the Human Rights Committee reiterated a state's obligation to investigate and punish.<sup>146</sup>

The state practices that make up the body of customary international law consist not only of judicial decisions, but also human rights reporting.<sup>147</sup> The United Nations and all regional charters require

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<sup>140</sup> *Id.* ¶128, at 142 (holding that authorities failed in their obligations to provide explanation and investigation into disappearance).

<sup>141</sup> Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 339.

<sup>142</sup> Bleier v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/37/40 at 130 (1982); Mojica v. Dominican Republic, U.N.H.R. Comm'n., U.N. Doc. CCPRR/C/51/D/449/1991 (1994); Quinteros v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/38/40 ¶ 16, at 216 (1983).

<sup>143</sup> Quinteros v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/38/40 ¶ 16, at 216 (1983).

<sup>144</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976. Article 4(2) states: "[w]ithin six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State."

<sup>145</sup> Quinteros v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/38/40 ¶¶ 6 -10, at 216 (1983).

<sup>146</sup> Bleier v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/37/40 at 130 (1982); Mojica v. Dominican Republic, U.N.H.R. Comm'n., U.N. Doc. CCPRR/C/51/D/449/1991 (1994) (finding obligation under article 2 ¶3 of the International Covenant on Civil and Political Rights).

<sup>147</sup> Convention Against Torture, *supra* note 69, at 197 (articles 19 requiring reports); American Convention, *supra* note 123; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which

party states to provide reports on their internal human rights situations.<sup>148</sup> These reports are published, and in the case of the Convention Against Torture, an independent expert makes follow up visits.<sup>149</sup> In these reports, states frequently state that they will investigate human rights violations and often stress their compliance with the norm.<sup>150</sup> The Chilean government, responding to international and regional pressure, set up an inquiry commission in 1990 to investigate the abuses of the Pinochet regime.<sup>151</sup> Other regions and international bodies have established investigative commissions in Latin America, as well as in Africa and Asia.<sup>152</sup> The reports of these commissions depict how a state deals with human rights legally and politically. In political matters, states demonstrate their recognition of the need to investigate and prosecute by conditioning aid on satisfactory investigation and prosecutions.<sup>153</sup> Reporting, establishing inquiry commissions, and conditioning aid on satisfactory investigations reflect state practice to investigate perpetrators of human rights violations.

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entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively.

<sup>148</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 9, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), art. 40, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>149</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Sub Commission Decision 1991/110, 43d Sess., E/CN.4/Sub.2/1991 (establishing Louis Joinet as special rapporteur for immunity). The Convention Against Torture has a special rapporteur for torture, Nigel Rodney, since 1993. Convention Against Torture, *supra* note 69, at 197 (articles 20 mandating investigations into reports).

<sup>150</sup> Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Question of Enforced or Involuntary Disappearances, U.N. Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, its causes and consequences, Comm'n on H.R., 51st sess., Item 10(c) of the provisional agenda, U.N. Doc. E/CN.4/1995/36 (1994) (discussing Chile's compliance and reports).

<sup>151</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶ 23 (discussing establishment of Rettig Commission in 1990); Inter-Am. C.H.R. 25 Report N° 98 Cases 11.505; 11.532; 11.541; 11.546; 11.549; 11.569; 11.572; 11.573; 11.583; 11.585; 11.595; 11.652; 11.655; 11.657; 11.675 y 11.705, at ¶ 33 (Apr. 7, 1998). *See also*, Schabacker, *supra* note 19, at 9-10.

<sup>152</sup> *See* Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 331-33 (describing commissions in Bolivia and Uruguay); Schabacker, *supra* note 19, at 7-21 (describing amnesty commissions in Argentina, Chile, El Salvador and South Africa).

<sup>153</sup> Helene Cooper, *World Bank China-Project Funding Plan Falls Apart In Face Of Diverse Opposition*, WALL ST. J., July 10, 2000, at A6 (reporting that China withdrew application for World Bank loan on dam because, under pressure from U.S., human-rights groups and other governments, loan imposes human rights conditions on loan); Christopher Marquis and Juan Forero, *Key House Leader Withdraws Support for Colombia Aid Plan*, N.Y. TIMES, Nov. 17, 2000, at A10.



U.N. reports and actions further reflect state practices.<sup>154</sup> Obligations to prosecute are seen not only in treaty provisions, but also in analyses of human rights reports.<sup>155</sup> The United Nations has established special independent rapporteurs for torture and impunity, who are instructed to assist with developing guidelines and principles, reporting, and bringing suspects to justice.<sup>156</sup> The U.N. Human Rights Committee recognizes that archiving human rights atrocities is a necessary step in fighting impunity and deterring further human rights abuses.<sup>157</sup> The United Nations also appointed a working group for cases of disappearances; it monitors, surveys, and reports on the practice of disappearances in various countries.<sup>158</sup> Chile has participated in reporting and complying with this working group. States typically comply with the reports although follow up is difficult to ensure.<sup>159</sup>

### B. *Amnesty in International Law*

Once a state determines it has an obligation to investigate or prosecute, it must balance this obligation against granting amnesty. No treaty provisions specifically prohibit amnesty.<sup>160</sup> Nevertheless, obligations to prosecute and investigate crimes may preclude amnesty.<sup>161</sup> As treaties mandating investigation, prosecution, and punishment, and

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<sup>154</sup> Roht-Arriaza, *Non treaty Sources*, *supra* note 113, at 43 (noting that U.N. practices involving resolutions and reports constitute state practice).

<sup>155</sup> *Id.* (discussing how reports can result in studies on issues such as impunity, declarations and rapporteurs).

<sup>156</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Sub Commission Decision, U.N. GAOR, 43d Sess. U.N. Doc E/CN.4/Sub.2/1991 (establishing Louis Joinet as special rapporteur for impunity). The Convention Against Torture has a special rapporteur for torture, Nigel Rodney (since 1993); Convention Against Torture, *supra* note 69, art. 20 (mandating investigations into reports).

<sup>157</sup> Joinet Report, *supra* note 10, principles 13-17.

<sup>158</sup> U.N. Res. A/RES/20, 36th Sess., 1980 and resolutions 1992/30, 1993/35, 1994/39 (establishing Working Group on Enforced or Involuntary Disappearances and clarifying mandate).

<sup>159</sup> U.N. Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, its causes and consequences, United Nations Economic and Social Council, 51st Sess., Item 10 (c) of the provisional agenda, ¶¶114-120, U.N. GAOR, H.R. Comm'n., 51st Sess. Doc. E/CN.4/1995/36 (1994).

<sup>160</sup> See Cassel, *supra* note 13, at 221 n.155 (discussing that nothing in the language or object of Inter-American conventions on forced disappearance of persons, and on prevention, punishment and eradication of violence against women of these treaties contemplates amnesties); see also Naomi Roht-Arriaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 57 (Naomi Roht-Arriaza ed., 1995) [hereinafter *Roht-Arriaza, Derogation*].

<sup>161</sup> G.A. Res. 133, U.N. GAOR, 47th Sess., Supp. No. 49 at 207, U.N. Doc. A/49 (1992) (precluding amnesty). See *infra* text accompanying notes 164-166.

national challenges to amnesty laws increase, the ability of amnesty to bar completely prosecution decreases. Further, monitoring and authoritative conventions have interpreted treaty provisions to prohibit or limit amnesty.<sup>162</sup>

### 1. Conventions Requiring Amnesty

Far from banning amnesty, some international treaties allow amnesty. Article 6(5) of the Second Additional Protocol to the Geneva Conventions<sup>163</sup> states: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained."<sup>164</sup> However, legal scholars have limited the scope of this provision. Article 6 of Protocol II states that Protocol II applies to civil wars and non-international armed conflicts.<sup>165</sup> Further, the amnesty provision is placed at the end of an article that guarantees due process rights to individuals. This, according to University of California at Hastings Professor Naomi Roht-Arriaza, means that the provision was meant to apply only to those combating the state itself.<sup>166</sup>

Some treaties do limit amnesty. Article 18 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearances<sup>167</sup> states that "[p]ersons who have or are alleged to have committed [disappearances]. . . shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction."<sup>168</sup> The U.N. Human Rights Committee in its studies on impunity has labeled blanket amnesty laws inconsistent with the ICCPR.<sup>169</sup> The Committee stated that blanket

<sup>162</sup> See *infra* text accompanying notes 170-190 and 209-215.

<sup>163</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609 (*entered into force* Dec. 7, 1978).

<sup>164</sup> *Id.*; Roht-Arriaza, *Derogation*, *supra* note 160, at 59 (stating that commentators claim amnesty is a domestic matter subject to government discretion and not fit for international regulation).

<sup>165</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3517, 3522 [hereinafter Geneva Convention].

<sup>166</sup> Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 339-40 (noting that article 6(5) applies to civil wars and non-international armed conflicts and was not meant to apply to agents of the state but those combating the state).

<sup>167</sup> G.A. Res. 133, U.N. GAOR Supp. 47th Sess., No. 49 at 207, U.N. Doc. A/49 (1992).

<sup>168</sup> *Id.*

<sup>169</sup> Mary Margaret Penrose, *Impunity – Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. INT'L L. J. 269, 284 n.74, 75 (1999) (discussing how U.N. Human Rights Committee conclude that blanket amnesty laws are always inconsistent with ICCPR as they create a climate of impunity and deny victims a right of remedy);

amnesties create a climate of impunity and deny victims a right to a remedy.<sup>170</sup> The European Court of Human Rights ruled in 1999 that the Convention Against Torture does not allow offenders to benefit from amnesty if that would exempt them from both criminal and civil proceedings or sanctions.<sup>171</sup>

## 2. State Acceptance of Amnesty

An examination of State practices suggests that states, at least in part, have accepted amnesty. Customary international law principles before the extradition of Pinochet reflected the common use of amnesty by governments in transition from military to civilian rule.<sup>172</sup> In contrast, after the *Velasquez* case established the obligation to investigate and prosecute crimes, the United Nations and regional human rights commissions have denounced amnesties in El Salvador, Uruguay, Argentina, and, recently, Sierra Leone.<sup>173</sup> Also, since the *Pinochet* litigation, one may detect a shift in attitude toward amnesty for human rights violators.<sup>174</sup> State practices indicate a trend toward disapproval of self-amnesties and blanket amnesties for repeated instances of torture, disappearances, and extralegal executions.<sup>175</sup>

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Roht-Arriaza, *Sources*, *supra* note 105, at 29 (discussing how U.N. Commission of Human Rights found amnesty incompatible with state duties under ICCPR).

<sup>170</sup> Juan Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 259 (1997).

<sup>171</sup> *Selmouni v. France*, Eur. Ct. H.R. app. 25803/94, *reprinted in* 38 I.L.M. 1491, 1505, 1511, 1513 (1999) (holding that France violated articles 3 and 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms); European Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No. 5), 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953, *as amended* by Protocols Nos 3, 5, and 8 which *entered into force* on Sept. 21, 1970, Dec. 20, 1971, and Jan. 1, 1990 respectively) (stating in Article 3 that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment” and in Article 6 that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunale established by law.”).

<sup>172</sup> Schabacker, *supra* note 19, at 2 (noting that Chile, Argentina, El Salvador, Haiti, post-unification Germany, Romania, Zimbabwe, and South Africa have employed amnesty proceedings).

<sup>173</sup> See Inter-American Commission on Human Rights, *Las Hojas Case* (El Salvador), Case 10.287, Inter-Am. C.H.R. 88 (1993); see also *Hugo Leonardo et. Al.* (Uruguay), Case 10.029, Inter-Am. C.H.R. 154 (1993); see also *Alicia Consuela Herrera et. Al.* (Argentina), Case 10.147, Inter-Am. C.H.R. 41 (1993).

<sup>174</sup> See Roht-Arriaza, *Derogation*, *supra* note 160, at 59 (discussing how international community began viewing amnesty during the 1990s).

<sup>175</sup> Roht-Arriaza, *Value of Amnesties*, *supra* note 13, at 329 (noting that granting amnesty for “repeated instances of torture, extra-legal executions and disappearances” violates customary international law); Roht-Arriaza, *Truth Commission*, *supra* note 1, at 314.

## 3. Chile: Challenge to Decree 2191

Chileans themselves have challenged amnesty Decree 2191. In the 1997 case of *Chanfeau Orayce and Others v. Chile*,<sup>176</sup> consolidating various complaints, the Inter-American Commission on Human Rights found that the application of amnesty Decree 2191 violated the American Convention on Human Rights.<sup>177</sup> The petitioners had complained that the Amnesty Decree Law 2191 “has not been repealed and has consequently remained in effect under the democratic government, even after Chile has ratified the American Convention.”<sup>178</sup> The Inter-American Commission recommended that Chile alter Decree 2191 “in order to comply with the provisions of the American Convention on Human Rights.”<sup>179</sup> The Inter-American Commission specifically told Chile to modify the amnesty to allow for investigation, identification, and punishment of perpetrators, “thus guaranteeing for the victims and their families a right to justice.”<sup>180</sup>

In reviewing Chile’s efforts to address human rights abuses under the Pinochet regime, the Inter-American Commission determined that the steps Chile had taken were not sufficient to guarantee American Convention rights to investigate and provide victims with a remedy (art 2).<sup>181</sup> Chile had enacted a compensation law, urged the Chilean Supreme Court to consider that the amnesty should not be a legal obstacle to investigation and identification of those responsible.<sup>182</sup> Further the National Commission for Truth and Reconciliation tried to establish compensation and redress for “serious violations of fundamental rights on the part of state agents.”<sup>183</sup> These steps alone, the Inter-American Commission concluded, were not sufficient to ensure the rights outlined in the American Convention.<sup>184</sup> According to the Inter-American Commission, Amnesty Decree 2191 violated the right to judicial protection because it left victims with no legal recourse.<sup>185</sup> Moreover, it

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<sup>176</sup> Cases 11505 et. Al, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc.7 rev. (1997).

<sup>177</sup> *Id.* ¶ 42

<sup>178</sup> *Id.* ¶ 43.

<sup>179</sup> *Id.* ¶ 109.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* ¶ 50.

<sup>182</sup> *Id.* ¶¶ 45-47. See also II TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 501 (Neil J. Kritz ed., 1995) (stating that President Alywin asked Supreme Court to instruct lower courts to reactivate human rights cases and informed Court that amnesty “cannot be an obstacle to the realization of a judicial investigation and the determination of responsibilities, especially in the cases of disappeared persons.”).

<sup>183</sup> *Id.*

<sup>184</sup> *Chanfeau Orayce & Others v. Chile*, Cases 11.505 et al., Inter-Am. C.H.R. 512, ¶ 50 OEA/ser.L/V/II.98, doc.7 rev. (1997).

<sup>185</sup> *Id.* ¶ 65.

violated the obligation to investigate since the truth and reconciliation commission had no authority either to publish names or to sanction perpetrators.<sup>186</sup> Thus, for the Inter-American Commission, admitting guilt, partial investigation, and compensation were not enough to fulfill obligations of the Convention.<sup>187</sup> The amnesty decree needed to allow full disclosure and judicial recourse.<sup>188</sup>

The Inter-American Commission thus held that the amnesty decree further violated the American Convention right to know the truth.<sup>189</sup> The Commission concluded that as a part of truth-telling, especially with disappearance cases, a state must investigate and determine the whereabouts of the disappeared.<sup>190</sup> Additionally, the Inter-American Commission found that the right to truth also included the right to a simple and prompt remedy, as mandated by article 25 of the American Convention on Human Rights.<sup>191</sup> The Inter-American Commission concluded that the amnesty law prevented the right to a simple and prompt remedy.<sup>192</sup>

The Inter-American Commission found by authorizing Decree Law 2191, Chile had failed to comply with its obligation to ensure and protect human rights.<sup>193</sup> As stated by the Inter-American Commission: "The continued application of the amnesty by a democratic government even after the end of the military regime which enacted this law, has legal implications which are incompatible with the provisions of the American Convention on Human Rights."<sup>194</sup>

#### 4. South Africa: The *AZAPO* Case

In 1996, the Constitutional Court of South Africa considered a challenge to the amnesty provision set out in the Truth and Reconciliation Act.<sup>195</sup> Families of apartheid-era victims, including the wife of journalist Steven Biko, challenged the provision that authorized the TRC to grant amnesty on the ground that amnesty to apartheid

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<sup>186</sup> *Id.* ¶ 66.

<sup>187</sup> *Id.* ¶ 70.

<sup>188</sup> *Id.* ¶ ¶ 50-65.

<sup>189</sup> *Id.* ¶ 85.

<sup>190</sup> *Id.* ¶ 88.

<sup>191</sup> *Id.* ¶ 89.

<sup>192</sup> *Id.* ¶ 89.

<sup>193</sup> *Id.* ¶ 97.

<sup>194</sup> *Id.* ¶ 76. *Carmelo Soria Espinoza v. Chile*, Case 11.725, Informe No. 133/99, Inter-American Court of Human Rights (1999) (noting that the Inter-American Court, complying with the Inter-American Commission, found in a case regarding extrajudicial execution the amnesty incompatible with the American Convention on Human Rights).

<sup>195</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC). Proper name for the Truth and Reconciliation Act is "The Promotion of National Unity and Reconciliation Act 34 of 1995".

perpetrators precluded the right of the victims to insist that the wrongdoers be prosecuted and punished, and that victims be compensated.<sup>196</sup> Section 22 of the South Africa Constitution states that “every person shall have the right to have justiciable disputes settled by a court of law. . .or impartial forum.”<sup>197</sup>

The Constitutional Court held that the amnesty and its purposes were constitutional.<sup>198</sup> First, the court acknowledged that “the effect of an amnesty undoubtedly impacts upon very fundamental rights.”<sup>199</sup> Judge Ismail Mahomed noted that customary international law does not allow amnesty for crimes against humanity, including torture, extralegal executions, and disappearances.<sup>200</sup> He recognized, however, that amnesty plays a role in national reconciliation, and thus may be granted for political reasons when involving less serious crimes.<sup>201</sup> The court ruled that the epilogue to the South African interim Constitution authorized Parliament to provide amnesty.<sup>202</sup> The Epilogue stated that: “The Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence.”<sup>203</sup> The Constitutional Court held that amnesty can provide this bridge.<sup>204</sup> It ruled that the South African amnesty was not a blanket amnesty, and thus was different from those in Argentina, Chile, and El Salvador.<sup>205</sup> The amnesty provision, the Constitutional Court held, was “specifically authorized for the purposes of effecting a constructive transition towards a democratic order.”<sup>206</sup>

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<sup>196</sup> *Id.* ¶ 8. See also Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 327 (noting that Steven Biko’s family did not want Truth and Reconciliation Commission to grant amnesty and take away victim’s right to compensation claiming that the amnesty section 20(7) violated the South African Constitution as it denies the victims the right to a legal remedy).

<sup>197</sup> *Id.* ¶ 9; S. AFR. CONST. art. 22 (Act No. 200, 1993).

<sup>198</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶ 32.

<sup>199</sup> *Id.* ¶ 9.

<sup>200</sup> *Id.* ¶¶ 25, 27. See also Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 329 n 21

<sup>201</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶¶ 17-19. See also, Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 329-30, n.21 & 22 (noting also that amnesty should be available for certain crimes and must be review able by courts and allow compensation for victims of human rights abuses).

<sup>202</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶¶ 10-19.

<sup>203</sup> *Id.* ¶ 3.

<sup>204</sup> *Id.* ¶¶ 10-19.

<sup>205</sup> *Id.* ¶ 32.

<sup>206</sup> *Id.*

The Constitutional Court further held the amnesty consistent with South Africa's obligations under international law, including its duty to prosecute.<sup>207</sup> According to the Constitutional Court, these obligations depend upon a distinction between acts of violence in the course of war or conflicts between states.<sup>208</sup> The Constitutional Court stated that "conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within a state on the other."<sup>209</sup> According to the Constitutional Court, after an internal, as opposed to an interstate, conflict, a country needs to reconstruct itself.<sup>210</sup> Amnesty, it reasoned, can be critical when the perpetrators live within the borders of the state.<sup>211</sup> In internal struggles the Constitutional Court relied on article 6(5) of Protocol II to the Geneva Conventions of 1949 and held that there is no obligation to prosecute.<sup>212</sup> The South African amnesty, thus, survived constitutional challenge. Commentators note that in South Africa, granting amnesty provided an inducement for apartheid participants to disclose information regarding crimes and thus facilitate full disclosure of the truth.<sup>213</sup> The amnesty process also provided victims with a remedy through the committee to hear complaints and compensation.<sup>214</sup>

## 5. U.N. Reports

U.N. reports and actions state that amnesty bars prosecution and the ability to provide victims with redress for the atrocities suffered.<sup>215</sup> The U.N. Human Rights Commission reports have specifically denounced the use of amnesty for certain types of crimes.<sup>216</sup> The Commission and Special Rapporteur for impunity further stated that amnesty, even when part of establishing peace and national reconciliation, cannot be granted to perpetrators before states afford the victims an effective remedy.<sup>217</sup>

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<sup>207</sup> *Id.* ¶¶ 30-32.

<sup>208</sup> *Id.* ¶ 30.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* ¶¶ 30-31.

<sup>211</sup> *Id.* ¶¶ 30-31.

<sup>212</sup> *Id.* ¶ 30.

<sup>213</sup> Orentlicher, *Limits on Lawlessness*, *supra* note 59, at C1.

<sup>214</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC).

<sup>215</sup> Joint Report, *supra* note 10, para. 26, principle 29.

<sup>216</sup> Joint Amnesty Study, *supra* note 37, at 635-36; *See also*, Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 340 & n.61.

<sup>217</sup> Joint Report, *supra* note 10 at 32 (affirming that amnesty may not be accorded to perpetrators before the victims have obtained justice by means of an effective remedy); The Administration of Justice and the Human Rights of Detainees, Commission on Human Rights Sub-Commission on Prevention of Discrimination and

Each state must, in fact, introduce safeguards against amnesty.<sup>218</sup> One of the most recent U.N. denouncements of amnesty is the reservation of the United Nations to the 1999 Lome Agreement<sup>219</sup> provision, which granted Foday Sankoh and the Revolutionary United Front amnesty.<sup>220</sup> The Special Rapporteur for impunity concluded that amnesties did not encourage national reconciliation, but only increased internal tensions and resulted in serious infringements of human dignity.<sup>221</sup> Finally, the Rome Statute establishing the International Criminal Court<sup>222</sup> left room to determine that domestic amnesties for crimes covered by the ICC statute would not necessarily preclude international prosecutions.<sup>223</sup>

#### IV. DISCUSSION-MODEL FRAMEWORK

As states move away from blanket grants of amnesty, it is clear that determining what type of amnesty is acceptable in a given situation involves a careful analysis of legal, political, and social factors. A framework for analyzing these factors is discussed below.

##### A. *Legal Concerns*

A state must design an amnesty that balances both international and domestic legal concerns. This requires looking at the role of international law in the domestic legal system.<sup>224</sup> The first legal concern is determining whether the state has a duty to investigate, prosecute, or punish the specific human rights abuses at issue.

A state should design an amnesty that does not counter its obligation to investigate human rights atrocities. Blanket grants of amnesty specifically violate international law, as they preclude identification and prosecution of human rights abuses.<sup>225</sup> Amnesties, that preclude identification of suspects and investigation of crimes can violate a state's obligation to ensure rights and its related responsibility to

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Protection of Minorities, 48th Sess., Item 10 of the provisional agenda, principle 29. E/CN.4/Sub.2/1996/18.

<sup>218</sup> Joint Report, *supra* note 10, principles 23 (concluding that safeguards must be introduced against abuse for purposes of impunity of rules pertaining to amnesty).

<sup>219</sup> ECOWAS, *supra* note 79.

<sup>220</sup> Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leon, U.N. SCOR, 56th Sess., para. 52, U.N. Doc. S/1998/836 (1999). *See also*, S.C. Res. 1315, U.N. SCOR, 57th Sess., Prmb., U.N. Doc. S/1315 (2000) (stating that the U.N. representative supplied an amendment to agreement).

<sup>221</sup> Joint Amnesty Study, *supra* note 37, at 636-37.

<sup>222</sup> Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc.A/CONF.183/9 (1998).

<sup>223</sup> Roht-Arriaza, *Some Thoughts on the Way Forward*, *supra* note 22, at 100 n.21; Scharf, *supra* note 7, at 521-26 (noting the U.S. has not ratified the Rome Statute).

<sup>224</sup> Bradley, *supra* note 5, at 2130; Davis, *supra* note 5, at 1370-71.

<sup>225</sup> *See* text and accompanying notes.



investigate.<sup>226</sup> The Inter-American Commission on Human Rights concluded that Chile must alter its blanket amnesty, Decree 2191, to allow judicial investigation and attribution of responsibility.<sup>227</sup> The Constitutional Court in South Africa upheld the amnesty provision in the Truth and Reconciliation Act, as it allowed investigation into the apartheid-era crimes.<sup>228</sup> An amnesty, then, must specifically allow investigation into the crimes and individuals responsible for those crimes.

In addition to investigation, a state may also have a legal obligation to prosecute.<sup>229</sup> An amnesty that prevents both civil and criminal proceedings may violate international law if it covers specific crimes such as torture, extralegal executions, disappearances, and crimes against humanity.<sup>230</sup> The Convention Against Torture and customary international law norms make it clear that an amnesty precluding investigation into or prosecution of official acts of torture is not valid.<sup>231</sup> A state, then, must limit the amnesty to those crimes for which it does not have an obligation to prosecute. For those which it does, like disappearances, a state must leave open the option of criminal prosecution or civil or administrative proceedings in certain cases.

Holding that an amnesty is consistent with international law further requires reconciling the grant of amnesty with treaty and customary international law obligations to provide judicial remedies, to punish violations, and to ensure rights to victims.<sup>232</sup> The U.N. Human Rights Committee interpreted the "right to remedy" provision of the ICCPR to require effective judicial processes.<sup>233</sup> An amnesty like the South African example, that bars criminal prosecution but allows other remedies may

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<sup>226</sup> See text and accompanying notes 136-183.

<sup>227</sup> Chanfeau Orayce & Others v. Chile, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997) at ¶ 109. See also, Roht-Arriaza, *Some Thoughts on the Way Forward*, *supra* note 21, at 94 & n. 6 (noting that lower courts prohibited application of 1978 amnesty finding that it violated Geneva Conventions of 1949, Convention Against Torture, and ICCPR).

<sup>228</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶ 32.

<sup>229</sup> See text accompanying notes 107-143. See also, Joinet Report, *supra* note 10, para. 27.

<sup>230</sup> Greenawalt, *supra* note 43, at 202 n. 58, 59 (concluding blanket and full amnesties must allow room to prosecute egregious offenders); Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 329 & n 21.

<sup>231</sup> Convention Against Torture, *supra* note 69, article 7. See also, text accompanying notes 172-190.

<sup>232</sup> Bleier v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/37/40 at 130 (1982); Mojica v. Dominican Republic, U.N.H.R. Comm'n., U.N. Doc. CCPRR/C/51/D/449/1991 (1994); Quinteros v. Uruguay, U.N.H.R. Comm'n., U.N. Doc. A/38/40 ¶ 16, at 216 (1983). See also, Joinet Report, *supra* note 10 ¶ 32 and principle 18.

<sup>233</sup> Roht-Arriaza, *Punishment*, *supra*, note 8, at 33 & n. 63 (discussing provisions of ICCPR and Universal Declaration of Human Rights requiring that concern with accountability and government authorities interpret remedy as prosecution).

fulfill a state's obligation to prosecute. A carefully tailored amnesty leaves room for investigation, civil proceedings, compensation and rehabilitation. It is critical to spell out exactly what crimes and proceedings the amnesty will cover.

A grant of amnesty further must be constitutional; that is, it must conform to local laws, and be affirmed officially by the state.<sup>234</sup> Constitutionality also involves the idea that a legislature or other democratic body approved the amnesty and the amnesty is reviewable by the judiciary.<sup>235</sup> An amnesty granted by a democratically elected body, subject to judicial review and constitutional, may be legal not only in the domestic state but internationally. A legally sound amnesty requires looking not only at the type and scope of amnesty, but at the political context surrounding the grant of amnesty.<sup>236</sup>

### *B. Political Concerns*

A state's decision to grant amnesty is typically influenced by political opinions as to how to handle perpetrators of human rights crimes. The Constitutional Court of South Africa distinguished international from internal conflicts, and concluded that a state must consider amnesty in light of its political realities.<sup>237</sup> Granting amnesty is an expression of political will and national sovereignty. As a sovereign act of state deciding how to proceed against former leaders and human rights violators, an amnesty must be politically acceptable. Opting for prosecution of human rights violators, may promote a destabilizing backlash in a country that has already endured atrocious crimes; and it may deter dictators from surrendering power in the first instance.<sup>238</sup> Granting amnesty, however, may not allow a society to give justice to the victims and further acknowledge that the perpetrators were wrong.<sup>239</sup> Granting amnesty requires considering political stability of the state and national sovereignty.<sup>240</sup>

. An amnesty will be more politically acceptable to the international community if granted by a more democratically elected body. As the

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<sup>234</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶ 10; HENKIN ET AL., *supra* note 43, at 631.

<sup>235</sup> Davis, *supra* note 5, at 1370 (concluding that immunities are fundamental characteristic of sovereign states in international system); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 878-79.

<sup>236</sup> Greenawalt, *supra* note 43, at 196 (noting that political climate is highly relevant to granting and designing amnesty).

<sup>237</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 30-31.

<sup>238</sup> Orentlicher, *Limits on Lawlessness*, *supra* note 59, at C01.

<sup>239</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 17-19.

<sup>240</sup> Roht-Arriaza, *Nontreaty Sources*, *supra* note 113, at 48.

*Pinochet* case demonstrates, executive grants of self-amnesty are often controversial.<sup>241</sup> A parliamentary-approved grant of amnesty, like that in South Africa, is certainly different from the one that the executive has forced parliament to accept.<sup>242</sup> More democratically enacted amnesties suggest a weighing of equities by both sides and often entail public acknowledgment of the crimes and persons covered by the amnesty.<sup>243</sup> The South African example demonstrates that Parliament can enact an amnesty provision and tailor the proceedings to achieve accountability, an important part of reconciliation.<sup>244</sup> Further, the Constitutional Court of South Africa distinguished parliamentary grants from a self-amnesty like that Pinochet granted himself.<sup>245</sup> Overall, it matters politically whether the body granting the amnesty is a democratically elected, totalitarian, or repressive regime.<sup>246</sup> Amnesty represents an expression of political will and is a critical component of the stability of the emerging regime. Newly elected regimes may find it difficult administratively and politically to prosecute.<sup>247</sup> Economic and political problems, as well as a need to live and work together, may stand at the forefront of the political agenda. The new government thus should consider what prosecution would mean to its credibility, and that of the judiciary, as well as the ability of both to prevent further human rights abuses. In designing amnesty, the state must determine: what body will review and approve grants of amnesty; how to allocate resources; and how each sector of the government will play a role in granting amnesty. A state must further decide what will happen with those individuals who are not granted amnesty, and ensure that some form of judicial or political process deals with the investigation and punishment if necessary.

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<sup>241</sup> Cassel, *supra* note 13, at 198; Slye, *supra* note 6, at 182, 184 (discussing repeal of laws that gave effective amnesty to military and prosecution of Jorge Rafael Videla, former military leader, for child kidnapping during his dictatorial regime in Argentina).

<sup>242</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 14, 32; Republic of South Africa Promotion of National Unity and Reconciliation Bill, 1994, Bill 30-95; Sachs, *supra* note 85, at 1566-67.

<sup>243</sup> Joinet Report, *supra* note 10, paras. 17-23; Roht-Arriaza, *Combating Impunity*, *supra* note 16, at 299-302; Brody, *supra* note 76, at A19 (noting that Pinochet's extradition awakens victims' hope); Rosenberg, *supra* note 74, at A20.

<sup>244</sup> Slye, *supra* note 6, at 179.

<sup>245</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶ 32.

<sup>246</sup> Cassel, *supra* note 13, at 215; Roht-Arriaza, *Developing Jurisprudence*, *supra* note 28, at 872-73. Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 St. Mary's L. J. 857, 859 (noting that identity of the amnesty grantor is important).

<sup>247</sup> Greenawalt, *supra* note 43, at 193 n.20 (concluding democratic countries do not criticize emerging democracies that grant amnesty).

### C. *Needs of the Victims and Society*

In analyzing amnesties the legal and political contexts involve social principles of justice and reconciliation.<sup>248</sup> Granting or rejecting amnesty impacts the needs of victims and society's need for truth, justice, and reparation.<sup>249</sup> It is necessary, then, to determine whether the amnesty actually offers the victims a chance at acknowledgment or truth telling, redress, and reparation for the atrocities.<sup>250</sup>

#### 1. Truth-Telling

Determining whether to grant amnesty requires careful consideration of the impact on truth-telling.<sup>251</sup> This is often the most difficult and critical component, as the amount of truth-telling is particular to each state, grounded in its history.<sup>252</sup> As the South African TRC demonstrated, truth-telling is a critical tool to enabling a state, and the international community, to move beyond the atrocities committed.<sup>253</sup> Truth telling is both an international and domestic concern, because it is one step towards deterrence of future human rights abuses and international crimes.<sup>254</sup> Additionally, telling the truth promotes healing.<sup>255</sup>

Truth-telling involves uncovering the facts surrounding human rights atrocities. This includes facts about the crimes and facts about the people responsible. Today sweeping amnesties covering all crimes and perpetrators do not allow a state to uncover the truths surrounding human rights atrocities.<sup>256</sup> An amnesty should allow not only for investigation into crimes but also for documentation of the facts surrounding the crimes.

Truth-telling, as the South African TRC demonstrated, allows the community to identify and publicize who committed specific crimes. Public disclosure of information not only provides deterrence in the form

<sup>248</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶¶ 17-19. *See also*, Minow, *supra* note 27, at 238-39.

<sup>249</sup> Joint Report, *supra* note 10, paras. 17-31; Greenawalt, *supra* note 43, at 200 (concluding that justice and accountability key to restorative justice which is necessary for individual and societal reconciliation); Minow, *supra* note 27, at 250-51.

<sup>250</sup> Joint Report, *supra* note 10, paras. 17-23; Roht-Arriaza, *Combating Impunity*, *supra* note 16, at 299-302; Brody, *supra* note 76, at A19 (noting that Pinochet's extradition awakens victims' hope); Rosenberg, *supra* note 74, at A20.

<sup>251</sup> Minow, *supra* note 27, at 243-45 (discussing restorative impact of truth telling).

<sup>252</sup> *Id.*, at 238 (discussing role of truth telling in bringing justice and history as critical parts of justice).

<sup>253</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶¶ 17-19.

<sup>254</sup> Joint Report, *supra* note 10, paras. 1-6; Roht-Arriaza, *Some Thoughts on the Way Forward*, *supra* note 22, at 93-4.

<sup>255</sup> Minow, *supra* note 27, at 241.

<sup>256</sup> Roht-Arriaza, *Derogation*, *supra* note 160, at 59-60.

of public condemnation, but also may allow other forms of redress such as reparations, public apologies, or civil proceedings. Thus, an important factor in determining whether to grant or reject a proposed amnesty is whether it allows for the identification of perpetrators and crimes.<sup>257</sup> However, a proper grant of amnesty should go one step further: it should allow documentation and even publication of the facts surrounding the human rights abuses committed by the perpetrators.

## 2. Redress/Reparation

A state, in deciding whether or not to grant amnesty, should further consider the ability of the victims to attain redress.<sup>258</sup> Redress in this context means acknowledgment of the facts and reparation for violations.<sup>259</sup> The Inter-American Commission criticized the Chilean grant of amnesty and the Chilean truth commission because both prevented families from learning the whereabouts of the disappeared.<sup>260</sup> Family members of those disappeared want to know what happened to the victims and be able to bury their dead.<sup>261</sup> They want acknowledgment that what the perpetrators did to them was wrong and an admission of official culpability.<sup>262</sup> The linking of the amnesty to the TRC in South Africa addressed the problems of accountability and fact-finding.<sup>263</sup> The Constitutional Court, affirming the amnesty, noted that while affecting fundamental rights, amnesty in exchange for disclosure achieved reconciliation and reconstruction aims.<sup>264</sup> Designing grants of amnesties thus requires determining that the grant of amnesty does not directly conflict with the ends of justice for both the state and the victims.<sup>265</sup> A

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<sup>257</sup> Minow, *supra* note 27, at 251 (stating that necessary to define justice for victims as accountability and reconciliation).

<sup>258</sup> Joint Report, *supra* note 10, paras. 26-34 & principles 18-22; Roht-Arriaza, *Punishment*, *supra* note 8, at 18-22.

<sup>259</sup> Roht-Arriaza, *Punishment*, *supra* note 8, at 19-20 (noting that this redress may come from state, individual perpetrator or somewhere else).

<sup>260</sup> Chanfeau Orayce & Others v. Chile, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997) at ¶ 88.

<sup>261</sup> Roht-Arriaza, *Truth Commission*, *supra* note 1, at 313 (observing that Argentinean and Chilean families and survivors want to know who was killed and why, but also where to recover body for burial).

<sup>262</sup> Minow, *supra* note 27, at 238 (discussing value of truth commissions over prosecution in restoring dignity to victims); Roht-Arriaza, *Truth Commission*, *supra* note 1 at 313, 316.

<sup>263</sup> Sachs, *supra* note 85, at 1576; Slye, *supra* note 6, at 171, 177 (commending South African amnesty and noting that quantity and quality of information gathered was good).

<sup>264</sup> Azanian Peoples Org. v. The President of the Republic of S. Af., 1996 (4) SALR 637 (CC) ¶¶ 9 -17. Paragraph 9 states that “[t]he effect of an amnesty undoubtedly impacts upon very fundamental rights,” and paragraph 17 states that reconciliation and reconstruction are goals of amnesty.

<sup>265</sup> *Id.* ¶¶ 31-32.

domestic grant of amnesty should, thus, not preclude official acknowledgment, by either those responsible or the state itself, or even public commemoration of human rights violations.<sup>266</sup>

Finally, amnesty must be consistent with providing reparation and rehabilitation for victims. A grant of amnesty that precludes identification of perpetrators or investigation into the crimes committed does not allow victims the reparation, rehabilitation, or compensation necessary to fully respect their human dignity and be in line with general notions of justice.<sup>267</sup> The Inter-American Commission for Human Rights determined that Chile's steps in providing compensation or reparations, while not sufficient, were steps in the right direction.<sup>268</sup> Both the South African and Chilean cases established that reparation and rehabilitation involves much more than simply monetary payments.<sup>269</sup> Reparations also involves acknowledging the atrocity as well as the dignity of the victims.<sup>270</sup> Reparation can occur through commemorations, medical care and formal public recognition by the state of its responsibility for atrocities.<sup>271</sup>

## V. CONCLUSION

The domestic grant of amnesty operates as an important legal, political, and social tool. It can ensure the relinquishing of power, foster an agreement to end human rights abuses by political actors, and expedite the transition to democratic rule. However, a state must think about amnesty in light many factors: its legal obligations to prosecute and

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<sup>266</sup> Roht-Arriaza, *Value of Amnesty*, *supra* note 13, at 343 (discussing importance of commemorative aspects of allowing people to mourn individually and collectively including exhumations, reburials, and remembrance ceremonies); Roht-Arriaza, *Truth Commission*, *supra* note 1, at 316 (discussing value of commemorations).

<sup>267</sup> *Civil And Political Rights, Including The Questions Of: Independence Of The Judiciary, Administration Of Justice, Impunity, The Right To Restitution, Compensation And Rehabilitation For Victims Of Gross Violations Of Human Rights And Fundamental Freedoms*, final report of the Special Rapporteur, M. Cherif Bassiouni, U.N. Commission on Human Rights, 56th session, Item 11(d) of the provisional agenda, paras. 21-24, at E/CN.4/2000/62, (2000) [hereinafter *Bassiouni Report*].

<sup>268</sup> *Chanfeau Orayce & Others v. Chile*, Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997) at ¶ 70. (concluding compensation not sufficient to meet duties under the American Convention on Human Rights.).

<sup>269</sup> Minow, *supra* note 27, at 236 n 6 (noting how monetary compensation can overemphasize material losses and underemphasize human losses).

<sup>270</sup> *Azanian Peoples Org. v. The President of the Republic of S. Af.*, 1996 (4) SALR 637 (CC) ¶¶ 17-19; Minow, *supra* note 27, at 236 (discussing how failure to address "damage to individual dignity and to the very idea that members of targeted groups are persons with dignity, ensures that consequences of mass violation will persist").

<sup>271</sup> Joint Report, *supra* note 10, paras. 41-42; Minow, *supra* note 27, at 238-40.

punish human rights abuses; political realities; and the needs of the society and victims of human rights suffering. Achieving this balance is not always easy, but is nonetheless critical. An analysis that looks at the scope of amnesty in the legal, political, and social context will enable a state to develop a solution that will respond to human rights abuses, provide justice to the victims, uncover the truth, and pave the way for reconciliation. Such an amnesty can achieve the aims of justice and truth-telling.