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COMMENT

Amnesty and Accountability

Gwen K. Young*

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INTRODUCTION

On December 31, 2000, the United States signed the Rome Statute to establish the International Criminal Court (ICC).¹ Former President Bill Clinton called the signature a step towards international justice.² The

¹ *Ratification Status, Rome Statute of the International Criminal Court*, as of Dec. 31 2000, at <http://www.un.org/law/icc/statute/status.htm> [hereinafter *Ratification Status*] (last visited Feb. 22, 2001); see also President Bill Clinton, *The Right Action, Remarks Made Upon Authorizing the United States to Sign the Treaty on the ICC* (Dec. 31, 2000), in *N.Y. TIMES*, Jan. 1, 2001, at A6; Thomas E. Ricks, *U.S. Signs Treaty on War Crimes Tribunal: Pentagon, Republicans Object to Clinton Move*, *WASH. POST*, Jan. 1, 2001, at A1 (noting U.S. signature to Rome Statute establishing ICC).

² Clinton, *supra* note 1. President Clinton, explaining the decision to sign the Rome Statue, stated:

We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity. We do so as well because we wish to remain engaged in making the I.C.C. an instrument of impartial and effective justice in the years to come. *Id.*

For objections to United States' support for the ICC see Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. (1st Sess. 1999) (bill sponsored by Jesse Helms to prohibit U.S. economic assistance to countries ratifying Rome Statute) and John R. Bolton, *Reject and Oppose the International Criminal Court, Council Policy Initiative: Toward an International Criminal Court*, the Council on Foreign Relations (1999) (explaining U.S. objections to ICC).

United States is one of 139 states to sign the treaty, which needs sixty ratifications to enter into force.³ The ultimate objective of the ICC is to ensure that criminal acts do not go unpunished anywhere in the world.⁴ The idea of international accountability is not new.⁵ Yet, the recent mass atrocities and systematic crimes in Yugoslavia and Rwanda have further pushed the creation of an international court.⁶

³ Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9, July 17, 1998, art. 126, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute]; Ratification Status, *supra* note 1 (stating that Rome Statute needs 60 ratifications to enter into force and has 27 as of December 31, 2000).

⁴ See Rome Statute, *supra* note 3, Preamble at 1002 (affirming that “the most serious crimes of concern to the international community as a whole must not go unpunished”); see also Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 522 (1999) [hereinafter Scharf, *Amnesty Exception*] (discussing Rome Statute preamble); Stephen D. Krasner, *A World Court That Could Backfire*, N.Y. TIMES, Jan. 15, 2001, at A15 (stating that Clinton’s signature “conveys support for a permanent tribunal that would allow judgment of individuals who are not brought to justice in national courts”).

⁵ See Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280, available at <http://www.umn.edu/humanrts/instree/imt1945.htm> (stating that there should be individual responsibility for crimes against peace, war crimes, and crimes against humanity); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704, Annex 1, reprinted in 32 I.L.M. 1159, 1192 (1993) (stating aim to punish “persons responsible for serious violations of international humanitarian law”); *United Nations: Security Council Resolution 955 Establishing The International Tribunal For Rwanda*, S.C. Res. 935, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/935 (1994), reprinted in 33 I.L.M. 1598, 1602 (1994) (reiterating aim to punish individuals responsible for serious international crimes); Leila Nadya Sadat, *The Evolution of The ICC: From The Hague to Rome and Back Again*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 31, 40 (Sarah B. Sewall & Carl Kayens eds., 2000) [hereinafter Sadat, *Hague to Rome*] (noting that Rome Statute builds on “the experience of Nuremberg, Tokyo, and the ICTY and ICTR”); see also Teresa Young Reeves, *A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification*, 8 HUM. RTS. BRIEF 15 (2000) (stating that International Criminal Court “embodies the principle of individual accountability that the justices at Nuremberg defined more than half a century ago”). For historical development of the ICC, see M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* (1998).

⁶ Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 685-86 (1996) (noting how International Criminal Tribunal for former Yugoslavia (ICTY) gave momentum to movement towards international criminal court); see also Vesselin Popovski, *International Criminal Court: A Necessary Step Towards Global Justice*, 31 SECURITY DIALOGUE 405 (2000) (stating that successful establishment of two ad-hoc international criminal tribunals for Former Yugoslavia and Rwanda indicate emerging consensus on need to end impunity for international crimes). Popovski also notes that the approval of the Statute for ICC is a further consolidation of this consensus. *Id.* at 405; see also Dr. Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT’L L. 595, 602 (1999) (stating that ICTR and ICTY

In contrast to the objectives of the ICC, national grants of amnesty often allow perpetrators of mass atrocities to go unpunished.⁷ Amnesty, a tool whereby a state forgets that perpetrators committed crimes,⁸ covers such crimes as torture, extra-judicial killings and other crimes against humanity.⁹ Recently, countries such as Chile, South Africa, Haiti, and Guatemala have granted amnesty to members of former regimes who committed international crimes.¹⁰ In 1999, for example, Sierra Leone rebel leader Foday Sankoh received amnesty as a part of a cease-fire agreement.¹¹ Although granted by U.N. negotiators, the United Nations

convey message that "era of impunity for egregious human rights violations is terminated").

⁷ Rome Statute, *supra* note 3, at 1002; *see also* Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 1, 2 (Sarah B. Sewall & Carl Kaysen eds., 2000) [hereinafter Sewall, *Overview*] (stating that Court's main purpose is to end impunity for perpetrators of mass atrocities). *See generally*, 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, 203 (1996) (discussing how international community should refrain from accepting amnesties for serious violations of human rights before prosecution).

⁸ *See* Azanian Peoples Org. v. President of the Republic of S. Afr. 1996 (4) SALR 671, 690, 692 (CC) (concluding that amnesty is sovereign act of oblivion and involves complete forgetting of past); Norman Weisman, *A History and Discussion of Amnesty*, 4 COLUM. HUM. RTS. L. REV. 529, 529 (1972) (noting that amnesty comes from Greek word "amnestia" meaning forgetfulness).

⁹ *See e.g.* Decree Law No. 2191 (Apr. 18, 1978) (Chile), *published in* Diario Oficial, No. 30,042 (Apr. 19, 1978) [hereinafter Decree 2191] (granting amnesty to individuals for crimes of torture and disappearances); Scharf, *Amnesty Exception*, *supra* note 4, at 507-11 (discussing amnesty and international crimes in Haiti, South Africa and Bosnia); Clinton, *supra* note 1 (stating that ICC statute will hold individuals accountable for genocide, war crimes, and crimes against humanity); *see generally* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995) (discussing amnesty case studies in Europe, Latin America, Asia and Africa).

¹⁰ Ley de Reconciliation Nacional, 18 Dec. 1996, Decreto 145-96 (Guatemala) (granting amnesty to Guatemalan military); Promotion of National Unity and Reconciliation Act 34 of 1995, *available at* <http://www.truth.org.za/legal/act9534.htm> (last visited Nov. 19, 2001) (establishing South African truth commission and amnesty process); Agreement between President Jean-Bertrand Aristide and General Raoul Cedras, July 3, 1993, *reprinted in* The Situation of Democracy and Human Rights in Haiti, G.A. Res. 49/27, U.N. GAOR, 49th Sess., Supp. No. 49, at 32, U.N. Doc. A/49/49 (1994) (discussing Governors Island Agreement which grants amnesty to President Cedras, military and political persons); Decree 2191, *supra* note 9. *See generally* Roht-Arriaza, *Case Studies: Latin America, Overview*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 155-59 (Naomi Roht-Arriaza ed., 1995) (discussing amnesty in Guatemala); Michael P. Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 2-18 (1998) [hereinafter Scharf, *Swapping Amnesty*] (analyzing amnesty in Haiti).

¹¹ Economic Community of West African States, Peace Agreement, July 7, 1999, Sierra Leone-Revolutionary United Front of Sierra Leone (RUF/SL), art. IX, *reprinted in* 11 AFR. J. INT'L & COMP. L. 557, 563 (1999) [hereinafter *Lome Agreement*] (granting amnesty to Corporal Foday Sankoh specifically and other individuals); Peace Agreement, Nov. 20, 1996, Sierra

itself now questions the validity of this amnesty.¹² Despite recent grants of amnesty, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court deliberately avoided the question of amnesty in adopting the Rome Statute.¹³

Since amnesty may prevent the ICC from achieving its main objective of prosecuting individuals for international crimes, the ICC must address this issue.¹⁴ Commentators urge the Rome Statute committee discussing the draft of the statute, the PrepCom,¹⁵ to acknowledge that domestic

Leone-Revolutionary United Front of Sierra Leone (RUF/SL), art. 14, *reprinted in* 9 AFR. J. INT'L & COMP. L. 414, 417-18 (1997) (concluding that "the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement"); *see also Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, ¶ 7, U.N. Doc. S/1999/836 (1999) (discussing Lome Agreement amnesty provision); Diane Marie Amann, *Medium as Message in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237 (forthcoming 2001).

¹² Special Court Statute attached to *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCOR, 52d Sess., U.N. Doc. S/2000/915 (2000) (mentioning amnesty granted in prior agreements); *Seventh Report of the Secretary-General*, *supra* note 11, ¶ 52 (discussing how U.N. representative signed Lome Agreement with reservation regarding amnesty); S.C. Res. 1315, 55th Sess., 4186th mtg., preamble, U.N. Doc. S/Res/1315 (2000) (noting that U.N. representative appended statement after his signature); *see also* Henrard, *supra* note 6, at 640 (discussing disclaimer by U.N. Special Representative that Secretary General does not recognize "the amnesty as applying to international crimes of genocide, crimes against humanity and war crimes").

¹³ Richard J. Goldstone & Nicole Fritz, *'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT'L L. 655, 659 (2000) (observing that Rome Statute does not discuss domestically enacted amnesty processes); Henrard, *supra* note 6, at 628-29 (noting Rome Statute appears to outlaw amnesties but that prosecutorial discretion may be used to incorporate amnesty); Scharf, *Amnesty Exception*, *supra* note 4, at 508 (noting ICC statute does not contain specific provisions addressing amnesty).

¹⁴ Rome Statute, *supra* note 3, preamble, at 1002 (affirming United Nations' commitment to individual accountability); *see* Cassel, *supra* note 7, at 200 (noting immediate need to study international responses to amnesties); Henrard, *supra* note 6, at 601 (discussing how establishment of Rome Statute affirms individual criminal responsibility under international law and signals that impunity is over); Reeves, *supra* note 5, at 15 (highlighting ICC's strength "in its capacity to hold individuals responsible for committing the most serious crimes of international concern"); *see also* Abram Chayes & Anne-Marie Slaughter, *The ICC and the Future of the Global Legal System*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 237, 239 (Sarah B. Sewall & Carl Kaysen eds., 2000) (discussing how Rome Statute seeks "to hold individuals accountable" for human rights violations); Popovski, *supra* note 6 at 405 (stating that "[t]he development of individual accountability for violations of human rights and humanitarian law, both in terms of codification and enforcement, is one of the most significant changes in the contemporary world politics").

¹⁵ Rome Statute, *supra* note 3; *Establishment of an International Criminal Court*, G.A. Res. 50/46, U.N. GAOR, 50th Sess., 87th plen. mtg., U.N. Doc. A/RES/50/46 (1995) (establishing preparatory committee to discuss International Law Commission (ILC) draft

amnesties pardoning crimes covered in the statute would not necessarily preclude international prosecution.¹⁶ The failure to mention amnesty, according to these commentators, ignores the reality of amnesty and its resulting impunity.¹⁷

This comment discusses the problem of amnesty in international law. It ultimately proposes a provision that the framers of the ICC may incorporate into the Rules of Procedure and Evidence accompanying the Rome Statute. Part I addresses the evolution of national amnesties. It looks at the history, types and goals of amnesty. It examines and contrasts Chilean and South African grants of amnesty to illustrate the spectrum of national responses to amnesty. It then examines international legal norms surrounding grants of amnesty. Part II discusses the aims and objectives of the ICC. Further, Part II describes in detail articles 17, 20 and 53 of the Rome Statute, which indirectly address aspects of amnesty. Part II also discusses the Rules of Procedure and Evidence which deal with admissible cases. Part III analyzes the interaction between these three articles and international legal norms regarding amnesty. It ultimately proposes a provision the Rome Statute should incorporate to provide clear guidance to the ICC on national grants of amnesty.

I. BACKGROUND

Understanding amnesty fully requires looking at the definition of and the rationale for granting amnesty. This section discusses what amnesty

of Rome Statute). *See generally* Bassiouni, *supra* note 5 (discussing drafting of Rome Statute and establishment of preparatory committee to oversee drafting); Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 61 (Sarah B. Sewall & Carl Kaysen eds., 2000) (describing drafting process of Rome Statute and logistics of Rome Conference); Sadat, *Hague to Rome*, *supra* note 5, at 31 (tracing development of Rome Statute).

¹⁶ Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 *LAW & CONTEMP. PROBS.* 93, 100 (1996) [hereinafter Roht-Arriaza, *Some Thoughts*] (asking jurists to “urge the Preparatory Committee to clarify that a domestic amnesty for crimes covered by the ICC’s statute would not necessarily preclude international prosecutions for such crimes”); *see* Goldstone & Fritz, *supra* note 13, at 656 (noting commentators who believe Rome Statute does not sufficiently provide for amnesty); Scharf, *Amnesty Exception*, *supra* note 4, at 508 n.7 (discussing how U.S. delegation suggested that ICC should account for national amnesties in “interest of international peace and national reconciliation”).

¹⁷ *See generally* Goldstone & Fritz, *supra* note 13, at 659 (arguing that Rome Statute “makes no accommodation for domestically enacted amnesty processes”); Scharf, *Amnesty Exception*, *supra* note 4 (discussing amnesty exceptions allowed for in Rome Statute); Ruth Wedgwood, *The International Criminal Court: An American View*, 10 *EUR. J. INT’L L.* 93, 95-97 (1999) [hereinafter Wedgwood, *American View*] (discussing how Rome Statute makes no explicit mention of amnesty).

is and its relation to impunity. The definition of amnesty, however, does not describe the rationale for amnesty. States often grant amnesty to facilitate a peaceful transition to a new government. However, the drawback of amnesty is that it often results in impunity for perpetrators of international crimes. The result is that a state and court must balance the need for amnesty with the impunity which may result.

A. The Evolution of Amnesty

Black's Law Dictionary defines "amnesty" as an act of forgiveness that a sovereign state grants to individuals who committed offensive acts.¹⁸ States typically grant amnesty to a group or class of persons, as opposed to granting a pardon to an individual.¹⁹ Related to, but distinct from amnesty, is impunity.²⁰ Impunity is the idea that an individual is immune from prosecution.²¹ Impunity does not acknowledge, forgive or

¹⁸ Azanian Peoples Org. v. President of the Republic of S. Afr. 1996 (4) SALR 671, 690, 692 (CC); 59 AM. JUR. 2D *Pardon and Parole* § 3 (1987); BLACK'S LAW DICTIONARY 82-83 (6th ed. 1990); see also Ronald C. Slye, *Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process*, in TRUTH v. JUSTICE 170, 171 (Robert I. Rotberg & Dennis Thompson eds., 2000) (describing amnesties as official acts protecting persons from liability). See generally Weisman, *supra* note 8, 529-31.

¹⁹ See Curtin v. United States, 236 U.S. 96, 97 (1915) (discussing how pardon is granted to individual and how pardon equals immunity); 59 AM. JUR. 2D. *Pardon and Parole* § 3 (1987); BLACK'S LAW DICTIONARY 1113 (6th ed. 1990); see also Naomi Roht-Arriaza, *Punishment, Redress and Pardon: Theoretical and Psychological Approaches in IMPUNITY AND HUMAN RIGHTS in INTERNATIONAL LAW AND PRACTICE* 22, 23 (Naomi Roht-Arriaza ed., 1995) [hereinafter *Roht-Arriaza, Punishment*] (discussing reasons for granting amnesty to groups). Note also that a pardon can leave a judgment of guilt in tact. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2604 (1991) [hereinafter Orentlicher, *Settling Accounts*].

²⁰ Louis Joinet, Special Rapporteur, *The Administration of Justice and the Human Rights of Detainees: The Question of Impunity for Perpetrators of Human Rights Violations*, Annex 1, Agenda Item 11(d), U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1, definitions, [hereinafter *Joinet Report*] (defining impunity as "the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account"); see also Henrard, *supra* note 6, at 613, 630 n.169 (noting that "whereas amnesty is close to impunity, there are also cases of impunity in its purest form, namely that all kinds of violations of human rights are simply ignored"); Scharf *Amnesty Exception*, *supra* note 4, at 508 (stating that "[i]n the present context, amnesty refers to an act of sovereign power immunizing person from criminal prosecution for past offenses").

²¹ BLACK'S LAW DICTIONARY 758 (6th ed. 1990) (defining impunity as "[e]xemption or protection from penalty or punishment"); see Case of Mentés v. Turkey, Eur. Ct. H.R. (1998), available at <http://www.dhcour.coe.fr/eng> (last visited Dec. 18, 2000), reprinted in 37 I.L.M. 858, 873 (1998) (describing Article 8 of Decree no. 430 (Dec. 16, 1990) which provides that impunity present when "[n]o criminal, financial or legal responsibility may be claimed against the State"); United Kingdom High Court of Justice, Queen's Bench Division (Divisional Court): In Re Augusto Pinochet Ugarte Oct. 28, 1998, reprinted in 38 I.L.M. 68 (1999) (defining impunity as where "those accused of crime could evade trial and any punishment which might follow on conviction"); *Joinet Report*, *supra* note 20, definitions

forget an offense, but simply bars prosecution of that offense.²² While distinct, both terms are interrelated as they render perpetrators unaccountable for crimes and can immunize such perpetrators from prosecution for past offenses.²³

States grant amnesty to achieve peacekeeping, nation-building, and reconciliation objectives.²⁴ Historically, states in conflict considered amnesty a necessary means to end wars, to maintain tranquility, and to establish democracy or, at least, civilian rule.²⁵ Political actors often used amnesty as a bargaining tool, promising dictators immunity from prosecution in exchange for relinquishing power.²⁶ This facilitated, in

(stating that impunity means that "whether in criminal, civil, administrative or disciplinary proceedings" perpetrators "are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, convicted, and to reparations being made to their victims").

²² See *Joint Report*, *supra* note 20, definitions; see also Naomi Roht-Arriaza, *Introduction, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 1, 4 (Naomi Roht-Arriaza ed., 1995) (discussing impunity and related component of lawlessness or lack of "legal procedures and criteria for dealing with past abuses"); Henrard, *supra* note 6, at 630 (characterizing impunity in its purest form as a statement "that all kinds of violations of human rights are simply ignored").

²³ See Slye, *supra* note 18, at 171 (noting that amnesty involves forgetting facts and unaccountability); Cassel, *supra* note 7, at 198 (relating impunity to absence of criminal or civil prosecution); see also 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*] (discussing obligation to prosecute and impact of amnesty on this obligation).

²⁴ See *Azanian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SALR 671, 672 (CC) (discussing how South Africa chose amnesty to advance "reconciliation and reconstruction"); Lome Agreement, *supra* note 11 (granting amnesty to rebel leader in exchange for cease-fire); see also Naomi Roht-Arriaza, *Conclusion: Combating Impunity, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 299-302 (1995) [hereinafter *Roht-Arriaza, Combating Impunity*] (discussing role of amnesty in peacemaking and nation building).

²⁵ See *Regina v. Bartle and the Commissioner of Police Ex Parte Pinochet*, 37 I.L.M. 1302, 1317, 1322 (H.L. 1998-99) (Nov. 25, 1998) (discussing in dicta reasons for Chilean amnesty decree 2191); *Azanian Peoples Org.*, (4) SALR at 690 (describing amnesty as 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 Roht-Arriaza, *Combating Impunity, supra* note 24, at 299-302 (stating amnesty is part of national reconciliation).

²⁶ See *Governors Island Agreement*, *supra* note 10; Naomi Roht-Arriaza, *Truth Commission and Amnesties in Latin America: The Second Generation*, 92 AM. SOC'Y INT'L L. PROC. 313, 314 (1998) [hereinafter *Roht-Arriaza, Truth Commission*] (noting that amnesty negotiated as price for military's relinquishment of control); Scharf, *Amnesty Exception, supra* note 4, at 508 (discussing various amnesties granted to achieve peace). As an example, the United States helped broker an amnesty deal in Haiti to get President Raoul Cedras to step down and then to restore former elected President Jean-Bertrand Aristide to power. 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) (citing Haitian

many instances, a peaceful transition from military to civilian government.²⁷ In Latin America, particularly, many declining military dictatorships in the 1970s and 1980s, anxious to arrange their own impunity, proclaimed blanket amnesties for themselves.²⁸ States, including the United States, remained silent regarding these grants of amnesty in order to encourage reconciliation and transition to democracy.²⁹ Outside of Latin America, other states such as South Africa, Haiti, and Romania generally viewed amnesty as a necessary component of transition, reconciliation, and peace.³⁰ The international community³¹ recognized even blanket amnesties, covering all types of

amnesty as example of amnesty brokered for peace). *See generally* Irwin P. Stotzky, *Haiti: Searching for Alternatives*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 185-88 (Naomi Roht-Arriaza ed., 1995) (analyzing history and impact of Haitian amnesty).

²⁷ *See* Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 299-302 (noting amnesty is bargaining chip available to mediators attempting to bring end to conflict); Scharf, *Swapping Amnesty*, *supra* note 10, at 4-9 (discussing how in Haiti "[t]he United States and United Nations saw the carrot of amnesty, together with the stick of threatened force, as the best way to persuade the military leaders to step down without a fight").

²⁸ Guatemala Amnesty Ley de Reconciliation Nacional, 18 Dec. 1996, Decreto 145-96, Congreso de la Republica; Decree 2191 *supra* note 9 (granting amnesty to individuals who committed criminal acts between September 1973 and March 1978); *see also* Cassel, *supra* note 7, at 197-99, 200, nn.9-12, 14 (discussing how Latin American dictators transitioning from military to civilian or democratic regimes used amnesty laws as insurance against prosecution of human rights abuses); Roht-Arriaza, *Some Thoughts*, *supra* note 16, 93-94 (noting that South African and Guatemalan amnesty laws moved away from blanket pre-conviction amnesties that Latin American governments typically enacted during 1970s and 1980s); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 *ST. MARY'S L.J.* 857, 858 n.5 (1995) (noting that broad amnesty laws are part of Latin American landscape).

²⁹ ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 100 (1998) (discussing how American policy ignored Latin American amnesties promulgated by dictatorial regimes); Schabacker, *supra* note 26, at 3 (discussing reluctance of international community to become involved with state's decision to grant amnesty domestically); Scharf, *Amnesty Exception*, *supra* note 4, at 508 (noting that U.S. delegation's 1997 draft to ICC PrepCom suggested amnesties may encourage reconciliation, international peace, and transition to democracy).

³⁰ *See* Promotion of National Unity and Reconciliation Act 34 of 1995; Governors Island Agreement, *supra* note 10, ¶ 6 (granting amnesty to coup leaders and supporters in accordance with Haitian Constitution); Edwin Rekosh, *Romania: A Present Culture of Impunity*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, 129, 139-40 (Naomi Roht-Arriaza ed., 1995) (declaring blanket amnesty for political offenses committed in Romania from December 30, 1947 to December 22, 1989); Scharf, *Amnesty Exception*, *supra* note 4, at 507 (noting United Nations brokered amnesties in Cambodia and South Africa to restore peace and democratic government). For a general discussion of amnesty in Haiti, *see* Stotzky, *supra* note 26.

³¹ International community here is defined to include: states, 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.

crimes, in order to end violence.³² In addition, newly installed regimes, or those in transition, sometimes consider amnesty when prosecution is impractical.³³ Regimes in transition often have fragile judiciaries which have little experience with judicial oversight of governmental policy.³⁴ Granting amnesty allows newly created regimes to build judicial and political structures without the strain of prosecution.³⁵ Amnesty, thus, becomes a part of nation-building.³⁶

Amnesty also plays an important role in self-determination and national sovereignty.³⁷ The decision to grant amnesty is an expression of

³² 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), article 6(5), reprinted in 16 I.L.M. 1442 (1977), [hereinafter Protocol II] (stating “[a]uthorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in armed conflict”); see also Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 299-302; Michael Vickery & Naomi Roht-Arriaza, *Human Rights in Cambodia*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, 246-49 (Naomi Roht-Arriaza ed., 1995) (describing attempts to broker amnesty in order to bring Khmer Rouge to peace agreement).

³³ See Decree 2191, *supra* note 9 (granting amnesty for acts during establishment of political stability); HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1085 (2000) (discussing how amnesty is often utilized to facilitate transfer between two regimes after periods of massive human rights violations); 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).

³⁴ Joint Report, *supra* note 20, ¶ 28 (noting that “all too often national courts are not yet capable of handing down impartial justice or are physically unable to function”); Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE* 235, 237 (Robert I. Rotberg & Dennis Thompson eds., 2000) (noting how in places like Kosovo, Rwanda, Cambodia, East Germany, East Timor, and Brazil “[t]here may be an inadequate number of skilled people . . . to administer the justice system”); Cassel, *supra* note 7, at 199 (noting that “[i]n most countries, police, prosecutors and judges remain under-trained and underpaid”); Henrard, *supra* note 6, at 633 (discussing how certain regimes in transition may not be “strong enough to challenge the human rights violations of the previous military regimes”); Roht-Arriaza, *Truth Commissions*, *supra* note 26, at 314 (discussing how weak domestic courts have difficulty standing against political decision of executive or legislature to enact amnesty).

³⁵ *Azanian Peoples Org.*, (4) SALR 671, 690 (discussing how “it is necessary after conflict for a society to build political and governmental reconstruction”); Minow, *supra* note 34, at 237-38 (noting that building social institutions is critical in aftermath of mass atrocities and that litigation may cost too much); Henrard, *supra* note 6, at 633 (noting that states transitioning from authoritarian to democratic regimes are trying to achieve both “sustainable democracy” and “the rule of law”).

³⁶ *Azanian Peoples Org.*, (4) SALR at 690-92 (discussing how amnesty fosters social reconciliation and reconstruction); Minow, *supra* note 34, at 237-38 (noting how prosecutions and trial strain building of judicial, political and social structures); Schabacker, *supra* note 26, at 11 n.64 (noting that amnesty in Chile was necessary in order to preserve fragile political stability during transition to democracy).

³⁷ Henrard, *supra* note 6, at 633-34 (discussing how amnesty can become part of realizing legitimacy of new regimes); Naomi Roht-Arriaza, *The Developing Jurisprudence on*

a political will to distance the new regime from the atrocities of past regimes.³⁸ Further, governments assuming power after conflict consider amnesty a critical component of national reconciliation.³⁹ Newly installed regimes may not want to prosecute former repressors and human rights abusers for fear of creating political backlash and increasing social tensions.⁴⁰ A newly installed regime, rather, may want to distance itself from the atrocities of the prior regimes and provide a common starting point for the future.⁴¹ Amnesties, then, are a way to

Amnesty, 20 HUM. RTS. Q. 843, 870-74 (1998) [hereinafter *Roht-Arriaza*, *Developing Jurisprudence*] (discussing how amnesties were expression of legislative and executive power placing sovereign authority above international law); Schabacker, *supra* note 26, at 3 (discussing reluctance of international community to become involved with state's decision to grant amnesty domestically). Thus, other nations historically considered amnesty as the act of a sovereign, political body not reviewable by the judiciary. *Chanfeau Orayce v. Chile*, Cases 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev., ¶ 53 (1997) (holding Chilean State and legislature responsible for granting or repealing amnesty); see Michael P. Davis, *Accountability and World Leadership: Impugning Sovereign Immunity*, U. ILL. L. REV. 1357, 1370 (1999) (concluding that immunities are fundamental characteristic of sovereign states in international system); Roht-Arriaza, *Truth Commissions*, *supra* note 26, at 314 (noting that in Latin America courts have rejected challenges to amnesty on grounds that "legislature is supreme and courts should not interfere with legislative decisions").

³⁸ *Azanian Peoples Org.*, (4) SALR at 692; see Slye, *supra* note 18, at 183 n.40 (stating that amnesty is seen 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) [hereinafter Wedgwood, *War Crimes*] (noting amnesty process is beneficial "when stabilizing a situation to allow civic rebuilding may be more important than extended general deterrence or vindication of the past").

³⁹ *Azanian Peoples Org.*, (4) SALR at 674-77 (concluding that amnesty is seen as necessary to restore peace and democratic government in South Africa); Scharf, *Amnesty Exception*, *supra* note 4, at 5078 (noting how other countries grant amnesty in order to restore peace and stabilize government). Cf., Annual Report of the Human Rights Committee, U.N. GAOR 51st Sess., Supp. No. 40, at 49 (stating that amnesty inhibits democracy); Diane Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 713 (1997) [hereinafter Orentlicher, *Swapping Amnesty*] (noting that people should be skeptical of claims that wholesale amnesty is approach most likely to facilitate national reconciliation).

⁴⁰ Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 299-302; Kent Greenawalt, *Amnesty's Justice*, in TRUTH V. JUSTICE 189, 200-01 (Robert I. Rotberg & Dennis Thompson eds., 2000) (discussing how restorative justice facilitates restoration of "desirable relations between offenders and victims" and that this can be more important than legal remedies); Scharf, *supra* note 4, at 508-09 (noting how amnesty is "necessary bargaining chip" to keep peace); UN War Crimes Prosecutor Says General Mladic Hiding in Serbia, AGENCE FRANCE PRESSE, Sep. 4, 2001 (discussing how former President Slobodan Milosovic and other former-Yugoslav leaders are hiding in Bosnia and Serbia and even protected by state immunity making national prosecution impossible); Diane F. Orentlicher, *Tribunal Has to Reach Out to Serbs*, NEWSDAY, July 10, 2001 (noting how Milosovic cannot and should not be tried in former-Yugoslavia due to fragility of new regime).

⁴¹ *Azanian Peoples Org.*, (4) SALR at 690 (discussing how South Africa's new regime needed to make political decisions about its future and that this may trump simple

deal with repressive pasts and reconcile divided societies.⁴²

Notwithstanding these positive aims, amnesty results in impunity for perpetrators of international crimes. By preventing identification and investigation of perpetrators, amnesties directly contravene judicial notions of accountability.⁴³ As a result, international bodies, including the United Nations, no longer unequivocally accept all amnesties that prevent investigation and prosecution of international crimes.⁴⁴ Whether an amnesty is acceptable in light of notions of international accountability depends on the process surrounding the grant of amnesty, and the crimes covered.⁴⁵

prosecution); Slye, *supra* note 18, at 183 (describing amnesty as providing clean break with past and providing common starting point for better future); Wedgwood, *War Crimes, supra* note 38, at 274-75 (explaining need for amnesty provisions in ICTY statute).

⁴² *Azanian Peoples Org.*, (4) SALR at 690-92 (discussing how South African amnesty is one way to deal with repressive past and reconstruct society); Henrard, *supra* note 6, at 595; Popovski, *supra* note 6, at 408 (stating "there will be cases where negotiating with warlords will be a tool to stop the violence"). Popovski further states that "[t]he peace in countries, like South Africa and Northern Ireland, indeed came through the amnesty of political murderers." *Id.*

⁴³ *Orayce*, ¶ 68 (discussing how Chilean National Truth and Reconciliation Commission was not "viable alternative to judicial process" as it did not "publish names of perpetrators or impose sanction on them"); Joinet Report, *supra* note 20, ¶¶ 27-32 (discussing aim of combating impunity by restricting amnesty provisions which contradict obligation to investigate violations and prosecute perpetrators); NEIER, *supra* note 29, at 96 (noting how President Andrew Johnson in 1865 exempt[ed] former Confederates from criminal punishment); Slye, *supra* note 18, at 179 (noting that amnesty procedures must be designed to provide accountability to ensure success of reconciliation); Cassel, *supra* note 7, at 198-200 (discussing link between impunity and amnesty); Roht-Arriaza, *Value of Amnesty, supra* note 23, at 340-41 (noting that amnesty may contravene duty to prosecute); see, e.g., Cassel, *supra* note 7, at 200 (noting that amnesty laws often result from fear "that democratic change might bring accountability for human rights violations").

⁴⁴ Annual Report of the Human Rights Committee, U.N. GAOR, 51st Sess. Supp. No. 40, at 1, U.N. Doc. A/51/40 (1993); see also *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.2/1985/16, par. 5 (1985) [hereinafter *Joinet Amnesty Study*]; 1999 REPORT ON CHILE, HUMAN RIGHTS WATCH, available at <http://www.hrw.org/press/2000/08/Pinochet/html> (last visited Nov. 29, 2000), § IV & n.98 (noting that Inter-American Commission on Human Rights and U.N. bodies criticized Peruvian amnesty for violating "the prohibition against amnesty laws covering crimes against humanity"). The United Nations recently denounced amnesty granted to Foday Sankoh in the Lome Agreement. Special Court Statute, *supra* note 12, ¶ 1 (acting pursuant to Resolution 1315 establishing special court and declaring that Special Court will not respect Lome Agreement amnesty); see Henrard, *supra* note 6, at 640 (noting that U.N. special representative of Secretary General added disclaimer to Lome peace agreement that "the U.N. does not recognize the amnesty as applying to international crimes of genocide, crimes against humanity and war crimes").

⁴⁵ See *Orayce*, ¶¶ 66-71 (noting how Chile's amnesty failed to meet certain rights and processes guaranteed by American Convention on Human Rights); *Azanian Peoples Org.*, (4) SALR at 690 (holding that TRC amnesty is not blanket amnesty for all individuals); General Guidelines on the Responsibilities of Democratic Governments to Investigate and Remedy

B. The Current Context of Amnesty

The scope of the amnesty process, as shown above, involves political and legal choices. In deciding whether to grant amnesty, a state must consider political and judicial stability, investigative powers, and options available to address victims' needs.⁴⁶ As these realities vary from state to state, so do the types of amnesties governments grant.⁴⁷

1. Self- and Blanket Amnesty: Chilean Decree 2191

One type of amnesty is self-amnesty.⁴⁸ Executives often issue this type of amnesty to ensure that once they relinquish power they will not face prosecution.⁴⁹ Self-amnesties generally cover only specific individuals

Human Rights Violations Under Prior Regimes, 1985-1986 Annual Report of Inter-American Commission Human Rights, 191-93 OEA/Ser.L, doc. 8 rev. 1 (1986) available at <http://www.oas.org>; see also Cassel, *supra* note 7, at 215 & n.112 (concluding that self-amnesties granted by extra constitutional regimes are legal nullities). See generally Weiner, *supra* note 28, at 858 (discussing guidelines for reviewing amnesty).

⁴⁶ See Weiner, *supra* note 28, at 859, 874-75 (discussing political context of amnesty); see e.g. Azanian Peoples Org., (4) SALR at 690-92 (discussing national value of amnesty in terms of reconciliation).

⁴⁷ Azanian Peoples Org., (4) SALR at 688 (stating that "there is no single or uniform international practice in relation to amnesty"); Greenawalt, *supra* note 40, at 195-96 (discussing political and societal dimensions and resulting spectrum of amnesties); Slye, *supra* note 18, at 171 (stating that there are many acts and processes falling under amnesty label).

⁴⁸ Chanfeau Orayce v. Chile, Cases 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997), ¶ 80 (discussing how "Decree 2191 enacted under the military dictatorship" places Chile in non-compliance with American Convention of Human Rights); see Henrad, *supra* note 6, at 630 (defining self-amnesty as occurring when regime relinquishing power grants itself amnesty or forces emerging regime to grant amnesty for previous violations); Weiner, *supra* note 28, at 859 (stating that identity of amnesty grantor is important); 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 (1999) (noting that Pinochet granted himself amnesty).

⁴⁹ See Report of the Working Group on Enforced or Involuntary Disappearances, *Its Causes and Consequences*, U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1995/36, 51st Sess., Provisional Agenda Item 10(c), ¶¶ 277, 286 (1994) (reporting on self-amnesty laws of Mexico and Morocco). Regarding the Mexican self-amnesty laws the Commission reports that "[o]n 12 January 1994, the Government decided to seek a political rather than a military solution to the conflict and unilaterally declared a cease-fire, [and] decreed a general amnesty." *Id.*, ¶ 277. The Commission reports that "the [King of Morocco proclaimed] amnesty on 19 July 1994 . . . for more than 400 persons detained for political reasons. *Id.*, ¶ 286; see also Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 857-58 (discussing amnesty in Argentina which "the military had granted to itself before leaving power"); Scharf, *Amnesty Exception*, *supra* note 4, at 509 (noting amnesty granted to induce specific leaders to relinquish power); Horowitz, *supra* note 48, at 492 (discussing how Pinochet's government issued Decree 2191 to protect Pinochet from facing criminal liability).

but are blanket and cover an array of crimes.⁵⁰ A self-amnesty is difficult to overturn, as it is a political grant and often viewed as necessary to governmental transition.⁵¹

For example, in 1978, Chilean President General Augusto Pinochet granted himself and military leaders amnesty, in Decree 2191, covering crimes committed between 1973 and 1978.⁵² In this period of Pinochet's rise to power, the government and military eliminated subversives and leftists, detaining and killing several thousand people.⁵³ When the

⁵⁰ See Decree 2191, *supra* note 9 (granting amnesty for all crimes committed during rise and rule of Pinochet); see Greenawalt, *supra* note 40, at 195 (contrasting blanket amnesties, which cover all crimes, with other forms of amnesty); Jorge Mera, *Chile: Truth and Justice Under the Democratic Government*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 171, 179 (Naomi Roht-Arriaza ed., 1995) (labeling Chilean Pinochet's amnesty as self-amnesty for military); Slye, *supra* note 18, at 172 (concluding that contemporary amnesties apply to classes of people); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 847 (noting how Chile's decree constituted self-amnesty because it was enacted primarily for military, and covered all crimes). For a discussion of Haitian amnesty see generally Scharf, *Swapping Amnesty*, *supra* note 10, at 524.

⁵¹ See *Orayce*, ¶ 76 (noting that in case of Chile, President Patricio Aylwin could not overturn this amnesty, as he had neither support from Parliament nor constitutional power to overrule amnesty). The Government sought to have Decree 2191 repealed, "but the relevant constitutional provision requires that any initiatives concerning matters of amnesty be tabled from the Senate (Art. 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." *Orayce*, ¶ 13. Instead, President Aylwin, the amnesty decree in place, established an investigative commission, and apologized officially for official abuses of prior regime. See Roht-Arriaza, *Truth Commissions*, *supra* note 26, at 313 (stating that President Aylwin set up Rettig Commission to investigate deaths and disappearances, under policy of "all the truth and as much justice as possible"); Schabacker, *supra* note 26, at 10 n.57 (discussing how President Aylwin "faced the uncomfortable position of sharing power with the former regime" and thus could not overturn Chilean amnesty); cf. Cassel, *supra* note 7, at 208-17; Roht-Arriaza, *Value of Amnesty*, *supra* note 23, at 339-41, nn.64-65 (discussing General Leopoldo Galtieri case where court held that illegal domestic amnesty cannot bind courts of another state); Slye, *supra* note 18, at 184 (discussing how Argentinean amnesty law passed by military regime shortly before leaving power was reversed by democratic legislature).

⁵² Decree 2191, *supra* note 9; Regina v. Bartle and the Commissioner of Police *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 that Chilean parliament passed decree granting amnesty to all persons involved in criminal acts from September 11, 1973 to March 10, 1978). See generally, Horowitz, *supra* note 48, at 492-96 (discussing Pinochet's rise to power and amnesty Decree 2191).

⁵³ See 1999 CHILE REPORT, HUMAN RIGHTS WATCH, available at http://www.hrw.org/hrw/reports/1999/chile/Patrick-01.htm#p164_5157 (last visited Feb. 14, 2001) (stating that Rettig Commission documented 3,197 cases); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2133 (1999) (stating that during Pinochet's rule "hundreds of thousands of people were detained for political reasons, and several thousand disappeared or were killed"); 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, 508-09 nn.63-64 (1999) (discussing records of Chilean national groups reporting that over two thousand people "had been killed in

government no longer considered itself in a state of siege, Pinochet declared a self-amnesty.⁵⁴ Parliament passed this decree on April 19, 1978, incorporating it into the constitution.⁵⁵ Decree 2191 covered the opposition as well as the military.⁵⁶ The military benefited most, however, as its personnel were responsible for most of the torture, disappearances, and killings during Pinochet's rise to power.⁵⁷ Further, Decree 2191 was a blanket amnesty covering all crimes committed.⁵⁸ Decree 2191, finally, covered all proceedings against such crimes.⁵⁹ The Chilean government justified amnesty Decree 2191 as necessary to preserve the fragile political stability during its transition to democracy.⁶⁰

violation of their human rights"); Davis, *supra* note 37, at 1359-60 (discussing Pinochet's rise and reign). For a discussion of the massive levels of state sponsored violence and the Latin American dirty wars against subversives see generally Bhuta, *supra* at 499.

⁵⁴ Regina v. Bartle and Commissioner of Police *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 parliament enacted amnesty in 1978 to establish peace and order); see also Bhuta, *supra* note 53, at 908 (noting that "[h]uman rights violations declined between 1977 and 1980, with a repeal of the state of siege"); Horowitz, *supra* note 48, at 492 n.18, 495 (discussing how Pinochet enacted Decree 2191 to protect himself from criminal liability for his acts).

⁵⁵ *Ex Parte Pinochet* 37 I.L.M 1302, 1317 (opinion of Lord Lloyd of Berwick); Chanfeau Orayce v. Chile, Case 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev., ¶ 1 (1997) (describing how Decree law 2191 was promulgated and enacted by government under military regime); Horowitz, *supra* note 48, at 495 & nn.46-47 (discussing how Chilean constitution incorporated Decree 2191).

⁵⁶ Decree 2191, *supra* note 9; *Ex Parte Pinochet*, 37 I.L.M 1302, 1317; Bhuta, *supra* note 53, at 509 (noting that Decree 2191 covered "those who had committed criminal actions" during 1973-1978).

⁵⁷ See Bhuta, *supra* note 53, at 507 (stating that National Intelligence Directorate (DINA) "was responsible for most of the political repression from 1974-1977"); Mera, *supra* note 50, at 180 (discussing how military "killed or forcibly disappeared" individuals); Schabacker, *supra* note 26, at 10 (discussing Chilean broad amnesty law which covered military and how military still in power during Aylwin government).

⁵⁸ Current Dispatches from Sebastian Brett, Human Rights Watch, at <http://www.hrw.org/campaigns/Chile98/dispatches.html> (last visited Nov. 29, 2001); Greenawalt, *supra* note 40, at 195 (stating that blanket amnesty covers "all crimes committed within a particular period"); Horowitz, *supra* note 48, at 495 (labeling Decree 2191 as "blanket amnesty law"); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 847 nn.16-18 (same).

⁵⁹ Decree 2191, *supra* note 9. Amnesties may be partial covering only civil or criminal proceedings, leaving other avenues open. See Greenawalt, *supra* note 40, at 195 (describing spectrum of amnesties according to whether they cover criminal proceedings); Horowitz, *supra* note 48, at 495 (stating that because of Decree 2191 Pinochet "is immune from prosecution in Chile"). But see Slye, *supra* note 18, at 182 (observing that Pinochet's amnesty "did not protect him from his Chilean and European victims' efforts to hold him accountable before a Spanish court."); Mera, *supra* note 56, at 181 (stating that lower courts in Chile have found that Decree 2191 "does not prevent investigation of the facts").

⁶⁰ See *Ex Parte Pinochet*, 37 I.L.M 1302, 1317 (noting amnesty granted in Chile to maintain "general tranquility, peace and order"); Mera, *supra* note 50, at 181 (describing perceived need for amnesty Decree 2191 to "restore social harmony and peace," but noting

2. Discrete Amnesty: South African Truth and Reconciliation Commission

A second type of amnesty occurs when judicial or political bodies grant amnesty in exchange for facts surrounding crimes.⁶¹ Groups do not broker this type of amnesty as an incentive to lay down weapons or cease hostilities.⁶² Rather, the rationale is to allow investigation of alleged human rights abuses.⁶³ The effect is amnesty in exchange for information to investigate international crimes. The model example is the South African truth and reconciliation process.⁶⁴

South Africa considered the role of amnesty in international law in 1996 when it created the Truth and Reconciliation Commission (TRC).⁶⁵

that decree had very little popular support).

⁶¹ Promotion of National Unity and Reconciliation Act 34 of 1995, § 8(3); see Greenawalt, *supra* note 40, at 195 (stating that amnesties may require individual applications like in South Africa where "individuals had to make a 'full disclosure' of their human rights violations"); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 846 (introducing various scopes and contexts of amnesties); Scharf, *Amnesty Exception*, *supra* note 4, 510 (noting that in South Africa amnesty was only available for individuals "who fully disclosed the facts of their apartheid crimes").

⁶² See Azanian Peoples Org. v. President of the Republic of S. Afr., 1996 (4) SALR 671, 672 (cc) (discussing aims of Truth and Reconciliation Commission to establish picture of what happened and fates or whereabouts of victims, and to restore human dignity to victims); see Orentlicher, *Swapping Amnesties*, *supra* note 39, at 713 (concluding that amnesties have implications for peace in countries emerging from conflict); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L. L. 316, 317 (1998) (concluding amnesties necessary only in some instances to bring end to bloody conflict); Weiner, *supra* note 30, at 860 (noting that states employ various types of amnesties to respond to human rights violations of prior regimes); Tina Rosenberg, *Truth Commissions Take On a Local Flavor*, N.Y. TIMES, Feb. 26, 2001, at A18 (discussing how various countries have decided to establish truth commissions including Canada which is thinking of establishing truth commission "to examine aspects of how it treated native peoples").

⁶³ See Henrard, *supra* note 6, at 645 (arguing that amnesty often occurs after atrocities committed); Orentlicher, *Swapping Amnesty*, *supra* note 39, at 714 (stating how South Africa's approach to amnesty facilitates full disclosure of facts surrounding crimes); Slye, *supra* note 18, at 171 (defining amnesty and variety of acts that fall under amnesties and using South Africa as amnesty that does not conceal facts about past violations).

⁶⁴ Minow, *supra* note 34, at 239 (discussing distinct and powerful role TRC played in truth-telling); Orentlicher, *Swapping Amnesty*, *supra* note 39, at 713-14 (labeling South Africa as model approach which "may have the effect of fostering a fuller accounting of the truth... as well as a more robust record of prosecution"); Slye, *supra* note 18, at 171 (concluding South African amnesty was sophisticated at providing truth, reconciliation and accountability).

⁶⁵ 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 amnesty); Alex Boraine, *Truth And Reconciliation in South Africa*, in TRUTH V. JUSTICE, 141, 143-45 (Robert I. Rotberg and Dennis

As Nelson Mandela assumed the presidency, there was discussion of what to do with the former apartheid leaders.⁶⁶ The African National Congress (ANC) wanted to provide a full account of atrocities, give justice to the victims, and punish apartheid leaders.⁶⁷ However, those who had been security officials during the apartheid era wanted blanket amnesty.⁶⁸ They had defended the negotiation process, and wanted amnesty in return for their continued loyalty to the emerging state.⁶⁹ Ultimately, South Africa chose an amnesty process⁷⁰ to help facilitate the difficult transition to democracy.⁷¹

Thompson eds., 2000) (discussing process South Africa pursued in appointing TRC and its provision for limited amnesty).

⁶⁶ NEIER, *supra* note 29, at 104 (mentioning that some supporters of amnesty considered it critical component of peaceful transition); Greenawalt, *supra* note 40, at 192 n.15 (noting that high officials in ruling national party said they would not surrender power without amnesty and Mandela feared no amnesty would yield an intensification of violent struggle); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 856 (noting that amnesty was discussed during 1993 negotiations with de Klerk government pushing for blanket amnesty); Sachs, *supra* note 65, at 1565-66 (commenting on each side's view in amnesty debate). See generally Berat, *supra* note 65 (tracing amnesty negotiations between government and political actors).

⁶⁷ Berat, *supra* note 65, at 272 (noting that ANC indicated that any amnesty would have to be accompanied by full disclosure of past activities of security forces); Borraine, *supra* note 65, 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 65, at 1566.

⁶⁸ Berat, *supra* note 65, at 272 (discussing security officials' desire for blanket amnesty); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 856 (noting how de Klerk government wanted blanket amnesty); Sachs, *supra* note 65, at 1566 (stating that former "President de Klerk had promised security forces that they would get amnesty in the new South Africa").

⁶⁹ Borraine, *supra* note 65, 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 65, at 1566 (observing how military wanted amnesty in exchange for loyalty to peace process).

⁷⁰ Sachs, *supra* note 65, at 1566 (noting ANC was not in position to defend elections without any inside people in security forces); see, Borraine, *supra* note 65, 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 37, at 856 n.111 (stating that Parliament enacted Truth and Reconciliation Act of 1995 to deal with amnesty).

⁷¹ Azanian Peoples Org. v. President of the Republic of S. Afr., 1996 (4) SALR 671, 691 (CC) (stating that amnesty was tool for "effecting a constructive transition towards democratic order"); NEIER, *supra* note 29, 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).

The Truth and Reconciliation Act established the TRC.⁷² It includes a provision allowing amnesty in exchange for full disclosure of the facts surrounding politically motivated crimes committed under the apartheid regime.⁷³ The TRC does not grant amnesty, however, for crimes committed for reasons of personal malice or gain.⁷⁴ 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.⁷⁵ The commissioners grant amnesty only in exchange for the truth.⁷⁶

Amnesty in exchange for truth is distinct from a self- or blanket amnesty. Unlike self-amnesty, in which the executive leads, parliament drafted the amnesty provision in the South African model.⁷⁷ Further, unlike Chile's Decree 2191, the South African amnesty process is conditional on full disclosure of the truth.⁷⁸ Individuals must present

⁷² Promotion of National Unity and Reconciliation Act 34 of 1995; *see also* Berat, *supra* note 65, at 271-80 (discussing process of enacting TRC legislation); Boraine *supra* note 65, at 144-46 (describing enactment and parliamentary legislation surrounding TRC).

⁷³ Promotion of National Unity and Reconciliation Act, §§ 20(3), (7)-(10) (outlining amnesty criteria); NEIER, *supra* note 29, at 104-05; Boraine, *supra* note 65, at 148 (noting that requirements for amnesty, including requiring detailed information relating to specific human rights violations and full disclosure, helped to limit impunity); Neil Boister and 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, 620 (2000) (stating that those involved in South African conflict could seek amnesty "for human rights violations committed for political purposes"); Sachs, *supra* note 65, 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").

⁷⁴ Promotion of National Unity and Reconciliation Act, § 20(3) (outlining important relationship between act perpetrated and object pursued); *see also* NEIER, *supra* note 29, 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 65, at 149.

⁷⁵ Promotion of National Unity and Reconciliation Act, preamble, §§ 4, 18 (empowering commission to consider whether act in accordance with political objective); NEIER, *supra* note 29, at 105 (discussing judicial evaluation and aim of truth); Boraine, *supra* note 65, at 148-49 (outlining amnesty criteria to include consideration of legal and factual nature surrounding each act); Greenawalt, *supra* note 40, at 195 (noting that TRC amnesty in South Africa "covers only crimes that have been fully disclosed"); Boister & Burchill, *supra* note 73, at 620 n.11 (noting that amnesty provision allowed amnesty for full disclosure of relevant facts).

⁷⁶ Promotion of National Unity and Reconciliation Act, preamble (stating how South Africa recognizes that it is "necessary to establish the truth in relation to past events"); *Azanian Peoples Org. v. President of the Republic of S. Afr.*, 1996 (4) SALR 671, 691 (CC); *see* Boraine *supra* note 65, at 150-51 (discussing how TRC committed itself to truth); Sachs, *supra* note 65, at 1569 (stating that amnesty commission granted amnesty for telling whole truth).

⁷⁷ Promotion of National Unity and Reconciliation Act 34 of 1995; *see* Boraine, *supra* note 65, at 144-45; Sachs, *supra* note 65, at 1567-68.

⁷⁸ Promotion of National Unity and Reconciliation Act 34 of 1995, § 20(3); *see*, Boraine,

themselves to the TRC and fully disclose all relevant facts in order for the TRC to grant amnesty.⁷⁹ Persons who do not appear before the commission, such as ex-Presidents P.W. Botha and F.W. de Klerk, will not receive amnesty.⁸⁰ Unlike blanket amnesties, the South African model is individualized and covers only those crimes furthering a political objective.⁸¹ Disclosure of the truth enables the TRC to identify other suspects and provides the victims' families with a sense of closure and acknowledgment.⁸² As a part of acknowledgment, the TRC also established a reparation committee that can make recommendations to the government regarding reparations, including compensation for individuals.⁸³ A conditional amnesty, then, can meet peacekeeping, nation-building, and reconciliation objectives of amnesty as well as the requirements of international accountability.⁸⁴ Regional and

supra note 65, 148-49 (outlining criteria surrounding TRC amnesty provision); Henrard, *supra* note 6, at 645 (noting that South African TRC process is example of discrete amnesty, conditional on complete disclosure of atrocities committed).

⁷⁹ Promotion of National Unity and Reconciliation Act 34 of 1995, preamble & 5(b) (stating how amnesty given for full disclosure to individual applications); Slye, *supra* note 18, at 172 (stating how TRC process differs in that individuals had to identify themselves "through applying and making full disclosure of the activities for which they wanted amnesty," labeling this "self-initiation"); Sachs, *supra* note 65, at 1566.

⁸⁰ Promotion of National Unity and Reconciliation Act 34 of 1995, §§ 18-19 (detailing requirements for individual applications); see NEIER, *supra* note 29, at 104-05 (noting that individual applications must be filed and that those who wanted to benefit from amnesty had to acknowledge crimes individually); Boister & Burchill, *supra* note 73, at 622 (stating that "[t]he living heads of the apartheid state, ex-President's P.W. Botha and F.W. de Klerk" did not apply for amnesty"). Chile's Decree 2191, however, covered the military and opposition leaders as well as Pinochet. *Ex Parte Pinochet*, 37 I.L.M 1302, 3 W.L.R. 1456 (H.L. 1998-99) (Nov. 25, 1998) (opinion of Lloyd Berwick).

⁸¹ Promotion of National Unity and Reconciliation Act, preamble, § 1(1)(i) (describing commitment to amnesty granted for acts tied to political objectives and defining political objective); *Azanian Peoples Org.*, (4) SALR at 691; see also Henrard, *supra* note 6, at 646 (noting that requirements for amnesty under TRC include that act is "associated with a political objective").

⁸² Boraine, *supra* note 65, at 153-55 (discussing how TRC process similar to process of acknowledgment); Minow, *supra* note 34, at 238 (concluding that Truth and Reconciliation Commission gave public acknowledgement and attention to survivors); Sachs, *supra* note 65, at 1573-74 (discussing TRC's role in fostering acknowledgment of facts and responsibility surrounding crimes).

⁸³ Promotion of National Unity and Reconciliation Act 34 of 1995, ¶ 25(b)(i); Boraine, *supra* note 65, at 146 (stating that TRC established Reparation and Rehabilitation Committee); Robert I. Rotberg, *Truth Commission and the Provision of Truth, Justice, and Reconciliation*, in *TRUTH v. JUSTICE*, 3, 11-12 (Robert I. Rotberg & Dennis Thompson eds., 2000) (stating that TRC's Reparation and Rehabilitation Committee recommended to Parliament who should be compensated and by how much.)

⁸⁴ *Azanian Peoples Org.*, (4) SALR at 690-92 (discussing how amnesty can assist reconciliation process in South Africa). For discussion of the TRC's ability to achieve reconciliation and accountability see generally Boraine, *supra* note 65; Slye, *supra* note 18.

international actors have praised the TRC approach to amnesty while rejecting Chile's Decree 2191.⁸⁵

C. *Amnesty in International Law*

As the experiences in Chile and South Africa demonstrate, states grant amnesties; however, states form a part of the international community. It is, therefore, necessary to look at how international legal norms treat national amnesties. Grants of amnesty often directly contradict international legal obligations to prosecute or investigate an individual suspected of international crimes. International law obligations to prosecute and investigate arise primarily out of treaty obligations and state practices.⁸⁶ By looking at treaties covering serious international crimes, and how monitoring bodies interpret amnesty provisions, this section attempts to define the international law surrounding amnesty.

1. International Conventions Allowing Amnesty

Few treaty provisions specifically prohibit amnesty and some actually allow broad grants of amnesty.⁸⁷ Article 6(5) of the Second Additional Protocol to the Geneva Conventions (Protocol II),⁸⁸ for example, permits

⁸⁵ *Azanian Peoples Org.*, (4) SALR at 692; *Chanfeau Orayce v. Chile*, Cases 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev., ¶ 68 (1997); *Garay Hermosilla*, Case 10.843, Rep. No. 36/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., at 156 (1997).

⁸⁶ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980) (holding that prohibition against torture is part of customary international law); *Aloeboetoe Case*, 15 Inter-Am. Ct. H.R. (ser. C), ¶¶ 55-58 (1993) (holding that legal obligations arise not only out of convention obligations but also out of customs of Saramaka tribe); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 102, 701 (1986) (stating that primary sources of law are treaty conventions, state practice or customary international law, and "general principles common to the major legal systems of the world"); see also LOUIS HENKIN ET. AL. HUMAN RIGHTS 295-304 (discussing sources of international law).

⁸⁷ Cassel, *supra* note 7, at 203 (noting that nothing in language or object of Inter-American conventions on torture or on prevention, punishment and eradication of violence against women contemplates amnesties); Scharf, *Swapping Amnesty*, *supra* note 10, at 521 (noting that there are frequently no international legal constraints to negotiation of amnesty for peace deal). For a discussion on amnesties in international conventions and decisions see generally 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*]. Nevertheless, obligations to prosecute, investigate and provide remedies to victims of crimes may interfere with the availability of amnesty. Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (1992) (precluding amnesty); Henrard, *supra* note 6, at 625 (noting that obligations to prosecute, investigate and provide remedy have implications for national amnesties).

⁸⁸ Protocol II, *supra* note 32; see also M. CHERIF BASSIOUNI, *AUT DEDERE AUD JUDICARE*

broad grants of amnesties for those individuals involved in conflict.⁸⁹ However, article 6 of Protocol II states that Protocol II applies only to civil wars and non-international armed conflicts.⁹⁰ The protocol additionally emphasizes the need to protect victims of armed conflict.⁹¹ Thus, acceptable grants of amnesty under Protocol II are limited to those that cover internal conflicts and coexist with due process rights for victims and individuals.⁹²

3, 101 (1995) (discussing text of Protocol II); Roht-Arriaza, *Derogation*, *supra* note 87, at 58-59 (discussing text and drafting of Protocol II).

⁸⁹ See Protocol II, *supra* note 32, art. 6(5) (stating “[a]t 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”); see also United States: Message From The President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims of Noninternational Armed Conflicts, Detailed analysis of Provisions, *reprinted in* 26 I.L.M. 561, 566 (1987) [hereinafter Transmittal Protocol II] (stating that article 6(5) permits broad grants of amnesty); Roht-Arriaza, *Derogation*, *supra* note 87, 58-59 (discussing Protocol II and its relation to question of amnesty after conflict).

⁹⁰ Protocol II, *supra* note 32, preamble; Transmittal Protocol II, *supra* note 89, at 563-65 (stating that Protocol II applies to non-international armed conflicts); Cassel, *supra* note 7, at 218 (noting that article 6(5) only applies to “amnesties for violations of international humanitarian law”); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 866 (stating article 6 applies to non-international conflicts).

⁹¹ Transmittal Protocol II, *supra* note 89, at 562 (noting that Protocol II designed to protect victims of conflict); BASSIOUNI, AUT DEDERE, *supra* note 88, at 101 (stating that Protocol II addresses criminal prosecutions and protection of victims in non-international armed conflict); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 865-66, nn.173-74 (noting that Protocol II intends “to protect victims of conflict”).

⁹² Protocol II, *supra* note 32, 1442, preamble (stating that article applies to “armed conflict not of an international character”); Cassel, *supra* note 7, at 218 n.127 (stating how Protocol II applies to violations “of [laws of] states in which they take place” and not “international humanitarian law”); Roht-Arriaza *Developing Jurisprudence*, *supra* note 37, at 864-66 (arguing that there are strong arguments against applying Protocol II to specific amnesties and that Protocol II does not aim to “allow states to completely evade prosecuting these crimes”); see Cassel, *supra* note 7, at 218 n.128 (discussing ICRC’s interpretation of article 6(5) as communicated to Prosecutor of International Criminal Tribunal for former Yugoslavia and reprinting text); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 865 (discussing generally criticism of idea that Protocol II authorizes broad amnesties). The Soviet Delegation to the conference stated that article 6 “could not be constructed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.” Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-77, 9 BERNE 319 (1978). They argue initially that the provision applies only to individuals combating the state itself. BASSIOUNI, *supra* note 88, at 101; Roht-Arriaza, *Value of Amnesty*, *supra* note 23, at 339-40 (noting that article 6(5) applies to civil wars and non-international armed conflicts and it is fairly clear it was not meant to apply to agents of state but those combating state). The amnesty provision, further, is at the end of an article guaranteeing due process rights to individuals. Protocol II, *supra* note 32, 1445-46, art. 6 (discussing due process guarantees); Transmittal Protocol II, *supra* note 89, at 563 (stating that Protocol II gives “fundamental

2. International Conventions Prohibiting Amnesty

In contrast to Protocol II, other international conventions serve to prohibit specific amnesties. Some treaties mandate investigation, prosecution, and punishment, thereby decreasing the ability of amnesty to bar prosecution.⁹³ For other treaties, monitoring and authoritative bodies have interpreted specific treaty provisions as prohibiting or limiting amnesty.⁹⁴ Thus, international legal norms do exist that limit amnesty.

a. Declaration on the Protection of All Persons From Enforced Disappearances

The Declaration on the Protection of All Persons from Enforced Disappearances (the Declaration) is an example of a treaty that precludes amnesty.⁹⁵ Article 18 of the Declaration does not allow amnesty to

due process for persons against whom sentences are to be passed or penalties executed"); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 865-66 (discussing how article 6(5) may be read to ensure protections for victims and legal obligations).

⁹³ 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, art. IV (1969) (requiring state parties to Convention to remove domestic limitations "to the prosecution and punishment . . . [of] war crimes and crimes against humanity"); *see also* Henrard, *supra* note 6, at 616, nn.103-04 (discussing how amnesties violate obligation to prosecute); Scharf, *Amnesty Exception*, *supra* note 4, at 515 & n.57 (noting that only in narrow situations, like where 1949 Geneva Conventions and Genocide Convention apply, "the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation" and further conceding that "a state's prerogative to issue amnesty for an offense can be circumscribed by treaties to which the state is a party").

⁹⁴ *Las Hojas Case (El Salvador)*, Case 10.287, Inter-Am. C.H.R. 88, OEA/ser. L./V/11.83, doc.14, ¶ 83 (1993), available at www.oas.org/cidh/annual/rep/92eng/ch3h.htm (concluding that El Salvadoran amnesty violates various articles of American Convention); *Mendoza v. Uruguay*, Cases 10.029, et. al., Inter-Am.C.H.R., OEA/Ser.L/V/II.83 doc. 14, at 154, ¶¶ 50-54 (1993), Rep. No. 29/92, available at www.oas.org/cidh/annualrep/92eng/ch3s.htm (discussing how Uruguayan amnesty does not ensure human rights or right to fair trial as guaranteed under American Convention); *see* Henrard, *supra* note 6, at 621, 625-27, nn.127, 146 (discussing how authoritative interpretations make it clear that states should investigate and bring to justice those responsible, and thus how amnesties are not necessarily accepted and respected in international law); *see infra* notes 95-115 and accompanying text. In addition to treaty provisions, customary international law principles link the duty to investigate, prosecute and punish to the decision to respect or reject amnesty. Scharf, *Amnesty Exception*, *supra* note 4, at 518-21 (discussing how customary international law norms do not provide restrictions on amnesty but do require prosecution and do create obligations which cannot be derogated from). For regional interpretation see 1985-1986 Annual Report of the Inter-American Commission on Human Rights 192-93, available at <http://oas.org> (outlining Organization of American States jurisprudence on amnesties).

⁹⁵ Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 87. *See generally* Naomi Roht-Arriaza, *Non-treaty Sources of the Obligation to Investigate*

prevent criminal proceedings or sanctions for disappearance crimes.⁹⁶ State parties to the declaration, therefore, may not grant a broad, blanket amnesty covering criminal proceedings for disappearances.⁹⁷

b. Convention Against Torture

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) precludes official acts of torture.⁹⁸ The Convention Against Torture does

and Prosecute, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 39 (Naomi Roht-Arriaza ed., 1995) [hereinafter Roht-Arriaza, *Nontreaty Sources*].

⁹⁶ Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 87, art. 18 (stating 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”). See also Human Rights Questions: Including Alternative Approaches For Improving The Effective Enjoyment of Human Rights and Fundamental Freedoms, Question of Enforced or Involuntary Disappearances, U.N. GAOR, A/51/561, 51st Sess., Agenda item 110(b), ¶ 1 (1996) (asking all states to implement principles in Declaration Against Forced Disappearances and remove obstacles to investigations of such acts); see generally Roht-Arriaza, *Nontreaty Sources*, *supra* note 95, at 44-45 (discussing aims and provisions of Declaration which sets forth “standards designed to punish and prevent” forced disappearances).

⁹⁷ See Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders, *reprinted in* 26 I.L.M. 317, 369 (1987) (holding that military officers could not benefit from amnesty for crimes of disappearances); Velasquez-Rodriguez, 4 Inter-Am. Ct. H.R. (ser. C), 325 (1989), *reprinted in* 28 I.L.M. 291 (holding disappearances are crimes); see Roht-Arriaza, *Nontreaty Sources*, *supra* note 95, at 44-45 (noting how Declaration Against Enforced Disappearances does not allow amnesty). Disappearance, according to the Organization of American States and the ICC, is a crime against humanity. Organization of American States Inter-American Convention on the Forced Disappearances of Persons, *reprinted in* 33 I.L.M. 1529, 1530 (1994). Sections III and IX of the Inter-American Convention Against Disappearances allow no immunities or mitigation unless the person provides information on the disappearances and otherwise must take legal, administrative and judicial steps to punish perpetrators of disappearances. *Id.*; see also STEINER & ALSTON, *supra* note 33, at 797 (discussing disappearances as violative of international law and universally recognized human rights); Henrard, *supra* note 6 (noting that U.N. Secretary General’s Special Representative added disclaimer to Lome Agreement stating that “the U.N. does not recognize the amnesty as applying to international crimes of genocide, crimes against humanity and war crimes”); Orentlicher, *Settling Accounts*, *supra* note 19, at 2593-94 (discussing duty to prosecute crimes against humanity).

⁹⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 [hereinafter Convention Against Torture]. See generally Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297, 311-12 (2000) (discussing Convention Against Torture and its duty to punish torture crimes); Schabacker, *supra* note 26, at 27-28 (discussing scope of Convention Against Torture).

not contain a specific provision regarding amnesty. However, Article 7 requires states to extradite or submit to competent authorities those suspected of committing acts of torture.⁹⁹ Courts and U.N. bodies have interpreted this provision to require the prosecution and punishment of acts of torture.¹⁰⁰ The European Court of Human Rights, going a step further, ruled that the Convention Against Torture does not allow amnesties which exempt offenders from criminal and civil proceedings or sanctions.¹⁰¹ In line with the Convention Against Torture, the

⁹⁹ Convention Against Torture, *supra* note 98. Article 7 of the Convention Against Torture requires state "under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall, . . . if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution." *Id.*, art. 7; see also BASSIOUNI, *supra* note 88, at 157 (stating that Convention Against Torture requires extradition or investigation and prosecution of acts of torture); Greenawalt, *supra* note 40, at 193 (noting that Convention Against Torture contains duty to prosecute). However, some 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. Henrard, *supra* note 6, at 617; Christopher Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 606 (1998) (stating that Convention against Torture does not explicitly mandate prosecution for all alleged cases of torture). Yet, the purpose of the Convention Against Torture is to punish and prosecute those responsible. See Scharf, *Swapping Amnesty*, *supra* note 10, at 25 (stating that even before Torture Convention general rules of international law obliged all states to punish acts of torture); Henrard, *supra* note 6, at 601 (noting that Convention Against Torture establishes individual responsibility for acts of torture); Boister & Burchill, *supra* note 73, at 626-30 & n.45 (discussing Convention Against Torture's obligation to prosecute).

¹⁰⁰ See *Regina v. Bartle and the Commissioner of Police Ex Parte Pinochet*, 38 I.L.M. 430, 2 W.L.R. 827, 839, 869, 875 (H.L. 1999) (Mar. 24, 1999) (citing Convention Against Torture as ground for extradition); Bhuta, *supra* note 53, at 519-22 (discussing House of Lords' discussion of extradition crimes in Pinochet case). For obligations to punish torture arising under other bodies see Velasquez-Rodriguez, *Inter-Am. Ct. H.R.*, 28 I.L.M. 291, 324-26 (1989) (holding Honduras had obligation, under American Convention, to prosecute individuals responsible for disappearances, torture, and other human rights violations). The Committee Against Torture and the U.N. Commission for Human Rights state that the Convention Against Torture require prosecution and punishment of torture. Convention Against Torture, *supra* note 98, art. 17 (establishing Committee Against Torture); see also Committee Against Torture, available at <http://www.unhchr.ch/html/menu6/2/fs.17.htm>; *Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, Commission on Human Rights, Resolution, E/CN.4/RES/2000/43, 20 (2000) (stressing that under article 4 of Convention Against Torture acts of torture must be made offenses under domestic criminal law and that acts of torture during armed conflict are considered grave breaches of Geneva Conventions of 1949); Report of the Committee Against Torture, U.N. GAOR, 45th Sess., Supp. No. 44, Annex V, at 109-13, U.N. Doc. A/45/44 (1990) (declaring that Convention Against Torture purpose of punishing acts of torture prevents amnesty for such acts).

¹⁰¹ *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 Protection of Human Rights and Fundamental Freedoms); see [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

International Criminal Tribunal for the Former Yugoslavia (ICTY), further, has declared amnesties for torture void.¹⁰² The ICTY states that these amnesties will not receive international recognition.¹⁰³ Finally, U.N. Commission on Human Rights (UNCHR) reports specifically denounce the use of amnesty for serious crimes, including torture.¹⁰⁴ Torture, therefore, is a crime serious enough to preclude amnesty under the Convention Against Torture.¹⁰⁵

c. International Covenant for Civil and Political Rights

The International Covenant for Civil and Political Rights (ICCPR) covers civil rights including the right to a remedy, the right to life, and the right to liberty.¹⁰⁶ The ICCPR also deals with torture and amnesty.¹⁰⁷

force on Sept. 21, 1970, Dec. 20, 1971, and Jan. 1, 1990 respectively, arts. 3, 6 (stating that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment," and that everyone has right to fair and public hearing); *see also* Gerard Cohen-Jonathan, *Un arret de principe de la "nouvelle" Cour europeenne des droits de l'homme: Selmouni contre France (28 Juillet 1999) in 104 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 288* (Dupuy, Pierre-Marie, and Jean-Pierre Queneudec eds., 2000) (discussing Selmouni case and European Convention for Human Rights).

¹⁰² Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶ 155, n.172 (Dec. 10, 1998) *reprinted in* 38 I.L.M. 317, 349; Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment (May 1997) *available at* <http://www.un.org/icty/tadic/trialc2/judgment/tad-t;970507e.htm> (last visited Nov. 19, 2001); HENKIN, *supra* note 86, at 621-22 (discussing significance of Tadic case regarding crimes against humanity).

¹⁰³ *Furundzija*, ¶ 155, at 349; *Tadic*, ¶ 264 (stating that amnesty for torture violates ICCPR).

¹⁰⁴ *Joint Amnesty Study*, *supra* note 44, at 635-36; Mary Margaret Penrose, *Impunity – Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. INT'L L.J. 269, 284 n.74 (1999) (noting that U.N. Commission on Human Rights states that blanket amnesty laws create climate of impunity and deny victims right to remedy); Roht-Arriaza, *Value of Amnesty*, *supra* note 23, at 340; *see also*, Declaration on the Protection of All Persons From Enforced Disappearances, *supra* note 87, art. 18 (declaring amnesties for forced disappearances void); Report of the Committee Against Torture, U.N. GAOR, 45th Sess., Supp. No. 44, Annex V, at 109-13 (declaring that Argentinian amnesty may violate obligation to prosecute torture).

¹⁰⁵ *See* Scharf, *supra* note 10, at 26 & n.182 (noting that UNHRC declares amnesty for acts of torture incompatible with duty to investigate); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1986) (requiring states to prevent and punish acts of torture). *See* Orentlicher, *Settling Accounts*, *supra* note 19, at 2567 (stating that duty to prosecute torturers "precludes adherent's to the Convention Against Torture from enacting, or at least applying, an amnesty law that forecloses [such] prosecution"). The final Declaration and Programme of Action of the 1993 World Conference on Human Rights affirms that "states should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture." World Conference on Human Rights, Declaration and Programme of Action, Vienna, June 1993, U.N. Doc. A/Conf./57/23, pt. 2.

¹⁰⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR]. *See generally* HENKIN, *supra* note 86, 323-30 (describing provisions and enforcement of ICCPR); STEINER & ALSTON, *supra* note 33, at 1161-71

Article 7 of the ICCPR prohibits torture.¹⁰⁸ The U.N. Human Rights Committee (HRC) is the authoritative interpreter of the ICCPR.¹⁰⁹ The HRC reasons that amnesties are incompatible with the duty of states to investigate torture, and concludes that a state party may not grant amnesty covering torture.¹¹⁰ The HRC goes even further to label blanket amnesty laws for any international crimes inconsistent with the ICCPR.¹¹¹

(reprinting text of ICCPR).

¹⁰⁷ ICCPR, *supra* note 106, art. 7 (stating that “[n]o one shall be subjected to torture”). The Committee has dealt with torture complaints and found that violations of article 7 require states to investigate and punish those found guilty of torture. *Tshitenge Muteba v. Zaire*, case No. 124/1982, U.N. GAOR, 39th Sess., Supp. No. 40, Annex XIII, U.N. Doc. A/39/40 (1984) (holding that Zaire as part of providing remedies should investigate, punish and prevent future acts of torture); BASSIOUNI, *supra* note 88, at 157-67 (discussing torture and prohibitions under international conventions).

¹⁰⁸ Convention Against Torture, *supra* note 98, art. 7; *Bleier v Uruguay*, Human Rights Committee, U.N. Doc. A/37/40 at 130 (1982) (holding that ICCPR obligations imply no amnesty for torture and that Uruguay violated ICCPR by granting amnesty); *see also* 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* 29 (Naomi Roht-Arriaza ed., 1995) [hereinafter Roht-Arriaza, *Sources*] (discussing HRC comment to ICCPR stating that amnesties are incompatible regarding acts of torture); *Henrard, supra* note 6, at 622 (discussing comment to ICCPR forbidding amnesty for acts of torture).

¹⁰⁹ ICCPR, *supra* note 106, art. 28 (establishing Human Rights Committee); *HENKIN, supra* note 86, at 644 (noting that U.N. Human Rights Committee was first human rights treaty body to formally address validity of amnesties by submitting comment on Article 7 of Convention Against Torture suggesting that amnesties are incompatible with punishing torture); Juan E. Mendez, *The Right to Truth*, *REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATION OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17-21 SEPTEMBER 1998*, at 255, 260 (Association Internationale de Droit Penal, 1998) (recognizing U.N. Commission on Human Rights through HRC as “the authoritative organ of interpretation of the International Covenant on Civil and Political Rights”).

¹¹⁰ General Comment No. 20 (on article 7), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/FEN/1/Rev.1 at 30 (1994), *available at* <http://wwwl.umn.edu/humanrts/gencomm/hrcom20.htm>; *Rodriguez v. Uruguay*, HRC 1994, U.N. Doc. CCPR/C/51/D/322/1988, Annex ¶12.3 (1994) *available at* <http://wwwl.umn.edu/humanrts/undocs/html/vws322.htm>; Roht-Arriaza, *Sources, supra* note 108, at 29 (discussing how UNHRC found amnesty incompatible with state duties under ICCPR); Roht-Arriaza, *Some Thoughts, supra* note 16, at 99 (noting UNCHR’s conclusion that ICCPR requires states to investigate allegations of human rights violations, bring perpetrators to justice, and ensure non-repetition).

¹¹¹ *See Concluding Observations of the Human Rights Committee: Chile*, Human Rights Committee, 65th Sess., CCPR/C/79/Add.104, ¶ 7 (Mar. 30, 1999) (affirming belief that amnesties are generally incompatible with right to remedy and holding that Chile’s amnesty decree prevents Chile from complying with its article 2 obligation under ICCPR to provide effective remedies to victims of human rights abuses); *Boed, supra* note 98, at 317 (recognizing that UNHRC and Inter-American Commission on Human Rights found blanket amnesty laws inconsistent with state duties to ensure rights or provide remedies); *Penrose, supra* note 104, at 284, nn.74-75 (discussing U.N. Human Rights Committee’s conclusion that blanket amnesties are always inconsistent with ICCPR because they create

The HRC interprets the right to an effective remedy outlined in article 2(3) to require effective judicial processes, prosecutorial mechanisms and compensation.¹¹² According to the HRC, grants of amnesty prevent courts from helping victims achieve this type of remedy for the rights guaranteed under the ICCPR.¹¹³

3. The American Convention on Human Rights and Amnesty

Further regional conventions speak to amnesty. The American Convention on Human Rights ("American Convention") is a regional human rights convention. The Inter-American Commission on Human Rights enforces the rights outlined in the American Convention through a complaint procedure. Chileans themselves challenged amnesty Decree 2191.¹¹⁴ In the 1997 case of *Chanfeau Orayce and Others v. Chile*,¹¹⁵ the Inter-American Commission on Human Rights found that the application of Decree 2191 violates the American Convention.¹¹⁶ According to the Inter-American Commission, Decree 2191 violated the right to judicial protection, because it left victims with no legal remedy.¹¹⁷ Moreover, Decree 2191 violated the obligation to investigate¹¹⁸ because it

climate of impunity and deny victim's right to remedy).

¹¹² ICCPR, *supra* note 106, art. 2(3) (requiring that each state party must undertake to ensure that any person whose recognized rights or freedoms are violated shall have effective remedy); *see* Tshitenge Muteba v. Zaire, case No. 124/1982, U.N. GAOR, 39th Sess., Supp. No. 40, Annex XIII, U.N. Doc. A/39/40 (1984) (holding that Zaire should investigate, punish, and prevent future acts of torture); Naomi Roht-Arriaza, *Sources, supra* note 108, at 33 & n.63 (discussing provisions of ICCPR and UDHR requiring that accountability means offering prosecution as remedy).

¹¹³ General Comment No. 20, *supra* note 110, at 30 (on article 7); HENKIN, *supra* note 86, at 644; Mendez, *supra* note 109, at 261 (noting that according to UNHRC, laws like amnesty that limit rights of victims to seek justice are incompatible with state obligations).

¹¹⁴ *Chanfeau Orayce v. Chile* Cases 11.505, Rep. No. 25/98, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, Doc. 7 rev. (1997). *See generally* HENKIN, *supra* note 86, at 648-54 (discussing *Orayce* case); *see also* Garay Hermosilla, Case 10.843, Rep. No. 36/96, Inter-Am. C.H.R./OEA/Ser.L/V/II.95 Doc. 7 rev., at 156 (1997) (holding Decree 2191 inconsistent with American Convention obligation to afford victims fair trial according to article 8).

¹¹⁵ Cases 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev. (1997) (consolidating various complaints regarding Decree 2191); HENKIN, *supra* note 86, at 648-54.

¹¹⁶ *Orayce*, ¶ 42; HENKIN, *supra* note 86, at 649; *see also* *Hermosilla*, Case 10.843, at 156, 182-83 (holding in 1996 that Amnesty Decree 2191 violated rights under American Convention to ensure victims access to fair trial and judicial protection).

¹¹⁷ *Orayce*, ¶ 64-65; HENKIN, *supra* note 86, at 650-51.

¹¹⁸ *Orayce*, ¶ 86; American Convention, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Red. OEA/Ser.L/V/II.23 doc. rev.2, Nov. 22, 1969, *entered into force* July 18, 1978, art. 1(1) [hereinafter *American Convention*] ("States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms"). The Inter-American Commission noted that the Inter-American Court had interpreted Article 1.1 of the

precluded the Chilean investigative commission from publishing names or sanctioning perpetrators.¹¹⁹ For the Inter-American Commission, admitting guilt, partial investigation, and compensation did not fulfill American Convention obligations.¹²⁰ The Inter-American Commission concluded that a state must investigate and determine the whereabouts of the disappeared and officially acknowledge who was responsible for such crimes.¹²¹ This truth process also requires a simple and prompt remedy,¹²² which the amnesty decree precluded.¹²³

Thus, the Inter-American Commission found that by authorizing Decree 2191, Chile failed to comply with its obligation to ensure and protect human rights.¹²⁴ The Inter-American Commission recommended that Chile alter Decree 2191 to comply with the American Convention.¹²⁵ Specifically, it should modify the decree to allow for investigation, identification and punishment of perpetrators.¹²⁶ For the Inter-American Commission, therefore, accountability for international crimes prevailed over national amnesty.¹²⁷

American Convention to require investigation and punishment of violations. *Orayce*, ¶ 66; Schabacker, *supra* note 26, at 30-33 (discussing American Convention and obligation to prosecute and investigate).

¹¹⁹ *Orayce*, ¶ 66; HENKIN, *supra* note 86, at 651.

¹²⁰ *Orayce*, ¶ 70. See also *Hermosilla*, at 171, ¶¶ 41-56 (describing Chilean truth commission and its findings); Cassel, *supra* note 7, at 216 n.120 (noting Inter-American Commission's finding that Chilean government's partial investigation was not enough).

¹²¹ *Orayce*, ¶ 88; HENKIN, *supra* note 86, at 652-53; see Cassel, *supra* note 7, at 208 (discussing Inter-American Commission's 1986 guidelines on amnesties).

¹²² *Orayce*, ¶ 89; HENKIN, *supra* note 86, at 653. According to article 25 of the American Convention, "[e]veryone has the right to simple and prompt recourse" and the State Parties must undertake to "develop the possibilities of a judicial remedy." American Convention, *supra* note 118.

¹²³ *Orayce*, ¶ 89; HENKIN, *supra* note 86, at 653.

¹²⁴ *Orayce*, ¶ 97; HENKIN, *supra* note 86, at 654. The Inter-American Court, complying with the Inter-American Commission, again found the amnesty incompatible with the American Convention on Human Rights in a case regarding extrajudicial execution. *Carmelo Soria Espinoza v. Chile*, Case 11.725, Rep. No. 133/99, Inter-Am. Ct. H.R. (1999) (holding that amnesty did not prevent Chile from holding state military intelligence officials responsible for extrajudicial execution of Espinoza).

¹²⁵ *Orayce*, ¶ 109.

¹²⁶ *Id.*

¹²⁷ 1985-1986 Annual Reports Inter-American Commission Human Rights, *supra* note 45, 193; Cassel, *supra* note 7, at 208 (discussing Inter-American guidelines); see, e.g., HENKIN, *supra* note 86, at 342-43 (discussing Inter-American system of rights).

4. Right to a Remedy

International and regional conventions dictate that states have a duty to provide victims of international crimes with a judicial remedy.¹²⁸ The UNCHR finds that grants of amnesty to perpetrators of serious human rights violations interfere with this right.¹²⁹ The UNCHR's special rapporteur for impunity argues that states cannot grant amnesty before affording victims a remedy, no matter what the aim.¹³⁰ The HRC also views blanket amnesties as the worst violations of the right to a remedy

¹²⁸ American Convention, *supra* note 118, art. 8 (guaranteeing right to prompt and effective judicial remedy); ICCPR, *supra* note 106, art. 2 (guaranteeing everyone right to effective remedy); [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* Sept. 21, 1970, Dec. 20, 1971 and Jan. 1, 1990 respectively, art. 13 (affirming that everyone has right to effective remedy before national authority even if violators were persons acting in official capacity). The Inter-American Commission on Human Rights has interpreted the "right to remedy" language in the American Convention to include a duty to investigate and prosecute crimes. Inter-Am. C.H.R., Rep. No. 26/92 (El Salvador), 82nd Sess., OEA/ser. L/V/II.82 (Sept. 24, 1992); 29/92 (Uruguay), 82nd Sess., OEA/ser. L/V/II.82, Doc. 25 (Oct. 2, 1992).

¹²⁹ *Rodriguez v. Uruguay*, Hum. Rts. Comm., 1994 U.N. Doc., CCPR/C/51/D/322/1988, ¶ 12.2 (1994) (holding that Uruguay's amnesty is incompatible with ICCPR obligations to provide remedy); Vienna Declaration and Programme of Action A/CONF/157/24, Part II, ¶ 91, part 1, at 20 (reasoning that amnesty was incompatible with right of every individual to fair hearing before an impartial and independent court); Joint Report, *supra* note 20, principle 18; *see also* Inter-American Commission on Human Rights, Las Hojas Case (El Salvador), Case 10.287, Inter-Am. C.H.R. 88 (1993), *available at* www.oas.org/cidh/annual/rep/92eng/ch3h.htm; Hugo Leonardo (Uruguay), Case 10.029, Inter-Am. C.H.R. 154 (1993) (holding El Salvadoran amnesty incompatible with article 1(1) of American Convention); Alicia Consuela Herrera (Argentina), Case 10.147, Inter-Am. C.H.R. 41 (1993) (denouncing amnesties in Uruguay, Argentina and Chile for failure to provide adequate judicial remedy); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 862 (discussing how amnesties fail to provide judicial remedies or reparations for victims mandated by treaties and customary international law principles).

¹³⁰ Joint report, *supra* note 20, ¶ 32, principles 18, 25 (affirming that amnesty may not be accorded to perpetrators before victims have obtained justice by means of effective remedy); *Question of the Impunity of Perpetrators of Violations of Human Rights*, Commission on Human Rights, E/CN.4/RES/1994/44, ¶ 21 (1994) (stating that individuals "should not benefit from any special amnesty law or other similar measures having the effect of exonerating them from any prosecution or penal sanction"). Article IV of U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, for example, requires states party to the convention to remove domestic limitations "to the prosecution and punishment . . . [of] war crimes and crimes against humanity." 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 (1969). Each state must, in fact, introduce safeguards against amnesty. Joint Report, *supra* note 20, principle 23 (concluding that safeguards must be introduced to protect against abuse); Joint, *Amnesty Study*, *supra* note 44, ¶ 5 (suggesting amnesty for international crimes and crimes against humanity would result in impunity).

because they result in impunity.¹³¹ U.N. actions, therefore, lead the trend away from automatic acceptance of all amnesties.¹³²

In sum, international convention obligations significantly narrow the scope of acceptable forms of amnesty.¹³³ Amnesty will not be valid if it

¹³¹ Joint Report, *supra* note 20, ¶ 32 (stating that “amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy”); Henrard, *supra* note 6, at 640 n.227 (arguing that self- and blanket amnesties are always unacceptable); Juan Mendez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 259 (1997); Penrose, *supra* note 104, at 284, nn.74-75. The position of the United Nations further demonstrates that amnesty unjustly bars prosecution and prevents redress for victims suffering from atrocities. Joint Report, *supra* note 20, ¶ 26, principle 25 (stating that amnesty may not affect victim’s right to reparation and that states have obligation to provide victims with remedy and reparation and ensure that perpetrators are prosecuted, tried and duly punished according to principle 18). Article IV of U.N. Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity for example, requires state party to the convention to remove domestic limitations to prosecution of crimes against humanity. 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 (1969); *see also* BASSIOUINI, *supra* note 88, at 3 (noting that obligation to prosecute is phrased in different ways in different treaties).

¹³² Las Hojas Case (El Salvador), Case 10.287, Inter-Am. C.H.R. 88 (1993), available at www.oas.org/cidh/annual/rep/92eng/ch3h.htm (denouncing amnesty in El Salvador); Hugo Leonardo (Uruguay), Case 10.029, Inter-Am. C.H.R. 154 (1993) (holding Uruguayan amnesty incompatible with international legal obligations); Alicia Consuela Herrera (Argentina), Case 10.147, Inter-Am. C.H.R. 41 (1993) (holding Argentinean amnesty incompatible with American Convention obligations). *See also* National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders, Supreme Court of Argentina, Dec. 30, 1986, reprinted in 26 I.L.M. 317, 319, 369 (1987) (noting that Argentine government and National Appeals Court for Federal District of Buenos Aires, Criminal Division, declared military’s self-amnesty unconstitutional and held invalid amnesty for former generals responsible for disappearances). *See also* text accompanying notes 114-23.

In light of these views, the United Nations recently affirmed its reservation to the Lome Agreement mandating a cease-fire agreement in Sierra Leone. ECOWAS: Peace Agreement between the Government of Sierra Leone and The Revolutionary United Front of Sierra Leone (RUF/SL), July 7, 1999, reprinted in 11 AFR. J. INT’L & COMP. L 557 (1999); *Seventh Report of the Secretary-General* *supra* note 11, at 7; *see* Amann, *supra* note 11, at 240 (analyzing U.N. reservation to Lome Agreement). The United Nations brokered and signed the agreement but attached a reservation to the amnesty provision granting Foday Sankoh and the Revolutionary United Front (RUF) of Sierra Leone amnesty. *Seventh Report of the Secretary-General*, *supra* note 11, ¶ 52; *see also* S.C. Res. 1315, 57th Sess., 4186th mtg., prml., U.N. Doc. S/Res/1315 (2000) (stating that U.N. representative supplied amendment to agreement); Amann, *supra* note 11, at 240 (observing that U.N. officials termed reservation as “proviso” or “statement”). Article 10 of the proposed Statute for the Special Court for Sierra Leone further states that amnesty granted for crimes against humanity, serious violations of international law, and the Geneva conventions will not bar prosecution by the Special Court. Special Court Statute, *supra* note 12; S.C. Res. 1315, 55th Sess., 4186th mtg., preamble, U.N. Doc. S/Res/1315 (2000); Amann, *supra* note 11, at 240 (discussing amnesty provision of Lome Agreement and how Special Court Statute nullifies this amnesty).

¹³³ Inter-Am. C.H.R., Rep. No. 26/92 (El Salvador), 82nd Sess., OEA/ser. L/V/II.82 (Sept. 24, 1992); 29/92 (Uruguay), 82nd Sess., OEA/ser. L/V/II.82, Doc. 25 (Oct. 2, 1992);

precludes investigation, prosecution, or redress for certain serious international crimes such as torture and disappearances.¹³⁴ The UNCHR considers self- and blanket amnesties invalid.¹³⁵ Acceptable amnesties, then, are discrete or conditional amnesties which allow for accountability and redress.¹³⁶ This trend away from simple acceptance of all amnesties and towards discrete amnesties allowing for individual accountability is one the ICC cannot ignore.

Rep. No. 24/92 (Argentina), 82nd Sess., OEA/Ser. L/V/II.82, Doc. 24 (Oct. 2, 1992) (interpreting right to remedy language in American Convention to require duty to prosecute). *Aut judicare* is Latin for the duty to prosecute. BASSIOUNI, *supra* note 88, at 3; Roht-Arriaza, *Sources*, *supra* note 108, at 25 (discussing universal jurisdiction and duty to prosecute or extradite).

¹³⁴ Chanfeau Orayce v. Chile, Cases 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, Doc. 7 rev., ¶ 66 (1997) (holding that Inter-American Court stipulates: "States must prevent, investigate and punish any violation of the rights recognized by the [American] Convention"); Velasquez-Rodriguez, 4 Inter-Am. Ct. H.R. (ser. C), 325 (1989), *reprinted in* 28 I.L.M. 291, 294 (holding states have duty to investigate and prosecute serious international crimes); Annual Report of The Inter-American Commission on Human Rights 1991, Report 28/92 and Report 29/92 (stating amnesties covering serious international crimes violate obligations to investigate and prosecute under American Convention).

¹³⁵ World Conference on Human Rights, Declaration and Programme of Action, Vienna, June 1993, U.N. Doc. A/Conf./157/23, pt. II, ¶ 60 ("states should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture"); 1999 REPORT ON CHILE, HUMAN RIGHTS WATCH, at www.hrw.org/wr2k/Americas-02.htm (last visited Nov. 19, 2001), § IV n.98 (noting that Inter-American Commission on Human Rights and U.N. bodies criticized Peruvian amnesty for violating "the prohibition against amnesty laws covering crimes against humanity"); Roht-Arriaza, *Thoughts*, *supra* note 16, at 94 & n.6 (noting that Peruvian and Chilean lower courts found amnesties violated Geneva Conventions of 1949, Convention Against Torture and ICCPR). Ms. Roht-Arriaza also notes that regional bodies have interpreted these treaties to prohibit application of Chilean amnesty Decree 2191 of 1978. Roht-Arriaza, *Some Thoughts*, *supra* note 16, at 94; Roht-Arriaza, *Truth Commission*, *supra* note 26, at 314 (arguing international community is moving away from blanket amnesties); *see* Cassel, *supra* note 7, at 204 & n.45 (stating that international community would not accept blanket amnesties); Henrard, *supra* note 6, at 641, n.227 (arguing that international legal community finds self- and blanket amnesties unacceptable); Schabacker, *supra* note 26, at 53 n.357 (arguing that blanket amnesties unaccompanied by investigation are probably not legitimate under international law).

¹³⁶ Boister & Burchill, *supra* note 73, at 636 n.90. *See* Joint Report, *supra* note 20, principles 18, 23 (requiring states to investigate and provide victims with remedies and to introduce safeguards against abuse of amnesty which would prevent these aims); Joint, *Amnesty Study*, *supra* note 44, at 636-37 (concluding that amnesties did not encourage national reconciliation, but only increased internal tensions and resulted in serious infringements of human dignity); *see also* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 728 & n.104 (1999) (noting that U.N. special rapporteur for impunity, Louis Joinet, recommends that states adopt variety of measures to expose truth and combat impunity); Joyner, *supra* note 99, at 596 n.1 (describing impunity and its relation to provision of remedies).

II. INTERNATIONAL CRIMINAL COURT

The Rome Statute of the ICC contains 128 articles outlining the jurisdiction and procedural rules of the Court.¹³⁷ The ICC aims to establish individual criminal liability for serious international crimes.¹³⁸ Article 17, article 20, and article 53, taken together, allow the ICC to take cases where the state is unwilling or unable to investigate or prosecute.¹³⁹ The Rules of Procedure and Evidence implement the jurisdiction of the ICC.¹⁴⁰

A. Aims of the ICC — Preamble

On July 17, 1998, at the Rome Diplomatic Conference, the International Law Commission (ILC) presented a statute to create the International Criminal Court (the “Rome Statute”).¹⁴¹ The ICC’s purpose is to establish individual criminal accountability for serious international crimes.¹⁴² In

¹³⁷ Rome Statute, *supra* note 3, arts. 1–128; see Sadat, *The Hague to Rome*, *supra* note 5, at 40 (stating that article 128 of ICC outlines Court’s jurisdiction and provides extensive detail about ICC’s structure, operations, and functions). For an overview of the Rome Statute see generally Brown, *supra* note 15, at 61–84.

¹³⁸ See Rome Statute, *supra* note 3, preamble (promoting individual responsibility for serious international crimes); Henrard, *supra* note 6, at 628–29 (discussing how ICC is consistent with individual accountability); Reeves, *supra* note 5, at 15 (noting that ICC embodies principle of individual accountability).

¹³⁹ Rome Statute, *supra* note 3, arts. 17, 20, 53; Brown, *supra* note 15, 73–76 (discussing admissibility of cases under ICC, complementarity and ICC defer all to national courts, and outlining briefly prosecutorial discretion); Scharf, *Amnesty Exception*, *supra* note 4, 524–25 (discussing article 17 and how amnesty may make cases inadmissible, article 20 and what constitutes tried and convicted, and prosecutorial discretion).

¹⁴⁰ Finalized draft text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, Incorporating document PCNICC/2000/INF/3/Add.1 (June 30, 2000) (stating aim as implementing Rome Statute provisions).

¹⁴¹ Rome Statute, *supra* note 3. Discussion of the court began in 1949. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need To Establish A Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 39, 50–55 (1997) [hereinafter Bassiouni, *From Versailles to Rwanda*] (noting that drafting of ICC began in post World War II era but that it was politically premature to establish ICC at that point); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 682–83 (1996) (noting that discussion began as early as post World War I with draft of statute developed by 1953). For a complete history of the Rome Statute see generally BASSIOUNI, *supra* note 5. A lack of political consensus on whether to develop the court and how to define crimes led to prolonged 35-year deadlock. Sadat, *Hague to Rome*, *supra* note 5, at 37. Then in 1992 the General Assembly of the United Nations requested the ILC to address the question of establishing the ICC and to elaborate a draft statute. Wexler, *supra* at 683–84; see, e.g., Sewall, *Overview*, *supra* note 7, at 5 (stating that ICTY and ICTR helped propel the efforts of the International Law Commission towards a formal treaty).

¹⁴² Rome Statute, *supra* note 3, art. 5 (defining serious crimes to include genocide, crimes against humanity, war crimes and aggression); see Chayes & Slaughter, *supra* note

the preamble of the Rome Statute, states pledge to punish the crimes of the most serious concern to the international community.¹⁴³ If states are unwilling or unable to punish these crimes, the ICC steps in to do so.¹⁴⁴ This commitment to individual responsibility under international law highlights that the ultimate objective of the ICC is to put an end to impunity for perpetrators.¹⁴⁵

The ICC will complement national jurisdiction by deferring to national prosecution unless a state is unwilling or unable to investigate or prosecute crimes.¹⁴⁶ Amnesty, a national act, forecloses a state's ability and willingness to investigate and prosecute a crime.¹⁴⁷ The Rome Statute, however, contains no provisions directly addressing amnesty.¹⁴⁸ Rather, the ILC simply drafted provisions outlining what constitutes an admissible case and prosecutorial discretion in articles 17, 20, and 53 of the Rome Statute.¹⁴⁹

14, at 239 (noting that Rome Statute seeks to hold individuals accountable for human rights violations); Henrard, *supra* note 6, at 629, n.164 (noting that ICC aims to punish those individuals responsible for international crimes); Popovski, *supra* note 6, at 412 (discussing development of individual accountability for violations of human rights).

¹⁴³ Rome Statute, *supra* note 3, preamble, art 5. See Brown, *supra* note 15, at 66 (stating that ICC aims to punish all individuals committing serious international crimes); Henrard, *supra* note 6, at 629 (noting that preamble of Rome Statute aims to make sure serious international crimes do not go unpunished).

¹⁴⁴ Rome Statute, *supra* note 3, art. 17; see Henrard, *supra* note 6, at 609, n.73 (noting that ICC will prosecute those individuals that national states are unwilling or unable to prosecute). For a discussion of possible problems with complementarity see generally Madeline Morris, *Complementarity and Conflict: States, Victims, and the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 195 (Sarah B. Sewall & Carl Kaysen. eds., 2000).

¹⁴⁵ Rome Statute, *supra* note 3, preamble (affirming objective to end impunity for individual perpetrators); Seawall, *supra* note 5, at 2 (stating that ICC's central purpose is to end impunity for those who commit mass atrocities).

¹⁴⁶ Rome Statute, *supra* note 3, art. 20; see also Sadat, *Hague to Rome*, *supra* note 5, at 39 (stating that basic premise for ILC was that Court should complement national prosecutions, rather than replace them); Henrard, *supra* note 6, at 609.

¹⁴⁷ Chanfeau Orayce v. Chile, Cases 11.505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, Doc. 7 rev., ¶ 96 (1997) (stating that amnesty legislation denied victims right to justice); see Joint Report, *supra* note 20, ¶¶ 27-32 (discussing how amnesty obstructs prosecution and investigation of crimes); Cassel, *supra* note 7, 197, 198-200 (discussing how amnesty causes impunity by preventing criminal or civil prosecution).

¹⁴⁸ *Statute of the International Criminal Court*, Dec. No. 98-408 D.C., Cons. const., J.O., Jan. 22, 1999, at 1317, available at <http://www.conseil-constitutionnel.fr/decision/1998/98408/98408dc.htm> (last visited Nov. 21, 2001), translated in 94 AM. J. INT'L L. 391, 392 (1999) [hereinafter Decision No. 98-408] (addressing French concern that Rome Statute does not include amnesty); see Goldstone & Fritz, *supra* note 13, at 656 (stating that Rome Statute does not accommodate amnesties); Scharf, *Amnesty Exception*, *supra* note 4, at 522 (stating that while Rome Statute does not specifically mention amnesty it may recognize amnesty exception under certain circumstances).

¹⁴⁹ Scharf, *Amnesty Exception*, *supra* note 4, at 522 nn.105-06. For an analysis of the

B. Article 17: Issues of Admissibility

Article 17 of the Rome Statute determines whether a case is admissible to the ICC.¹⁵⁰ A case is admissible if a state is unwilling to genuinely prosecute or investigate.¹⁵¹ Factors to determine unwillingness include: (1) a state's decision to shield the perpetrator from criminal responsibility, (2) unjustified delay in prosecution or investigation, or (3) national proceedings which do not manifest an intent to bring the perpetrator to justice.¹⁵² The inability to prosecute also includes the collapse of a state's judicial system, its inability to apprehend the accused, and the inability to obtain the necessary evidence or testimony.¹⁵³

A case is per se inadmissible if the state with jurisdiction over the individual is investigating or prosecuting the case.¹⁵⁴ A case is also inadmissible if the state has investigated or tried the individual with an intent to bring the individual to justice.¹⁵⁵ The provisions do not state,

Preparatory Committee on the Establishment of an International Criminal Court's work see M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in INTERNATIONAL CRIMINAL LAW ENFORCEMENT 597-638, 617-23 (M. Cherif Bassiouni ed., 2d ed. 2000) (discussing six PrepCom sessions held between 1996 and 1998). Negotiations began in 1995 when the United Nations created the Preparatory Committee on the "Establishment of an International Criminal Court." G.A. Res. 51/207, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/207 (1996); G.A. Res. 50/46, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/46 (1995); G.A. Res. 49/73, U.N. GAOR, 49th Sess., U.N. Doc. A/RES/49/73 (1994) (affirming mandate of Preparatory Committee with aim to finalize and adopt convention in 1998).

¹⁵⁰ Rome Statute, *supra* note 3, art.17(2); Brown, *supra* note 15, at 73-74 (outlining what makes case admissible under article 17).

¹⁵¹ Rome Statute, *supra* note 3, art. 17(1)(a); see also Brown, *supra* note 15, at 75; Scharf, *Amnesty Exception*, *supra* note 4, at 524-25 (stating that inadmissible case is one where state is investigating or prosecuting crime).

¹⁵² Rome Statute, *supra* note 3, art. 17(2)(c) (including in definition of 'unwillingness to prosecute,' proceedings that were not conducted "with an intent to bring the person to justice"); see also Brown, *supra* note 15, at 73-74 (noting case may be admissible to ICC if national proceedings did not bring person to justice); Scharf, *Amnesty Exception*, *supra* note 4, at 525 (noting that standard to determine if investigation is genuine is whether it was conducted consistent with intent to bring person to justice).

¹⁵³ Rome Statute, *supra* note 3, art.17(3) (defining inability to prosecute to include lack of judicial resources and empowering ICC to consider whether "due to a total or substantial collapse or unavailability of its national judicial system" state is unable to carry out proceedings); see also Brown, *supra* note 15, at 74 (calling ICC's jurisdiction critical "safety net" available when "there is not alternative forum to prosecute").

¹⁵⁴ Rome Statute, *supra* note 3, art. 17(1)(a); Brown, *supra* note 15, at 74 (noting that state with jurisdiction may "assert a superior right" simply by investigating or prosecuting case); Scharf, *Amnesty Exception*, *supra* note 4, at 525.

¹⁵⁵ Rome Statute, *supra* note 3, art. 17(1)(a)-(d); Brown, *supra* note 15, at 74 (discussing how ICC must defer to national proceedings); Reeves, *supra* note 5, at 15-16 (describing principles of complementarity).

however, what type of investigation or prosecution is required.¹⁵⁶

C. Article 20: Ne bis in idem

Article 20 further ensures that the ICC's jurisdiction does not replace or add to national jurisdiction.¹⁵⁷ Rather, it simply complements national jurisdiction.¹⁵⁸ Article 20 provides that the ICC will not try individuals who the state has already tried.¹⁵⁹

Article 20 however places limits on state proceedings. The state proceedings must intend to bring the individual to justice.¹⁶⁰ Further, no state or other court may try an individual whom the ICC convicted or acquitted.¹⁶¹

D. Article 53: Initiation of an Investigation

Article 53 outlines prosecutorial discretion.¹⁶² The prosecutor for the ICC has discretion to initiate an investigation.¹⁶³ The ICC prosecutor

¹⁵⁶ Rome Statute, *supra* note 3, art. 17 (making no mention more specific than "investigation"); see also Scharf, *Amnesty Exception*, *supra* note 4, at 525 (noting significance of Article requiring investigation but not specifying criminal investigation).

¹⁵⁷ Rome Statute, *supra* note 3, art. 20 (ensuring that individuals tried for crimes under ICC jurisdiction are not tried by two courts). *Ne bis in idem* is the prohibition against double jeopardy. Michael P. Scharf, *Justice versus Peace, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 179, 188 (Sarah B. Sewall & Carl Kaysen eds., 2000).

¹⁵⁸ Rome Statute, *supra* note 3, preamble (emphasizing that International Criminal Court shall be complementary to national criminal jurisdictions); see also Brown, *supra* note 15, at 73 (noting that ICC is to complement national jurisdiction and not displace criminal jurisdiction of states); Goldstone & Fritz, *supra* note 13, at 666 (stating that Rome Statute and ICC intended expressly to complement national systems).

¹⁵⁹ Rome Statute, *supra* note 3, art. 20(3) ("no person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct").

¹⁶⁰ Rome Statute, *supra* note 3, art. 20(3)(a) (stating that ICC may try individual tried by another court if proceedings in other court "[w]ere for the purpose of shielding the person concerned from criminal responsibility").

¹⁶¹ Rome Statute, *supra* note 3, art. 20(2) ("no person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court"); see, e.g., Scharf, *Amnesty Exception*, *supra* note 4, at 525 (discussing possible functional equivalents to trial and conviction).

¹⁶² Rome Statute, *supra* note 3, art. 53 (providing prosecutor discretion not to initiate investigation upon finding that there is no reasonable basis to proceed); see also Scharf, *Amnesty Exception*, *supra* note 4, at 524 (noting that article 53 permits prosecutor to decline to initiate investigation).

¹⁶³ Rome Statute, *supra* note 3, art. 53(1) ("[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation"); see also Rome Statute, *supra* note 3, art. 15(1) (allowing prosecutors to "initiate investigations proprio motu). See generally Brown, *supra* note 15, at 76 (outlining prosecutorial steps towards investigation); Goldstone & Fritz, *supra* note 13, 656-57 (discussing prosecutors' independence and

may initiate an investigation if there is a reasonable basis to believe the alleged crime falls within the jurisdiction of the court.¹⁶⁴ In addition, the ICC prosecutor may initiate an investigation if the case is admissible under article 17 and investigation would serve the interests of justice.¹⁶⁵ Upon investigation, the ICC prosecutor has discretion whether to prosecute.¹⁶⁶ Factors determining whether to prosecute include: (1) whether the case is admissible under article 17, and (2) whether prosecution would be in the interests of justice.¹⁶⁷ In deciding whether to prosecute, the ICC prosecutor may consider all circumstances surrounding the crime.¹⁶⁸ Finally, a prosecutor must inform the Pre-Trial Chamber of their decision regarding prosecution.¹⁶⁹ The Rome Statute, thus, allows prosecutorial discretion to decide whether to investigate and to prosecute a crime subject to review by the Pre-Trial Chamber.¹⁷⁰

powers); Henrard, *supra* note 6, at 629 (discussing prosecutors' discretion to prosecute proprio motu).

¹⁶⁴ Rome Statute, *supra* note 3, art. 53(1)(a) (permitting prosecutors to initiate investigation if there is reasonable basis to believe that crimes within jurisdiction of court have been or are being committed); see Brown, *supra* note 15, at 76 (noting that prosecutors may proceed with investigation if there is sufficient evidence to believe that crime has occurred); Scharf, *Amnesty Exception*, *supra* note 4, at 524 (noting prosecutor must have "substantial reasons" to investigate).

¹⁶⁵ Rome Statute, *supra* note 3, art. 53(1)(b)-(c); see Brown, *supra* note 15, at 76 (noting that prosecutors "must make a preliminary decision as to whether to proceed with a full investigation").

¹⁶⁶ Rome Statute, *supra* note 2, art. 53(2) (stating that prosecutors may conclude "that there is not a sufficient basis for prosecution"); see Scharf, *Amnesty Exception*, *supra* note 4, at 524 (discussing prosecutorial discretion to initiate prosecution under article 53).

¹⁶⁷ Rome Statute, *supra* note 3, art. 53(2)(c) (stating that analysis of whether sufficient basis for prosecution exists includes determination of whether prosecution would be in interest of justice); see Brown, *supra* note 15, at 76 (noting reasons prosecutors may not want to proceed with full investigation or prosecution); Goldstone & Fritz, *supra* note 13, at 656, n.3 (labeling "exceptional" fact that article 53 permits prosecutor to forego investigation or prosecution where prosecution "would not serve the interests of justice"); Scharf, *Amnesty Exception*, *supra* note 4, at 524.

¹⁶⁸ Rome Statute, *supra* note 3, art. 53(2)(c) (permitting prosecutors to take "into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime" when deciding whether to prosecute).

¹⁶⁹ Rome Statute, *supra* note 3, art. 53(2) (stating that "the Prosecutor shall inform the Pre-Trial Chamber . . . of his or her conclusion and the reasons for the conclusion" to prosecute or not).

¹⁷⁰ Rome Statute, *supra* note 3, art. 53 (requiring prosecutors to inform Pre-Trial Chamber of decisions to initiate investigation or prosecute); see Scharf, *Amnesty Exception*, *supra* note 4, at 524 (observing that "the decision of the Prosecutor under Article 53 is subject to review by the Pre-Trial Chamber of the Court").

E. Rules of Procedure and Evidence

The ICC will implement articles 17, 20, and 53 with the Rules of Procedure and Evidence.¹⁷¹ The Rules of Procedure and Evidence contain 225 rules that guide the ICC's implementation of specific articles.¹⁷² Rule 51, for example, deals with admissibility outlined in article 17.¹⁷³ Rule 51 permits a state to confirm in writing to the ICC whether it is investigating or prosecuting a case.¹⁷⁴ The ICC, according to rule 51, will consider this confirmation when it determines whether a state is unwilling to investigate or prosecute the crimes at issue.¹⁷⁵

Additionally, rule 162 deals with the exercise of ICC jurisdiction.¹⁷⁶ Rule 162 permits the ICC to consider a request from a state for a waiver of the power of the ICC to exercise jurisdiction.¹⁷⁷ Rule 162 also allows the ICC to consult with the states with jurisdiction.¹⁷⁸ If the ICC does not exercise jurisdiction, rule 162 allows, but does not require, the ICC to request the state with jurisdiction to exercise its power.¹⁷⁹ The Rules of Procedure and Evidence, therefore, affect the admissibility of cases and the exercise of ICC jurisdiction. These rules, however, are subordinate to the articles themselves, and are still in draft form.¹⁸⁰

In summary, the Rome Statute contains various articles outlining the division of criminal jurisdiction between national and international courts for crimes.¹⁸¹ However, none of these articles explicitly mention

¹⁷¹ Finalized draft text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, Incorporating document PCNICC/2000/INF/3/Add.1 (June 30, 2000) [hereinafter Rules of Procedure and Evidence] (stating that "[t]he Rules of Procedure and Evidence are an instrument for the application of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases").

¹⁷² *Id.*, preamble.

¹⁷³ *Id.* Ch.3 § 3 rule 51 (implementing admissibility provisions of article 17(1) by allowing states to present information regarding national investigation or prosecution).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (referring to "matters under Article 17 section 2 the ICC will consider confirmation that state investigating or prosecuting").

¹⁷⁶ *Id.*, rule 162 (outlining considerations ICC may make in determining whether or not to exercise jurisdiction).

¹⁷⁷ *Id.* (stating that Court shall give favourable consideration to host state's request for waiver of Court's exercise of jurisdiction when request based on important state interest).

¹⁷⁸ *Id.*, rule 162(1) (requiring ICC to consult with state parties regarding exercise of jurisdiction).

¹⁷⁹ *Id.*, rule 162(3) (stating that Court may request state party to exercise jurisdiction).

¹⁸⁰ *Id.*, preamble.

¹⁸¹ Rome Statute, *supra* note 3, arts. 17, 20, & 53; see Brown, *supra* note 15, at 73 (noting how Rome Statute outlines complementary criminal jurisdiction for international crimes); see also Sewall, *Overview*, *supra* note 7, at 20 (noting that "we doubt that the ICC will override state sovereignty by abandoning complementarity").

amnesty. Yet, as the ICC may substitute for a national investigation or prosecution, it must consider national grants of amnesties. A national grant of amnesty may preclude domestic prosecution and investigation of crimes.¹⁸² A national grant of amnesty may also violate international legal conventions. In light of domestic realities and international obligations, the ICC will have to consider how amnesty affects its jurisdiction and the goals of international accountability.

III. ANALYSIS—AMNESTY AND THE ROME STATUTE

The United Nations adopted the Rome Statute with no explicit mention of amnesty.¹⁸³ On the one hand, the literal language of the Rome Statute could prohibit grants of amnesty. On the other hand, there are ambiguities in the language which seem to allow for amnesty. However, ambiguous language that leaves room for amnesty is not enough. The ICC, as an international body, must address national amnesties to reconcile them with its goal of international accountability. The ILC initially could incorporate proposed guidelines on amnesty into the Rules of Procedure and Evidence. These guidelines outline what constitutes an acceptable amnesty in light of international convention obligations, the aims of the ICC, and national concerns.

A. Rome Statute Does not Allow for Amnesty

Read literally, the Rome Statute does not mention amnesty.¹⁸⁴ Articles 17, 20, and 53 instead state that the ICC will not exercise its jurisdiction over those cases a national judicial body has tried.¹⁸⁵ According to article

¹⁸² Decree 2191, *supra* note 9; Lome Agreement, *supra* note 11 (stating that “no official or judicial action is taken against any member of the RUF/SL”); *Azanian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SALR 671, 677 (CC) (stating that with amnesty “perpetrators of evil acts” are “protected in their freedom by an amnesty”); Roht-Arriaza, *Value of Amnesty*, *supra* note 23, at 340-41 (discussing how amnesties may prevent investigation and prosecution).

¹⁸³ See Goldstone & Fritz, *supra* note 13, at 659 (noting that Rome Statute makes no accommodation for domestically enacted amnesty processes); Roht-Arriaza, *Some Thoughts*, *supra* note 16, at 100 (urging ICC Preparatory Committee to clarify that domestic amnesties for crimes under ICC statute would not preclude prosecution). At this point the Rome Statute is complete until it is ratified completely and put into force. Rome Statute, *supra* note 3, art. 126. Amendments will be possible after seven years. *Id.*, art. 121.

¹⁸⁴ Rome Statute, *supra* note 3, arts. 17, 20, & 53 (containing no mention of amnesty); see Wedgwood, *American View*, *supra* note 17, at 96 (stating that Rome Statute does not mention amnesty). *But see* Goldstone & Fritz, *supra* note 13, at 656 (noting that statute allows for accommodation of amnesty).

¹⁸⁵ Rome Statute, *supra* note 3, art. 17(1)(c) (defining inadmissible case as one where person concerned has already been tried); *id.*, art. 20(3) (stating that ICC will not try

17, an inadmissible case is one that the state has prosecuted.¹⁸⁶ Read literally article 17 requires a trial.¹⁸⁷ The requirement that a state bring the person to justice through national proceedings further suggests judicial proceedings.¹⁸⁸ Finally, the article specifically mentions the collapse of the national judicial system as a circumstance rendering a state unable to carry out proceedings.¹⁸⁹ Read as a whole, article 17 may require a formal national judicial proceeding to prevent the ICC from exercising its jurisdiction.¹⁹⁰

Article 20 prevents the ICC from trying someone tried or acquitted at the national level for the same crime.¹⁹¹ It refers to convicting or acquitting individuals before a court.¹⁹² With article 17, article 20 mandates the ICC to consider whether a national judicial proceeding occurred to decide if a case is admissible.¹⁹³

Finally, article 53 mentions that a prosecutor must consider whether the case is admissible under article 17 in deciding whether to investigate.¹⁹⁴ Further, the investigation or prosecution of the state or the ICC needs to be in the interests of justice.¹⁹⁵ Therefore, read literally,

individual for specific crimes if another court already tried individual for those crimes); *id.*, art. 53(1)(b) (stating that prosecutor shall consider whether case is admissible under article 17 before initiating prosecution or investigation); Brown, *supra* note 15, at 74 (noting that ICC jurisdiction is expressly limited to cases "where no state with jurisdiction has investigated or prosecuted the case"); Reeves, *supra* note 5, at 15 (noting Court's fundamental principle of deference to national judicial systems).

¹⁸⁶ Rome Statute, *supra* note 3, art. 17(1)(a)-(c); see notes 150-56 and accompanying text.

¹⁸⁷ Rome Statute, *supra* note 3, art. 17(1)(c) (defining inadmissible case as one where "the person concerned has already been tried for conduct").

¹⁸⁸ Rome Statute, *supra* note 3, art. 17(2)(b) & (c) (describing proceedings "inconsistent with an intent to bring the person concerned to justice" as unwillingness by state to carry out investigation or prosecution); Scharf, *Justice versus Peace*, *supra* note 157, at 188 (suggesting that phrase "inconsistent with an intent to bring the person concerned to justice" may be interpreted "as requiring criminal proceedings"); Wedgwood, *American View*, *supra* note 17, at 97 (suggesting that using term "justice" limits article 17's scope regarding national proceedings).

¹⁸⁹ Rome Statute, *supra* note 3, art. 17(3); see Brown, *supra* note 15, at 74 (acknowledging that ICC will consider strength of judiciary system in deciding whether state can carry out prosecution).

¹⁹⁰ Rome Statute, *supra* note 3, art. 17; see also Brown, *supra* note 15, at 74 (defining terms of article 17 as clear and narrow).

¹⁹¹ Rome Statute, *supra* note 3, art. 20. Scharf, *Justice versus Peace*, *supra* note 157, at 188 (describing how article 20 is intended to prevent double jeopardy).

¹⁹² Rome Statute, *supra* note 3, art. 20(2) (stating no person will be tried by another for crimes "for which that person has already been convicted or acquitted by the Court").

¹⁹³ Rome Statute, *supra* note 3, arts. 17, 20; see Scharf, *Justice versus Peace*, *supra* note 157, at 188 (conceding that article 20 speaks of trial by another court and that language regarding intent to bring one to justice implies criminal proceedings).

¹⁹⁴ Rome Statute, *supra* note 3, art. 53(1)(b) & (2)(b).

¹⁹⁵ *Id.*, art. 53(1)(c) & (2)(c); see Scharf, *Justice versus Peace*, *supra* note 157, at 188 (noting

articles 17, 20 and 53 of the Rome Statute do not allow for amnesty. However, the ICC may read the articles more broadly to allow for amnesty.

B. Articles 17, 20, and 53 Allow for Amnesty

1. Admissible Cases

Commentators argue that articles 17, 20, and 53 of the Rome Statute, while not mentioning amnesty explicitly, may allow for amnesties.¹⁹⁶ According to article 17, the ICC will not claim jurisdiction over a case that a state with jurisdiction is investigating.¹⁹⁷ However, this article does not define investigation.¹⁹⁸ The ICC could interpret investigation to include truth and reconciliation commissions like the one established in South Africa.¹⁹⁹ In the case of South Africa, the ICC may recognize the TRC amnesties, as the TRC investigated the crimes at issue and held individuals accountable.²⁰⁰ Therefore, under article 17, the ICC may recognize those amnesty processes that allow for sufficient investigation

that Pre-Trial Chamber reviews prosecutorial decision to see if decision serves "interests of justice").

¹⁹⁶ Scharf, *Amnesty Exception*, *supra* note 4, at 522-25 (discussing how amnesty may be allowed under articles 16, 17, 20 and 53); *see also* Goldstone & Fritz, *supra* note 13, at 656 (noting that Rome Statute does allow for amnesties where consistent with justice); Henrard, *supra* note 6, at 629 (acknowledging that amnesty might be matter of prosecutorial discretion).

¹⁹⁷ Rome Statute, *supra* note 3, art. 17 (1)(a); Rules of Procedure and Evidence, rule 51; *see* Brown, *supra* note 15, at 73-74 (discussing how Rome Statute "limits the jurisdiction of the ICC to cases where no state with jurisdiction has investigated or prosecuted the case").

¹⁹⁸ Rome Statute, *supra* note 3, art. 17 (mentioning only "investigation"); *see* Scharf, *Amnesty Exception*, *supra* note 4, at 525 n.128 (noting that concerned state could argue that truth commission constitutes genuine investigation); Chanfeau Orayce v. Chile Cases 11505, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev., ¶ 86 (1997) (discussing how obligation to investigate includes obligation to "identify those responsible and impose pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim").

¹⁹⁹ Azanian Peoples Org. v. President of the Republic of S. Afr. 1996 (4) SALR 671, 686-87 (CC) (analyzing different countries' approaches to truth commissions); *see* Boister & Burchill, *supra* note 73, at 620 n.11 (noting that TRC amnesty provision allowed amnesty for full disclosure of relevant facts); Henrard, *supra* note 6, at 636-39 (stating that truth commissions provide sanctioned fact finding, official recognition and accountability).

²⁰⁰ *Azanian Peoples Org.*, (4) SALR at 688-91 (stating that individuals held accountable by having to apply for amnesty); Slye, *supra* note 18, at 180-82 (noting how TRC achieved interrelated objectives of reconciliation and accountability); Henrard, *supra* note 6, at 645-46 (discussing how TRC in South Africa balanced individual accountability and political constraints).

of crimes.²⁰¹ As well, the ICC may reject blanket amnesties that are little more than inaction.²⁰²

The wording of article 17 further suggests that the ICC may recognize the role political realities play in investigation and prosecution of crimes.²⁰³ Article 17 requires states to submit cases to the ICC if the national proceedings failed to bring the perpetrator to justice.²⁰⁴ Yet, article 17 does not define what is required to bring someone to justice.²⁰⁵ The ICC can construe bringing someone to justice narrowly, to require criminal prosecution, or broadly to include truth telling to an

²⁰¹ See Rome Statute, *supra* note 3, art. 17(1)(b); Scharf, *Amnesty Exception*, *supra* note 4, at 525 (arguing truth commission like that in South Africa could constitute investigation); Henrard, *supra* note 6, at 640 nn.227-28 (noting that self- and blanket amnesties without mechanism for unveiling truth are absolutely unacceptable).

²⁰² See Rome Statute, *supra* note 3, art. 17 2(a) (defining "unwillingness" to investigate or prosecute as proceedings whose purpose is shielding person concerned from criminal liability); Wedgwood, *American View*, *supra* note 17, at 94 (stating that ICC will act only when national actors do not act).

²⁰³ See Rome Statute, *supra* note 3, art. 17(1)(b) (recognizing that state may decide not to prosecute); see, e.g., Goldstone & Fritz, *supra* note 13, at 667 (observing that ICC "will act on and shift the global political dynamics"); Henrard, *supra* note 6, at 645-46 (discussing balancing of political constraints and realities with demands of justice); see also Rome Statute, *supra* note 3, art. 17(3) (stating that in determining inability to prosecute "the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings"). Rule 51 regarding admissibility allows the ICC to consult with the state and for the state to provide in writing that it is investigating or prosecuting the case. Rules of Procedure and Evidence, rule 51.

²⁰⁴ Rome Statute, *supra* note 3, art. 17(2)(b) (defining unwillingness to investigate or prosecute to include proceedings that are "inconsistent with an intent to bring the person concerned to justice"); Scharf, *Amnesty Exception*, *supra* note 4, at 525 (describing how ICC will assume jurisdiction if national prosecution is "inconsistent with an intent to bring the person concerned to justice"). Rule 51 regarding admissibility allows for state to show ICC that "its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct." Rules of Procedure and Evidence, rule 51.

²⁰⁵ See Scharf, *Amnesty Exception*, *supra* note 4, at 525 (noting that ICC may interpret phrase "bring the person concerned to justice" to require criminal proceedings); Wedgwood, *American View*, *supra* note 17, at 97 (stating that "[t]he ambiguity of this provision limited in its language to the demanding word of justice"). However, the Rome Statute does not go beyond this phrase, and in fact only suggests that weak judiciaries are incapable of bringing someone to justice. Rome Statute, *supra* note 3, art. 17(3) (allowing, but not requiring, ICC to accept jurisdiction over case when state's judiciary system is unable to obtain accused or necessary evidence and testimony to carry out its proceedings). Article 17(3) directly addresses the rationale that amnesty is often a national decision to handle atrocities in manner that does not further weaken fragile judiciary. See *id.*; Pasqualucci, *supra* note 33, at 276 (noting amnesty preferable in certain situations due to lack of judicial resources for prosecution). The result in this instance would be rejection by the ICC of an amnesty granted solely because the national judiciary of the state was not developed enough to investigate and prosecute individuals. Rome Statute, *supra* note 3, art. 17(3).

investigative commission.²⁰⁶ Read in combination with article 53,²⁰⁷ which permits prosecutorial discretion, article 17 suggests that the ICC does not require a judicial proceeding.²⁰⁸ Again something different, like a truth commission, may suffice.²⁰⁹ Therefore, in certain circumstances neither national nor international prosecution may be necessary.²¹⁰ The ICC thus would retain power to recognize an amnesty or consider it an act inconsistent with justice.²¹¹

²⁰⁶ *Azanian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SALR 671, 689-90 (CC) (suggesting amnesty processes important part of deterrence and relying on Protocol II to grant amnesty for intra-state conflicts rather than prosecute). See generally Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 282-83 (describing variants of investigations); Henrard, *supra* note 6, at 637-40 (discussing various aspects of truth commissions and their relation to prosecution); Dinah L. Shelton, *Addressing Human Rights Abuses: Truth Commissions and The Value of Amnesty*, 19 WHITTIER L. REV. 325, 332-38 (1997) (discussing various Latin American truth commissions as compared to South Africa's TRC). But see Chanfeau Orayce and Others v. Chile Cases 11505, Rep. No. 25/98, Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev., ¶ 68 (1997) (stating that Chile's Truth and Reconciliation Commission was not "viable alternative to judicial process" as it could not "publish the names of persons who had committed the crimes nor impose any type of sanction").

²⁰⁷ Rome Statute, *supra* note 3, art. 53 (allowing prosecutor to look at all surrounding circumstances to determine if ICC prosecution is just); see Goldstone & Fritz, *supra* note 13, at 660-62 (discussing scope of prosecutor's power and discretion to forego investigation); Wedgwood, *American View*, *supra* note 17, at 96-97 (remarking that ICC prosecutor may decline case if investigation would not serve interests of justice).

²⁰⁸ Rome Statute, *supra* note 3, art. 17 (stating simply that states must investigate, but making no mention of type of proceeding).

²⁰⁹ See Scharf, *Amnesty Exception*, *supra* note 4, at 525 (noting that state could argue that truth commission is genuine investigation). But see Roht-Arriaza, *Value of Amnesty*, *supra* note 23, at 342 (discussing how truth commission and prosecution are different and can work together or against each other). For a discussion of Truth Commissions see generally Rotberg, *supra* note 83, at 3 (discussing truth commissions and their relation to justice and reconciliation); Dumisa B. Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in TRUTH v. JUSTICE, 158 (Robert I. Rotberg and Dennis Thompson eds., 2000) (discussing various types of truth commissions and their related procedures).

²¹⁰ See Orayce, ¶ 68 (suggesting that viable alternatives to judicial processes would involve ability to publish names and impose sanctions); *Azanian Peoples Org.*, (4) SALR at 685 (arguing that deterrence and reconciliation goals fulfilled through TRC process); see also David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in TRUTH v JUSTICE 99, 102-05 (Robert I. Rotberg & Dennis Thompson eds., 2000) (discussing how truth commissions can achieve goals of accountability and sanctions for perpetrators); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 306 (1998) (discussing South Africa's TRC and stating that "the Truth Commission solution is suitable for a nation which is freeing itself from regime of terror and undergoing a transition to democracy"). For a general discussion of truth commissions compared against prosecution, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

²¹¹ Rome Statute, *supra* note 3, art. 17(2)(c) (stating ICC shall consider if proceedings are consistent with intent to bring one to justice); Goldstone & Fritz, *supra* note 13, at 656 (noting Rome Statute allows for accommodation of amnesties "where these are consistent

Article 20 also allows the ICC to determine if a state conducted its national proceedings in a manner consistent with bringing the accused to justice.²¹² Read broadly, this wording leaves room for a state or individual to argue that appearing and confessing before a truth commission is equivalent to trial and acquittal.²¹³ Further, by not specifying what type of trial, article 20 seems to allow a state to address crimes through a civil proceeding, or perhaps through an administrative court.²¹⁴ Therefore, article 20 allows the ICC to recognize those amnesties that do not foreclose all avenues of proceedings.

2. Prosecutorial Discretion

Finally, article 53 gives the ICC prosecutor discretion to consider amnesty in deciding whether to investigate or to prosecute a crime.²¹⁵ The ICC prosecutor may determine whether recognizing a grant of amnesty serves the interests of justice.²¹⁶ The prosecutor may also consider all circumstances surrounding a state's decision to prosecute to determine if the prosecution is just.²¹⁷ Further, the Pre-Trial Chamber, which oversees the prosecutor's acts, may reconsider the prosecutor's

with justice"); Sharf, *Amnesty Exception*, *supra* note 4, at 526 (arguing that ICC should consider amnesties in prosecutorial decisions).

²¹² Rome Statute, *supra* note 3, art. 20 (3)(b).

²¹³ Scharf, *Amnesty Exception*, *supra* note 4, at 525 (noting possible argument that truth commission is genuine investigation); see Wedgwood, *American View*, *supra* note 17, at 96 (arguing that in some situations prudential judgment and high statesmanship call for truth commissions as only course for prosecution of gross human rights violations). Yet, "tried" and "acquitted" are very specific terms of art in criminal practice.. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE, CASES AND COMMENTARY* 1390-91, 1452-53 (6th ed. 2000)(discussing effect of acquittal and double jeopardy, and acquitted for sentencing purposes).

²¹⁴ Rome Statute, *supra* note 3, art. 20 (referring only to "trial" and "proceedings" with no mention of types).

²¹⁵ See Rome Statute, *supra* note 3, art. 53(1)(c) (allowing prosecutor to consider whether investigation would serve interests of justice); Goldstone & Fritz, *supra* note 13, at 656 (describing scope of prosecutorial discretion afforded by article 53 and its relation to article 15).

²¹⁶ See Rome Statute, *supra* note 3, art. 53 (1)(c) (permitting prosecutor to forego investigation or prosecution where these "would not serve the interests of justice"); Goldstone & Fritz, *supra* note 13, at 656 (noting that "there are contexts in which the award of amnesty will comport with the 'interests of justice'"). See generally Brown, *supra* note 15, at 76 (discussing prosecutor's preliminary decision regarding whether to proceed with investigation involves determination of whether investigation would be in interests of justice).

²¹⁷ See Rome Statute, *supra* note 3, art. 53 (permitting prosecutor to consider all circumstances in determining whether to prosecute); see, e.g., Morris, *supra* note 144, at 206 (noting that ICC prosecutor should consider impediments to judicial authority in determining whether to initiate investigation and prosecution).

decision as to whether national investigation is sufficient and national prosecution just.²¹⁸ As in articles 17 and 20, the ICC then has the ability to determine if amnesty is in the interests of justice and should thus be recognized.²¹⁹

C. *Leaving Room to Consider Amnesty is not Enough*

The foregoing demonstrates that the ICC may interpret the Rome Statute as permitting recognition of amnesty.²²⁰ Because this permission is not explicit, however, a contrary reading is also possible. It is necessary for the ICC to recognize that not addressing amnesty may be inconsistent with the aims of the ICC and international law.²²¹ Finally, by not mentioning amnesty specifically the Rome Statute provides little guidance to states regarding acceptable amnesties for ICC crimes. The Rome Statute further ignores the reality of amnesty with regard to regimes in transition leaving such regimes with little support in addressing human rights abuses.²²² Therefore, leaving room to consider amnesty is not enough, and the ICC must incorporate a direct provision detailing acceptable amnesties.

²¹⁸ Rome Statute, *supra* note 3, art. 53; Brown, *supra* note 15, at 76 (noting that Pre-Trial Chamber must review decision not to proceed).

²¹⁹ Rome Statute, *supra* note 3, arts. 17(2)(c), 20(3)(b), 53(1)(c) (mentioning that national investigation or prosecution must be in interests of justice).

²²⁰ Stephen Ellman, 1998 *Otto L. Walter Lecture International Human Rights At Century's End Justice Richard Goldstone*, 15 N.Y. L. SCH. J. HUM. RTS. 241, 260 (stating that amnesty may still be possible under the provision for 'deferral of investigation or prosecution' on request from the United Nations Security Council); Goldstone & Fritz, *supra* note 13, at 665-66 (discussing how prosecutorial discretion may encompass attention to amnesty); Scharf, *Amnesty Exception*, *supra* note 4, at 508 (noting Rome Statute contains several ambiguous provisions which could allow ICC to consider amnesty). Cf. *Statute of the International Criminal Court*, Decision No. 98-408 D.C., Cons. const., J.O., Jan. 22, 1999, at 1317, available at <http://www.conseil-constitutionnel.fr/decision/1988/98408/98408dc.htm>, translated in 94 AM. J. INT'L L. 391, 392 (1999) [hereinafter Decision No. 98-408] (holding that prosecution by ICC "might be inconsistent with an amnesty proclaimed by France").

²²¹ Rome Statute, *supra* note 3, preamble (affirming ICC aim of international accountability); Declaration on the Protection of All Persons From Enforced Disappearances, *supra* note 87, art. 18 (prohibiting amnesty for forced disappearances); Convention Against Torture, *supra* note 98, art. 7; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, arts. IV - VII (requiring states to punish, legislate penalties for, or extradite persons suspected of genocide crimes). See generally Henrard, *supra* note 6 (discussing relation between individual accountability and amnesty).

²²² Ellman, *supra* note 220, at 260-61 (stating that ICC may not recognize South African amnesties as they could demonstrate an unwillingness to prosecute); Henrard, *supra* note 6, at 633 (acknowledging that states cannot absolutely prohibit grants of amnesties due to vital concerns and needs of states in transition); Wedgwood, *War Crimes*, *supra* note 38, at 275 (asserting that most civil wars end with amnesty).

1. Recognizing Amnesty May Be Inconsistent With the Aims of the ICC

Failure to address amnesty is directly inconsistent with the objectives of the ICC.²²³ The Preamble of the ICC states that the ultimate aim of the ICC is to ensure individual accountability for human rights violators.²²⁴ By not addressing amnesty, the Rome Statute provides the ICC with no guidelines to ensure that recognizing amnesty comports with notions of individual accountability.²²⁵ Without such guidance, the ICC could recognize Decree 2191 in light of the fact that Chile investigated the crimes at issue.²²⁶ This would be an incorrect result, however, because the Chilean investigation did not ensure accountability.²²⁷ In order to achieve individual accountability for serious international crimes, the ICC should provide specific guidelines governing acceptance of nationally granted amnesties. Specific guidelines would ensure that the ICC recognizes amnesties compatible with its objective of individual accountability.

²²³ Rome Statute, *supra* note 3, preamble (affirming objectives of ICC); Wedgwood, *American View*, *supra* note 17, at 96 (stating simply that Rome Statute “skirted” the question of amnesty); *see also* Henrard, *supra* note 6, at 605 (arguing that establishment of ICC will “give life to the principle of individual criminal responsibility”).

²²⁴ Rome Statute, *supra* note 3, preamble; Brown, *supra* note 15, at 66 (stating: “[t]he institution’s goal will be to help ensure that individuals who committed the most serious of international crimes will be punished”). *See generally* Henrard, *supra* note 6, at 596-610 (discussing history and development of notion of individual accountability).

²²⁵ Ellman, *supra* note 220, at 260-61 (observing that ICC may reject South African amnesties despite allowance for accountability); Scharf, *Amnesty Exception*, *supra* note 4, at 526 (noting that ICC should only take amnesties which allow for accountability and redress); Wedgwood, *American View*, *supra* note 17, at 96 (noting that failure of Rome Statute to consider amnesty may prove “troublesome”).

²²⁶ Decree 2191, *supra* note 9; *Chanfeau Orayce and Others v. Chile* Cases 11505 et. al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, doc. 7 rev., ¶¶ 47, 67 (1997) (discussing importance of creation of National Commission for Truth and Reconciliation in Chile for gathering information); Mera, *supra* note 56, at 181-84 (discussing investigation in light of Chilean amnesty Decree 2191).

²²⁷ *Orayce*, ¶ 68 (holding that National Truth and Reconciliation Commission did not publish results nor impose sanctions). The Inter-American Court gave guidelines to Chile in how to modify the amnesty decree to allow for an investigation that would satisfy American Convention on Human Rights obligations. *Id.*, ¶¶ 109-10. For idea of earlier guidance given to Chile see 1985-1986 Annual Reports Inter-American Commission Human Rights (1986), report of Chile, available at <http://www.oas.org> (analyzing Chilean country report regarding human rights with recommendations).

2. Recognizing Amnesty Contradicts International Treaty Obligations Regarding Crimes Within ICC Jurisdiction

Further, the Rome Statute does not address whether a state may grant amnesty for crimes within ICC jurisdiction and crimes prohibited by international conventions.²²⁸ Articles 17, 20, and 53 only require a state to investigate the crime at issue.²²⁹ Investigation does not necessarily mean punishment or prosecution for serious international crimes.²³⁰ International conventions, however, obligate states to prosecute serious crimes including torture and disappearances.²³¹ Therefore, it would be inappropriate to recognize an amnesty decree like Decree 2191 which covers torture and disappearances but only allowed the Chilean truth commission to conduct a limited investigation.²³² By not addressing amnesty, the ICC may condone amnesties that preclude criminal prosecution of international crimes leaving those perpetrators unpunished.²³³

²²⁸ Rome Statute, *supra* note 3, art. 5 (defining crimes within ICC jurisdiction to include: “[t]he crime of genocide; crimes against humanity; war crimes; and [t]he crime of aggression”); Scharf, *Amnesty Exception*, *supra* note 4, at 508 (noting Rome Statute made no mention of amnesty); Wedgwood, *American View*, *supra* note 17, at 96 (criticizing Rome Statute for avoiding amnesty question).

²²⁹ Rome Statute, *supra* note 3, arts. 17, 20, 53; see Brown, *supra* note 15, at 76 (noting that ICC prosecutor will initiate investigation unless “investigation would not be in the interests of justice”); Goldstone & Fritz, *supra* note 13, at 656 (observing that ICC Rome Statute does “allow for the accommodation of amnesties where these are consistent with justice”).

²³⁰ Convention Against Torture, *supra* note 98, art. 12 (requiring states to “ensure that its competent authorities proceed to a prompt and impartial investigation” as distinct from article 7 requiring prosecution or extradition); *Orayce*, ¶ 68; *Azarian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SALR 671, 680, 691 (CC) (holding that investigation often more successful without punishment and that it even advances social reconstruction); see also Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 283-86 (discussing procedures and goals of investigations).

²³¹ Declaration on the Protection of All Persons From Enforced Disappearances, *supra* note 87; Convention Against Torture, *supra* note 98, art. 7; Genocide Convention, *supra* note 221, arts. IV – VII. For a general discussion of international conventions requiring prosecution see Roht-Arriaza, *Sources*, *supra* note 108, at 24-38.

²³² Decree 2191, *supra* note 9; see Roht-Arriaza, *Derogation*, *supra* note 87, at 57 (noting that prohibiting amnesty is converse of obligation to prosecute); Scharf, *Amnesty Exception*, *supra* note 4, at 514 n.53 (noting that “it would be inappropriate for an international criminal court to defer to a national amnesty in a situation where the amnesty violates obligations contained in the very international conventions that make up the court’s subject matter jurisdiction”).

²³³ Rome Statute, *supra* note 3, preamble (affirming that perpetrators will not go unpunished anywhere); Brown, *supra* note 15, at 66 (stating that upon ratification ICC will ensure “that individuals who commit the most serious of international crimes will be punished”); Wedgwood, *American View*, *supra* note 17, at 96-97 (suggesting that not addressing amnesty will not necessarily result in principled prosecution especially for individuals within states in transition).

3. Not Mentioning Amnesty Provides No Guidance for States

Finally, by not addressing amnesty directly, the Rome Statute provides no guidance to states or other international bodies as to what constitutes an acceptable amnesty.²³⁴ By not discussing what constitutes an acceptable amnesty, the ICC statute ignores the fact that amnesties vary in scope and effect.²³⁵ As a result, the ICC may reject amnesties like those granted by the TRC, which allow for investigation and a just resolution of the conflict.²³⁶

4. Amnesty is a Reality

The ICC Rules of Procedure and Evidence should address amnesty because amnesty is a reality in the international community.²³⁷ The ICC will be the first permanent international court to hold individuals responsible for their international crimes, and complement national jurisdiction.²³⁸ If the ICC is to complement national jurisdiction in

²³⁴ Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 299 (noting that there has been no consistent application of law regarding amnesty guidelines); Sewall & Kaysen, *supra* note 7, at 5 (noting that for many legal scholars “the ICC represents the logical evolution of efforts to define and enforce international justice”); Wedgwood, *American View*, *supra* note 17, at 94 (labeling Rome Statute as piece of “international architecture for the future”); Weiner, *supra* note 30, at 859-60 (observing little international guidance and wide domestic practices regarding amnesty, ultimately calling for international guidelines in this area).

²³⁵ *Azanian Peoples Org.*, (4) SALR at 685 (stating that there is no one international practice regarding amnesty); Greenawalt, *supra* note 40, at 195-96 (discussing spectrum of amnesties); Roht-Arriaza, *Derogation*, *supra* note 87, at 57-60 (discussing types of amnesties and relation to obligations to prosecute).

²³⁶ Boraine, *supra* note 65, at 154-55 (noting how TRC process “broke the deathly silence surrounding the grotesque consequences of apartheid”); Seawall & Kaysen, *supra* note 7, at 7 (noting that “recent transitions in Haiti and South Africa . . . offer examples of amnesties that an ICC should respect”); Slye, *supra* note 18, at 171 (praising South African investigation process); Ellman, *supra* note 220, at 260-62 (suggesting that international criminal court during apartheid-era would not recognize post-apartheid conflict amnesties); Orentlicher, *Swapping Amnesty*, *supra* note 39, at 713-14 (labeling South Africa model investigatory approach).

²³⁷ Lome Agreement, *supra* note 11; Decree-Law Regarding the Amnesty of Some Crimes and Pardon of Some Sentences, no. 3/1990, published in Monitorial Oficial, Jan. 5, 1990 (granting amnesty to Romanian political leaders); Wedgwood, *War Crimes*, *supra* note 38, at 275 (noting that most wars end in amnesty and how prosecutorial discretion must consider amnesty as factor).

²³⁸ Jonathen Tepperman, *Contempt of Court, How Jesse Helms and the State Department are Helping Future Milosovics Escape Justice*, 32 WASH. MONTHLY 25, 31 (stating how ICC serves as powerful deterrent); White, *supra* note 105, at 131 (discussing how with emerging norm to investigate and impart justice international community needs consistent policy to punish the wrongdoers, bring justice to victims and their families, deter future violators, and spread pedagogical message concerning rules of moral conduct); see Goldstone & Fritz, *supra* note 13, at 665-67 (noting that ICC is more than symbol and will have “very real impact on the conditions which compel the award of amnesties”); Wedgwood, *American*

international criminal matters, it must address the national reality of amnesty.²³⁹

In 1997, the U.S. Delegation circulated a paper which suggested that the proposed ICC should consider amnesty when deciding whether to prosecute a particular offender.²⁴⁰ According to the United States, some amnesties are necessary.²⁴¹ The United States, along with other states, is worried that the ICC will prevent efforts to restore peace and halt human rights violations.²⁴² Despite U.S. efforts, however, the issue was not

View, *supra* note 17, at 96 (arguing that Rome Statue will result in first permanent international court, with jurisdiction over all serious violations of "the laws of war" and genocide).

²³⁹ *Azanian Peoples Org.*, (4) SALR at 685 (observing that countries other than South Africa have recently granted amnesty, including Chile and Argentina); Sadat, *Hague to Rome*, *supra* note 5, at 39 (commenting that basic premise of ICC is to complement rather than replace national jurisdiction); Goldstone & Fritz, *supra* note 13, at 667 (stating that ICC while not usurping domestic jurisdiction, will "act on and shift global political dynamics" and thus affect grants of amnesty); Henrard, *supra* note 6, at 595 (noting amnesties will continue to reoccur); Scharf, *Amnesty Exception*, *supra* note 4, at 508 (listing countries which have recently granted amnesty); Wedgwood, *American View*, *supra* note 17, at 95-97 (discussing reality of amnesty); Krasner, *supra* note 4, at A15 (arguing that international criminal prosecution must pay attention to political realities).

²⁴⁰ Scharf, *Amnesty Exception*, *supra* note 4, at 508 n.7 (describing U.S. Delegation's paper submitted to ICC PrepCom in August 1997); Wedgwood, *American View*, *supra* note 17, at 96 (noting how United States circulated nonpaper regarding amnesty and its relation to admissibility); see also Ruth Wedgwood, *The Constitution and the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 119, 127-30 (Sarah B. Sewall & Carol Kaysen eds., 2000) [hereinafter Wedgwood, *Constitution and the ICC*] (discussing U.S. concerns with prosecutorial discretion); Goldstone & Fritz, *supra* note 13, at 660-63 (analyzing scope of prosecutor and expressing concern that matters will not be discretely handled).

²⁴¹ NEIER, *supra* note 29, at 100 (discussing necessity of amnesties in some circumstances under U.S. policy); Stotzky, *supra* note 26, at 188-89 (discussing enormous pressure put on Haiti by United States and United Nations to accept "illegal amnesty"); Scharf, *Amnesty Exception*, *supra* note 4, 508-10 (discussing U.S. support for and arguments in favor of amnesty); Wedgwood, *American View*, *supra* note 17, at 96 (noting that for America some amnesties represent "responsible decision by a democratic regime").

²⁴² Kenneth Roth, *Endorse the International Criminal Court*, in *Toward an International Criminal Court?*, Three Options Presented as Presidential Speeches Sponsored by the Council on Foreign Relations, Council on Foreign Relations (1997) (addressing United States and other concerns that ICC may not allow amnesties which are necessary to induce dictators to step down or to transition to democracy); Bolton, *supra* note 2 (arguing ICC is "dangerous" as it will not contribute towards deterrence and will intrude on national sovereignty); Scharf, *Amnesty Exception*, *supra* note 4, at 521 n.102; Clinton, *supra* note 1, at A6 (describing President's concern that ICC may result in "politicizing prosecutions"); Barbara Crossette, *World Criminal Court Having Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A10 (discussing U.S. concerns with intruding into national affairs of countries in deciding which cases are admissible to ICC). For a culmination of U.S. dissenting views see Protection of United States Troops From Foreign Prosecution Act of 1999, H.R. 2381, 106th Cong. (1999) (aiming to prohibit U.S. economic assistance to countries ratifying Rome Statute); see *Statute of the International Criminal Court*, Decision No. 98-408 D.C., Cons. const., J.O., Jan. 22, 1999, at 1317, available at <http://www.conseil-constitutionnel.fr/decision/1998>

resolved.²⁴³ The PrepCom should take the opportunity now to include amnesty guidelines in the rules of procedure and evidence.

D. Amnesty and the Rules of Procedure and Evidence

In light of international legal norms surrounding amnesty, the Rules of Procedure and Evidence accompanying the Rome Statute should include a provision specifically governing amnesty.²⁴⁴ Addressing admissible cases and ICC jurisdiction, rules 51 and 162 provide a framework for recognizing both ICC and national jurisdiction over international crimes.²⁴⁵ Under both rules, the ICC must consider national issues such as amnesty when determining the admissibility of a case.²⁴⁶ However, the Rules of Procedure and Evidence do not provide enough guidance for achieving individual accountability for crimes in light of national grants of amnesty.²⁴⁷ The ICC must determine what constitutes an acceptable amnesty in terms of individual criminal responsibility and

/98408/ 98408dc.htm, translated in 94. AM. J. INT'L L. 391, 395 (1999) (expressing concern that ICC did not address amnesties and thus consider national concerns).

²⁴³ Scharf, *Amnesty Exception*, *supra* note 4 at 508 (stating that U.S. proposal "met with criticism from all quarters" and Rome Statute only has ambiguous provisions regarding amnesty); *see also* Decision No. 98-408, at 395 (holding that ICC may ignore amnesty as nothing in Rome Statute specifically deals with amnesty); Goldstone & Fritz, *supra* note 13, at 656 (noting how Rome Statute did not specifically address amnesty concerns); Wedgwood, *American View*, *supra* note 17, at 96 (observing that amnesty, a "vexing problem," was not discussed in Rome).

²⁴⁴ Morris, *supra* note 144, at 207 (arguing that ICC's complimentary provisions are "product of political conflict and compromise . . . which leave unaddressed issues that will be critical to their effective implementation"); Henrard, *supra* note 6, at 616-27 (discussing amnesty in light of international conventions and obligations surrounding accountability, ultimately suggesting drawing line between permissible and impermissible amnesties); Wedgwood, *American View*, *supra* note 17, at 96 (suggesting that not addressing amnesty will create problems for notions of complementarity).

²⁴⁵ Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Test of the Rules of Procedure and Evidence, PCNICC/2000/INF/3/Add.1, rules 51, at 162 (2000) (permitting states to provide information under article 17 and discussing how ICC will exercise jurisdiction); Wedgwood, *American View*, *supra* note 17, at 94 (stating Rome doctrine of complementarity leaves power with national jurisdictions). *See generally* Morris, *supra* note 144, 198-207 (discussing complementarity and implications on national concerns).

²⁴⁶ Report of the Preparatory Commission for the International Criminal Court, *supra* note 245, art. 51, 162 (2000) (permitting states, under rule 51 to submit information regarding national processes, and permitting ICC under rule 162 to consult with states on regarding exercise of ICC jurisdiction).

²⁴⁷ Report of the Preparatory Commission for the International Criminal Court, *supra* note 245, preamble (2000) (noting rules subordinate to Rome Statute); *see* Henrard, *supra* note 6, at 628-29 (observing that Rome Statute both seems to proscribe amnesty and, yet, allow prosecutor to deal with amnesty); Wedgwood, *American View*, *supra* note 17, at 96 (arguing Rome Statute does not provide enough guidance regarding amnesties).

national sovereignty.²⁴⁸

The Rules of Procedure and Evidence are an appropriate avenue to address the issue of amnesty. The Rome Statute text is final and parties to the statute can amend it only after the statute enters into force.²⁴⁹ However, the rules are still in draft form. Therefore, the Rules of Procedure and Evidence are the appropriate place to include a provision that allows the ICC to recognize those amnesties that do not violate rights to justice, truth, and reparation. As well the provision would allow the ICC to reject amnesties that violate international justice. The provision should permit the ICC to determine whether to recognize amnesty on a case-by-case basis. To address concerns raised by international legal actors and scholars the new rule should say:

The Court, in determining the admissibility of a case, shall take into consideration national grants of amnesty. In deciding whether to recognize amnesty as a bar to admission of a case to the Court, the Court shall look at the following factors:

- (a) the process surrounding the grant of amnesty, paying specific attention to the actor granting the amnesty, and to whether and what domestic body has expressed approval;
- (b) whether the crimes covered by the amnesty are referred to in article 5, 6, 7 or 8 of this statute;
- (c) what proceedings the amnesty precludes, and whether the amnesty allows investigation of crimes at issue in an administrative, judicial or official forum;

²⁴⁸ Rome Statute, *supra* note 3, preamble (affirming individual accountability for serious international crimes). Henrard, *supra* note 6, at 645-46 (noting how amnesties often cover international crimes of previous regime, crimes that ICC claims jurisdiction over); see Decision No. 98-408, at 395 (discussing how failure of Rome Statute to address amnesty may result in ICC infringing on national sovereignty). For a general discussion of who the ICC serves and its complexity as a leader see Morris, *supra* note 144, at 196 (arguing that ICC will serve victims and "the broader community of states that are parties to the ICC" and thus have to resolve conflicts between state grant of amnesty which may diverge with international community and victim interests).

²⁴⁹ Rome Statute, *supra* note 3, art. 121 (stating parties may propose amendments seven years or more from entry into force of Rome Statute); Wedgwood, *American View*, *supra* note 17, 104 (noting that Rome Statute bars amendment "for seven years after its entry into force"); see also Brown, *supra* note 15, at 72 (noting amendments can be adopted by 2/3 vote of all states parties and come into effect for all when ratified by seven-eighths of them); Wedgwood, *Constitution and The ICC*, *supra* note 240, at 128 (discussing how rules of procedure and evidence can address concerns about Statute).

(d) the stability of the judiciary in the state and whether prosecution of such acts by a national or international body, such as the ICC, would weaken the role of the judiciary;

(e) whether the amnesty allows official national recognition of the crimes and individual responsibility for such crimes, taking into account specific steps the state has taken to acknowledge the crimes and responsibility for those crimes; and

(f) the ability of the victims to obtain redress and reparations for the atrocities suffered.

A provision containing these guidelines for amnesty would allow the ICC to reject Pinochet's self-amnesty, while respecting amnesties resulting from the South African TRC process.²⁵⁰ Subsection (a) specifically refers to which body granted amnesty in the first instance. Subsection (a) allows the ICC to reject, as other international actors have done, self-amnesties like Pinochet's Decree 2191.²⁵¹ Yet, it would allow the ICC to recognize the South African TRC amnesties which are the result of a parliamentary act, constitutional provision and judicial approval.²⁵²

Subsection (b) provides that the ICC will only recognize those amnesties which do not cover serious international crimes defined under the Rome Statute. International conventions require prosecution of

²⁵⁰ *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., ¶¶ 79,109 (1997) (holding Pinochet's amnesty violates Chile's international legal obligations); *Azanian Peoples Org. v. President of the Republic of S. Afr.* 1996 (4) SALR 671, 687-91 (CC) (discussing different amnesty processes and holding that South African process is "constitutional compact"); *Garay Hermosilla et al.*, Case 10.843, Rep. No. 36/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., at 156 (1997) (labeling Amnesty Decree 2191 self-amnesty).

²⁵¹ *Orayce*, ¶¶ 79, 109-10 (holding that Decree 2191 violates American Convention and recommending that Chile adapt its legislation to comply with convention obligations); *Hermosilla*, ¶ 59 (rejecting Decree 2191); Communication No. 746/1997: Chile 04/08/99. CCPR/C/66/D/746/1997, Human Rights Committee, 66th Sess., CCPR/C/66/D/746/1997, ¶ 4.7 (1999) (acknowledging Chile's amnesty as self-amnesty). However, the Chilean Supreme Court has upheld Amnesty Decree 2191 against constitutional challenge. *Hermosilla*, ¶¶ 7-10 (discussing Chilean Supreme Court's reasoning in upholding Decree 2191); *Roht-Arriaza*, *Developing Jurisprudence*, *supra* note 37, at 848-49 nn.29-31 (discussing how Chilean Supreme Court upheld Decree 2191 on at least two occasions).

²⁵² *Azanian Peoples Org.*, (4) SALR at 672; *Ellman supra* note 220, at 257 (noting that South African Constitution contains provision allowing for amnesty); *see, e.g., Hermosilla*, ¶ 43 (noting how Inter-American Commission found Chile's amnesty in conflict with Chilean constitution).

serious crimes such as torture and disappearances.²⁵³ Under subsection (b), the ICC should not recognize Decree 2191 as it applies to disappearances.²⁵⁴ Subsection (b), however, permits the ICC to recognize those TRC amnesties covering specific political crimes not proscribed by the Rome Statute.

Additionally, subsection (c) deals with amnesties covering all or only certain proceedings. Under this subsection, the ICC could reject, Decree 2191 for its failure to allow for a full judicial investigation of the crimes at issue.²⁵⁵ The ICC, however, may respect the South African TRC process as it entails an official investigation into the crimes at issue.²⁵⁶

Subsection (d), moreover, deals with the ability of the state to prosecute, and the impact of prosecution on the reputation of the judiciary. The ICC, in looking at Decree 2191, could take into account whether Chile had the judicial capacity to try Pinochet and if ICC prosecution would sacrifice its legitimacy.²⁵⁷ Further, the ICC could also recognize the South African TRC process as an acceptable judicial alternative during South Africa's transition to democratic rule.

Subsection (e) deals with the main concern outlined by the Inter-American Commission in the *Orayce* case.²⁵⁸ Investigation must be an

²⁵³ Convention Against Torture, *supra* note 98, art. 7; Declaration Against Forced Disappearances, *supra* note 87. See generally BASSIOUNI, *supra* note 88 (describing duties to prosecute or extradite criminals for international crimes).

²⁵⁴ Rome Statute, *supra* note 3, art. 5 (defining crimes against humanity as crimes within ICC jurisdiction); Inter-American Convention on the Forced Disappearances of Persons, *supra* note 97, at 1530 (affirming that disappearance is crime against humanity); Declaration Against Forced Disappearance, *supra* note 87, art. 18 (prohibiting amnesty for disappearances).

²⁵⁵ *Orayce*, ¶¶ 76, 109, 110; *Hermosilla*, ¶ 111; see also Roht-Arriaza, *Combating Impunity*, *supra* note 24, at 284 (noting that investigation under Chilean commission was limited to investigating, for example, only cases in which torture led to death).

²⁵⁶ *Orayce*, ¶ 80 (noting that domestic legislation which encompassed Decree 2191 prevails in ongoing judicial processes); see Pasqualucci, *supra* note 33, at 276 (discussing how lack of resources may make prosecution difficult); Schabacker, *supra* note 26, at 10 nn.56-7 (discussing how difficult prosecution would have been after Pinochet stepped out of power).

²⁵⁷ *Orayce*, ¶ 13 (discussing how majority of Senate needs to vote to repeal laws and that President Aylwin probably did not have this support); *Hermosilla*, ¶ 41 (recognizing that President Aylwin could not annul amnesty); Schabacker, *supra* note 26, at 10 (suggesting President Aylwin did not have political support for prosecution); Ruth Wedgwood, *International Conference: Augusto Pinochet and International Law*, 46 MCGILL L.J. 241, 247 (2000) (noting that Aylwin government succeeded Pinochet with limited latitude to act regarding Decree 2191). See generally Mera, *supra* note 56, at 172-76, 183-84 (discussing acts government in transition took after Pinochet's reign to deal with human rights abuses).

²⁵⁸ *Orayce*, ¶¶ 66-71 (holding that obligation exists under American Convention for states to investigate, and that amnesty decree 2191 prevented Chile from fully complying with this obligation). The Inter-American Commission relied heavily on its earlier decision in the *Hermosilla* case where it addressed the issue of Decree 2191 violating American

official act allowing for official recognition of the crimes and wrongdoers, public acknowledgement, and compensation for victims.²⁵⁹ Investigations, as the *Orayce* case demonstrates, must involve more than simply looking into the facts.²⁶⁰ Investigation should involve something like the South African TRC process which allowed for acknowledgement of responsibility and public disclosure of the information.²⁶¹

Finally, subsection (f) addresses the needs of the victims. Based on the victims' needs for a remedy, the ICC could reject Decree 2191 as it did not allow the victims recourse in Chile.²⁶² At the same time, the ICC could recognize the TRC amnesty as it allowed victims redress and reparation.²⁶³ The ICC should recognize those amnesties that provide the victims with a remedy.

E. Amnesty and National Sovereignty

One drawback of mentioning amnesty specifically in the Rome Statute is that it may inhibit national sovereignty. Amnesty, after all, is an expression of self-determination and national sovereignty.²⁶⁴ The South

Convention obligations to investigate forced disappearances. *Hermosilla*, ¶ 51 (introducing issue of amnesty preventing investigation).

²⁵⁹ *Orayce*, ¶¶ 68, 109-10 (requiring Chile to modify amnesty decree to provide for identification and publication of those responsible, investigation, and compensation); *Hermosilla*, ¶¶ 54-55 (holding amnesty should not prevent investigation).

²⁶⁰ *Orayce*, ¶ 70 (noting that investigation must involve identification of those responsible, imposition of sanctions and assurance of adequate reparation to victims); *Hermosilla*, ¶¶ 48, 73 (stating that investigation for international crimes must meet Inter-American Court requirements of objectivity and must be assumed by state "as its own legal duty").

²⁶¹ Promotion of National Unity and Reconciliation Act 34 of 1995, §§ 3(1)(d), 3(3)(d), 4(a)(v), 4(c) (requiring TRC to publish amnesty decisions, provide reports of commission's work, and hold individuals accountable); *Azanian Peoples Org. v. President of Republic of S. Afr.* 1996 (4) SALR 671, 683-84 (CC) (stating that truth commission allows for uncovering of information and acknowledgment of crimes better than "abstract right of prosecution"); see also *Hermosilla*, ¶ 111 (requiring Chile to investigate crimes of previous "de facto" "with a view to identifying the guilty parties, establishing their responsibilities and effectively prosecuting them").

²⁶² American Convention, *supra* note 118, art. 25 (promoting right to remedy); *Orayce*, ¶¶ 66-71 (noting how Chile did not prove concrete opportunities for redress and reparation to victims); *Hermosilla*, ¶ 71 (describing how Decree 2191 prevents any initiation of remedy).

²⁶³ Promotion of Unity and National Reconciliation, §§ 3(c), 11(c) (defining aims of reparations to include compensation and redress); *Orayce*, ¶¶ 60-71 (holding Chile violated article 25 of American Convention guaranteeing a right to judicial protection); *Azanian Peoples Org.*, 4 SALR at 702-03 (holding that TRC provided concrete opportunity for redress and compensation).

²⁶⁴ *Orayce*, ¶ 80 (noting Decree 2191 is permanent part of domestic legislation); *Azanian People's Org.*, 4 SALR at 687 (suggesting amnesty processes are one of state practice and not

African TRC process represents a national decision of how to deal with the national reality of apartheid.²⁶⁵ By explicitly mentioning amnesty, the Rome Statute permits the ICC to determine that such national decisions are void, and prosecute individuals. The decision to reject a national decision of amnesty may ignore other national, judicial, and political processes designed to deal with the crimes.

Yet, the ICC would be addressing amnesty covering a limited number of international crimes.²⁶⁶ The crimes covered by the ICC statute are those covered by international conventions.²⁶⁷ These international conventions already require prosecution by state parties, and in some instances reject amnesty explicitly.²⁶⁸ Therefore, the ICC and Rome Statute are not imposing new obligations on state parties of international conventions. Further, by mentioning amnesty specifically the Rome Statute provides states with guidance on how to structure amnesty

guided by single uniform international law standard). Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 863 (noting that many courts see amnesties "as exercised of sovereign authority"); Wedgwood, *War Crimes*, *supra* note 38, at 271 (noting that amnesty is important part of civic rebuilding).

²⁶⁵ *Azanian Peoples Org.*, (4) SALR at 685-91 (describing South Africa's quest for reconciliation and ubuntu in granting amnesty only for crimes committed in furtherance of political objectives); Sachs, *supra* note 65, at 1565-68 (describing decision to grant amnesty in South Africa); see Neier, *supra* note 29, at 104-05 (describing how South Africa came to amnesty decision and that decision required provision for it to be incorporated into Transitional Constitution); Boed, *supra* note 98, at 298 (describing South African amnesty as one type and modality of amnesty to deal with national realities and perhaps international crimes); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 856-57 (noting South African model of South Africa different in setting up discrete amnesty); Rosenberg, *supra* note 62, at A18 (noting how it is not typical for truth commissions to grant amnesty).

²⁶⁶ Rome Statute, *supra* note 3, art. 5 (permitting ICC jurisdiction only over genocide, crimes against humanity, war crimes and the crime of aggression); Brown, *supra* note 15, at 67-70 (discussing crimes within ICC jurisdiction); Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 146-53 (describing crimes within ICC scope and jurisdiction and critiques regarding ICC definition and treatment of such crimes).

²⁶⁷ Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 93; Genocide Convention, *supra* note 221; Inter-American Anti-War Treaty of Non-aggression and Conciliation (Saavedra Lamas Treaty), Oct. 10, 1933, 49 Stat. 3363, 163 L.N.T.S. 57; see, e.g., Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *supra* note 5 (prosecuting acts involving crimes against humanity and torture); London Agreement, *supra* note 5 (mandating prosecution for acts of genocide and other war crimes). See generally BASSIOUNI, *supra* note 88, at 303-18 (listing conventions by type of crime or issue).

²⁶⁸ Declaration Against Forced Disappearances, *supra* note 87, art. 18 (prohibiting amnesty); Convention Against Torture, *supra* note 98, art. 7 (obligating states to extradite or submit individuals to competent authorities); Genocide Convention *supra* note 221, art. IV (requiring prosecution of genocide).

processes to meet international obligations.²⁶⁹ The proposed provision attempts to deal both with international concerns regarding serious international crimes and convention obligations as well as with national sovereignty concerns.

The Rules of Procedure and Evidence can ensure that the ICC's aim of individual accountability does not undermine national preferences for amnesty.²⁷⁰ By addressing amnesty through these rules, the ICC may recognize amnesties that are necessary to discover the facts surrounding crimes or to facilitate national reconciliation.²⁷¹ Doing so, therefore, allows the ICC to adhere to international investigation and redress requirements without suborning national sovereignty concerns.²⁷²

CONCLUSION

Twenty-seven states have ratified the Rome Statute, approximately half of the signatures necessary for the ICC to enter into force.²⁷³ The ICC compliments national jurisdiction over international crimes.²⁷⁴ The ICC does not replace the state's jurisdiction over the individual.²⁷⁵ However,

²⁶⁹ Henrard, *supra* note 6, at 604 (stating how ICC can assist with individual accountability aims in treaty conventions); *see* notes 87-113 and accompanying text discussing obligations to prosecute specific international crimes. *See generally*, Scharf, *supra* note 5, at 4, 502-25 (discussing how ICC may interpret Rome Statute in line with international convention obligations).

²⁷⁰ Rome Statute, *supra* note 3, preamble, at 1102 (stating aim is accountability for serious international crimes); *see* Wedgwood, *Constitution and the ICC*, *supra* note 240, at 128 (stating how states can address concerns regarding Rome Statute in rules of procedure and evidence). To understand amnesty and its effect on admissibility, *see* Henrard, *supra* note 6, at 626-30 (arguing that ICC must address and even accommodate for national amnesties in certain situations).

²⁷¹ *Azanian Peoples Org.*, (4) SALR at 690; Minow, *supra* note 34, at 252 (calling TRC inquiry into crimes of apartheid and providing reconciliation "exemplary" work); Slye, *supra* note 18, at 179-82 (arguing that South African amnesty process "provided more accountability" and reconciliation than any other amnesty process).

²⁷² *See* Seawall, *supra* note 7, at 7 (noting that "recent transitions in Haiti and South Africa . . . offer examples of amnesties that an ICC should respect"); Davis, *supra* note 37, at 1370 (noting that amnesty is expression of sovereignty); Henrard, *supra* note 6, at 645-46 (discussing how ICC, in dealing with national amnesties, will have to use balancing process); Roht-Arriaza, *Developing Jurisprudence*, *supra* note 37, at 870-74 (discussing role of amnesty in national self determination).

²⁷³ Rome Statute, *supra* note 3, art. 126; *Ratification Status*, *supra* note 1; *see also* Ricks, *supra* note 1, at A1 (noting that 27 nations have ratified Rome Statute).

²⁷⁴ Rome Statute, *supra* note 3, art. 17; *see also* Sadat, *Hague to Rome*, *supra* note 5, at 39 (describing ICC system as complementary); Henrard, *supra* note 6, at 609 (discussing how ICC complements national jurisdiction).

²⁷⁵ Rome Statute, *supra* note 3, art. 17 (defining inadmissible cases as those where state already acted); *see also* Brown, *supra* note 15, at 73-75 (discussing deferral of ICC to national jurisdiction); Wedgwood, *American View*, *supra* note 17, at 94 (arguing ICC will only intrude

the ICC should address state actions which act as a shield to individual accountability for international crimes.²⁷⁶

In order to enforce effectively individual accountability for international crimes the ICC must address the reality of amnesty.²⁷⁷ As the experiences of Chile and South Africa demonstrate, amnesty can be a tool allowing perpetrators to escape responsibility for crimes or a process aimed at furthering accountability.²⁷⁸ The ICC, therefore, should not ignore these experiences.

The rules underlying the ICC should include a provision on amnesty. In order to assure that the ICC or states punish perpetrators, the ICC's considerations must go beyond simply whether the state investigated the crimes at issue. The ICC must consider its ultimate objectives, international legal norms establishing individual criminal responsibility, and the benefits amnesty can bring to states in transition. Including a provision that addresses the political process establishing amnesty and victims' needs will allow the ICC to balance individual criminal responsibility with national concerns. This will be a step towards international justice.

where national courts are unable to proceed).

²⁷⁶ *Azanian Peoples Org.*, (4) SALR at 685, 691 (defining amnesty as "forgetting" of offenses); Joint Report, *supra* note 20, ¶ 32, principle 25 (calling upon international community to reject amnesties which result in impunity or shielding perpetrators from accountability); Slye, *supra* note 18, at 171 (defining amnesty as shield from liability).

²⁷⁷ *Azanian Peoples Org.*, (4) SALR at 687 (noting that amnesty is process other countries outside of South Africa adopt); Henrard, *supra* note 6, at 595 (conceding that amnesty is current and future reality); Scharf, *Amnesty Exception*, *supra* note 4, at 508 (acknowledging amnesty as modern reality).

²⁷⁸ Promotion of Unity and National Reconciliation Act 34 of 1995, § 4(a)(v) (stating aim of TRC as accountability); *Azanian Peoples Org.*, 4 SALR at 691 (holding amnesty not blanket and available with full disclosure of facts and to those who presented themselves before commission); Joint Report, *supra* note 20, principle 25 (suggesting amnesty may be kept with bounds of accountability); *see also* Slye, *supra* note 18, at 180-82 (discussing how TRC process contributed towards accountability more than any other amnesty process); Henrard, *supra* note 6, at 645-46 (acknowledging that TRC amnesty process one that allows for accountability).