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Rethinking Amnesty

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RETHINKING AMNESTY

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I. INTRODUCTION

> "Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation."[1]

Numerous political changes have occurred in the past twenty years. Repressive dictatorships have been replaced by democratic governments in many countries. A significant component of these transitions has been acknowledging and reconciling the human rights abuses committed by the previous regime. In an attempt to achieve closure to the past conflict, several of these countries have passed amnesty laws covering members of the former regimes. In some cases, the amnesty provision was even endorsed by the United Nations as an effort to restore peace and ensure a successful democratic transition.[2] However, the attainment of peace does not in each single instance correspond to the pursuit of justice. Ideals of peace should remain subject to the international norms relating to threshold human rights standards. Thus, scholars have suggested that granting amnesty to those who commit serious violations of international humanitarian or human rights law is incompatible with the purposes and objectives of world order.[3] Prosecuting the alleged offenders has become an affirmative duty and a necessary step toward the achievement of justice. Accordingly, states have an international obligation to provide for individual accountability mechanisms in order to hold human rights violators responsible for the atrocities committed.[4]

This Article will focus on the issue of accountability under the existing international law and will address the following question: Is there a duty to prosecute perpetrators of human rights abuses? Furthermore, if there is such a duty,

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1. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 27 (1996).

2. *See* Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 41 (1996) (noting that the United Nations helped negotiate amnesties in Cambodia, El Salvador, Haiti, and South Africa). *See also* Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 484-85, n.187 (1990).

3. *See generally* ASPEN INST. STATE CRIMES: PUNISHMENT OR PARDON - RAPERS AND REPORT OF THE CONFERENCE (1989).

4. *See id.*

what are its precise contours, its reach and its limits? Can amnesty laws and truth commissions ever be legal despite the evolving body of human rights law that seems to dictate the absolute assurance of those rights? Part I of this Article will examine the existing accountability mechanisms, while evaluating their respective strengths and weaknesses. Part II will focus on the existing state practice regarding amnesty laws in the context of two different political and geographic paradigms, Latin America and South Africa. Part III will study the international documents and customs imposing legal obligations on states to provide for effective accountability measures. Finally, Part IV will seek to define particular circumstances under which amnesty provisions and truth commissions do or do not fulfill the global mandates of justice as it relates to individual responsibility. Do amnesty laws provide for *de facto* impunity, or do they represent effective methods of achieving a legitimate form of accountability while preserving internal peace and stability?

II. EXISTING ACCOUNTABILITY MECHANISMS

The theoretical conclusion that a particular individual should be held accountable for his or her violations of threshold human rights norms is merely the first step in the entire process of bringing about justice. Once we reach the conclusion that justice can only be served by imposing individual responsibility on the alleged offender, the question of "how?" immediately springs to mind. Under the current international regime, three different accountability mechanisms exist.[5] First, national courts provide a forum for the prosecution of such offenders in cases where the offender or the crimes committed are somehow linked to the particular country.[6] National courts also provide a forum when a country has implemented domestic legislation incorporating the principle of universal jurisdiction.[7] Second, international tribunals represent another type of forum for the prosecution of human rights violations. These include the *ad hoc bodies*, such as the International Tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone, as well as the International Criminal Court and similar regional fora, namely the European Court of Human Rights and the Inter-American Court.[8] Third, non-legal sanctions, most often in the form of truth commissions and amnesties, seek to redress past crimes by shifting the focus of accountability from its penal function toward reconciliation and an all-encompassing "coming to terms with the past" solution. The three mechanisms are not mutually exclusive; in fact, a successful interplay of the different fora could represent the most desirable solution in some cases. The following sections evaluate the strengths and the

5. *See generally* Neil J. Kritz, *Coming To Terms with Atrocities: A Review of Accountability Mechanisms For Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127 (1996); Bassiouni, *supra* note 1; Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591 (1998).

6. *See generally* Kritz, *supra* note 5, at 136-39 (using the example of Bosnia to illustrate the difficulties that national prosecutions can encounter in ethnically or politically divided societies).

7. *Id.*

8. *See generally id.* (discussing the ad hoc tribunals in Bosnia and Rwanda); *see generally* 2 INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni 2d ed. 1998).

weaknesses of each particular accountability measure as the necessary procedural framework in the pursuit of justice.

A. National Courts

Prosecution of human rights offenders before domestic tribunals can serve important political, legal, and societal functions. First, such trials can foster the political legitimacy of the new regime from both international and national perspectives.[9] That is, the successor government projects to the outside world its willingness to abide by the existing human rights standards and reassures the global community that there will be no further violations.[10] Thus, the new leaders establish themselves as the "good guys" by choosing to redress past offenses. Furthermore, the successor regime proves to its own citizens the restored respect of human rights that had been lacking in that particular country. The new government thereby detaches itself from the previous "offending" regime and enhances its own credibility and trustworthiness in the eyes of its subjects.[11] Second, national prosecutions of human rights violators serve to rebuild the local judiciary and criminal justice system, thereby accomplishing a significant legal function. These prosecutions establish local courts as credible and fair fora and enhance the respect for the entire transition process of the particular country.[12] Third, domestic prosecutions serve a societal goal by bridging the gap between the violent, precarious past and the hopeful future. National courts can render verdicts of more "symbolic force."[13] These verdicts signify not only the culpability of an individual offender, but furthermore inculpate the entire previous regime: its practices, standards, and procedures. The new government accomplishes an enormous task through a national prosecution: it acknowledges the wrong from the past; it establishes respect for the present; and it promises hope for the future.

From a pragmatic point of view, national prosecution may represent the best solution in a particular case. However, where the transition process had been tenuous and where the current situation is still unstable, an international proceeding insensitive to the "nuances of local culture" could result in more direct harm to the country.[14] International tribunals may not be willing or capable to prosecute *all* of the accountable individuals, thereby failing to produce "complete" justice from both the moral and the legal point of view.[15] Lastly, an international judicial organ may not even exist which is available to prosecute particular offenders.[16] Thus, domestic tribunals represent not only a valuable resource in the

9. *See* Kritz, *supra* note 5, at 132.

10. *See id.* at 132-133.

11. *See id.*

12. *See id.* at 133.

13. *Id.*

14. *Id.*

15. *See id.* (noting that the international tribunals for Rwanda and the former Yugoslavia have limited their prosecutions to a relatively small number of people for both practicality and policy reasons). The Special Court for Sierra Leone, similarly, will only be able to prosecute about ten individuals due to its comparatively small budget of $10 million.

16. *See id.*

pursuit of international justice, but often the only legal mechanism providing for accountability.

However, prosecutions before domestic tribunals can fall short of fulfilling the goals of justice. Irregularity of procedure, political pressures, and societal strife too often color the contours of domestic criminal proceedings, consequently undermining the attempt to define individual accountability.[17] First, domestic trials may fail to meet international fairness standards, including the right to counsel, the introduction and examination of evidence and witnesses, and the transparency of procedures. Witnesses may be unavailable due to the precarious political situation in the region; judges may be biased because of political influences or corruption, and lawyers may be uninterested and incompetent. Second, national courts may be severely limited in their jurisdictional reach. In most cases, domestic legislation only provides for accountability for persons somehow linked to the country. Statutes implementing universal jurisdiction are rare, as most states are hesitant to implement them due to concerns of comity and state sovereignty.[18] Third, the political situation of the country may dictate certain results. The current regime, fearful of being incriminated itself, could prevent access to documents and relevant evidence. Conversely, the regime in power could seek to benefit from the trial by demonstrating to the people its own willingness to be different from the past rulers. Such a government could impose the desired outcome of guilt and severe punishment on the alleged offender while ignoring standards of fair trials and due process rights.[19] Finally, a domestic prosecution could deepen an already existing ethnic or societal gap by allocating the blame for previous offenses on a particular group. The entire process could thus be viewed "as a collective mea culpa of sorts, a potent acknowledgment and repudiation of such sordid crime committed by one's compatriots."[20] The prosecutions in such a scenario become a means of prolonging the conflict rather than a mechanism of justice and reconciliation. Therefore, criminal proceedings in domestic fora can, in certain situations, worsen the political situation of the country and further obscure the pursuit of justice.

B. International Tribunals

The advantage of international prosecutions for violations of human rights lies in the obvious fact that such processes are international. A global forum can therefore "convey a clear message that the international community will not tolerate such atrocities, hopefully deterring future carnage of that sort both in the country in question and worldwide."[21] In addition to the deterrence value of international prosecutions, such legal measures can also enhance the development

17. *See generally id.* at 136-139 (using the example of Bosnia to illustrate the difficulties that national prosecutions can encounter in ethnically or politically divided societies).

18. For a fuller discussion of the principle of universal jurisdiction, *see* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 766-78 (1991). *See also* 2 INTERNATIONAL CRIMINAL LAW 298 (M. Cherif Bassiouni 2d ed. 1986).

19. For a discussion of dangers of unfairness related to domestic trials, *see* Kritz, *supra* note 5, at 134-35.

20. *Id.* at 136.

21. *Id.* at 129.

of international criminal norms. Key proceedings, such as Nuremberg or even the trials before the *ad hoc* bodies for Yugoslavia, Rwanda, and Sierra Leone, establish specific precedents and strengthen the general proposition that human rights violations are of global concern.[22] International proceedings thus serve to circumvent concepts of national sovereignty and to establish once and for all that no human rights offender can be immunized from the reach of international law.

Furthermore, international proceedings are advantageous with respect to domestic trials for several practical reasons. First, an international tribunal is more likely to be staffed with experts, qualified attorneys, skillful prosecutors, and neutral judges.[23] Second, such a tribunal will most likely apply international law to a particular offense. This in turn eliminates the risk of murky domestic legislation as the substantive body of law and further advances the international standards sought to be respected. Third, an international body can often do more than a local tribunal.[24] That is, problems of personal jurisdiction and access to evidence are often more easily solved by an international judicial organ whose statute has been implemented to deal specifically with these kinds of situations and whose global reputation could procure cooperation by third parties and by the allegedly "neutral" governments.[25] International fora for accountability can, in certain contexts, represent a far more attractive option for the redress of human rights violations.

However, international judicial bodies are not infallible. First, as mentioned above, international prosecutions are often insensitive of the particular country's political situation. A proceeding focused solely on the pursuit of absolute truth with a clearly contemplated criminal punishment may do more than is needed in a specific context. That is, reconciliation may become too hard to implement in a society already torn by civil or ethnic strife after a full-blown criminal investigation uncovers the often too painful details about the atrocities committed. A particular society may be on the verge of forgiveness with a non-legal accountability method already in place. An international proceeding in such an instance looks more like an intrusion upon a struggling society than a facet of global justice.[26]

Second, international tribunals may be even more limited in their reach than the domestic fora. In most cases, these judicial bodies are products of international cooperation and compromise. They represent the least common denominator of human rights norms, encompassing only those that the majority of the world thinks should be respected in the absolute sense.[27] Furthermore, international tribunals are

22. *See id.* at 129-32 (noting the advantages of international tribunals over domestic prosecutions).

23. *See id.* at 129.

24. *See id.* at 129-30.

25. *See* Kritz, *supra* note 5, at 129-30. In many cases, potential defendants have left the territory where the atrocities were committed or are generally inaccessible; thus, "an international tribunal stands a greater chance than local courts of obtaining their physical custody and extradition." *Id.* at 129.

26. *See id.* at 145-46 (noting problems in the relationship between the International Criminal Tribunal for Rwanda and the country of Rwanda itself). "[I]t was almost as though a nation still reeling and traumatized by a horrific genocide was completely irrelevant to tribunal officials . . . ." *Id.* at 146.

27. *See* Joyner, *supra* note 5, at 609 (noting that international tribunals are often influenced by the Great Powers on the Security Council and that such political considerations can undermine their

often *ad hoc*, with statutes written in accordance with a particular situation, a specific war, or a peculiar context. Their reach may be undermined in irregular, unusual situations that do not fit the drafters' contemplated model of accountability.[28] Third, international prosecutions may have less impact on the implicated country.[29] The proceedings are often conducted in a language foreign to the relevant nation, the sessions usually take place in the western hemisphere, the decisions are seen as a product of occidental bias and victor's justice, and the people most directly affected may not even be aware of the particular prosecution. Therefore, international fora for individual accountability, even though functioning under the pretext of universal justice, may fail to redress a particular grievance and may not reach their specifically mandated goals.

C. Non-Legal Sanctions: Amnesties and Truth Commissions

In an attempt to deal with the aftermath of massive human rights violations, many countries have established non-legal accountability mechanisms, such as amnesties and truth commissions.[30] While falling short of criminal sanctions, these methods can often represent meaningful measures that not only redress previous grievances, but also acknowledge human rights violations.

Most cases of human rights abuses involve mass participation in the committed brutalities. Criminal prosecutions are *per se* selective: "prosecution of every single participant in the planning, ordering, or implementation of the atrocities in question... would be politically destabilizing, socially divisive, and logistically and economically untenable."[31] The accountability mechanism of non-legal sanctions can be the most broadly applied, the farthest-reaching, and the most all-encompassing. Furthermore, amnesties and truth commissions can represent a legitimate and official acknowledgment of the past abuses by an official government body. They enhance both the domestic and the international credibility of the current regime without unleashing divisive societal forces that too often accompany criminal prosecutions.[32] These accountability mechanisms also provide the framework for official investigations, permit for a public catharsis of the inflicted pain and evil, procure an impartial forum for the victims to tell their story, and sometimes even establish a legal basis for compensation of the victims or for punishment of the offenders.[33] Finally, amnesties and truth commissions can be organized relatively quickly, function more promptly, and facilitate closure regarding a troubled past.[34]

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effective operation).

28. *See id.* at 609-10 (noting the weaknesses of ad hoc judicial bodies as revealed through the examples of the Yugoslavian and the Rwandan tribunals).

29. *See* Kritz, *supra* note 5, at 132-33.

30. Some of these countries include Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, and South Africa. *See* Scharf, *supra* note 2, at 41.

31. *See* Kritz, *supra* note 5, at 138-39.

32. *See id.* at 145-46; *see supra* text accompanying note 25.

33. Kritz, *supra* note 5, at 141.

34. *Id.* at 141-42; *see* Joyner, *supra* note 5, at 610.

Non-criminal accountability mechanisms can however be insufficient to redress human rights abuses. First and foremost, the mechanisms do not impose criminal sanctions. The notion of individual accountability inherently carries with itself the concept of criminal liability.[35] Thus, amnesties and truth commissions are often seen as equating pardon with reconciliation and *de facto* impunity with justice. Second, non-legal sanctions may be unfairly administered. They do not generally afford those implicated the level of due process protections provided to criminal defendants; they are often informal and less public; they can be subject to political manipulation by the new regime and can produce a large, ostracized element within the society.[36] Third, amnesties and truth commissions tend to undermine the substantive norms of human rights law. They establish principles of criminal impunity that can contravene duties imposed by international treaties and custom. They modify *jus cogens* and *erga omnes* norms[37] to fit the inflicted precarious situation or the ethnically unstable region. They adopt *ad hoc* rules and procedures that may be far from legitimate but are still uncontrollable and unreachable by any other judicial organs. Thus, non-criminal fora for accountability may convey the unwarranted message that there is no duty to prosecute human rights offenders. "The power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the governments but of the victims... The recurrence of pre-prosecution amnesty is therefore an anomalous phenomenon developed as part of a policy of impunity."[38]

III. STATE PRACTICE: THE EXISTING PARADIGMS

Recent trends in state practice regarding individual accountability for human rights violations committed in the course of internal conflicts point toward permitting amnesty laws and truth commissions. In the past two decades, there have been nineteen truth commissions in sixteen countries.[39] However, the context of each case of amnesty is inherently different in its interplay with the international law duty to prosecute. Namely, three major paradigms have emerged in the global community. First, Latin American countries have experimented with amnesties and truth commission in transitional democracies. These accountability methods

35. *See* Bassiouni, *supra* note 1, at 20 (noting that truth commissions "should not be deemed a substitute for prosecution"); *see also* Kritz, *supra* note 5, at 141 (noting that "such an entity cannot substitute for prosecutions").

36. *See* Kritz, *supra* note 5, at 141.

37. *Jus cogens* and *erga omnes* norms are the so-called peremptory norms that are deemed to be so fundamental that they are both non-derogable and applicable to all states. For a fuller discussion of these principles, see CARTER & TRIMBLE, *supra* note 17, at 98-100. *See also* M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 63-65 (1996) (defining 'jus cogens' as the legal status that certain international crimes may reach and 'erga omnes' as the legal implications arising out of a certain crime's characterization as jus cogens); Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Judgment of Feb. 5), at 32. Scholars have argued that there are four *jus cogens* crimes, genocide, crimes against humanity, war crimes, and torture, for which prosecution should be required. *See* Bassiouni, *supra* note 1, at 20.

38. *See* Bassiouni, *supra* note 1, at 19.

39. 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, 6 (1999).

reflected much more a "coming to terms with the past" than a pursuit of international justice.[40] Second, South Africa's Truth and Reconciliation Commission is an example of a non-legal mechanism that not only acknowledges the painful past, but that also redresses human rights violations and respects international standards.[41] Finally, the Sierra Leonian Truth and Reconciliation Commission, while designed to parallel the largely successful South African model, has been undermined by the establishment of the Special Court for Sierra Leone, which somewhat negated the essence and legitimacy of the Commission.[42] Thus, the Sierra Leone paradigm perfectly illustrates the existing tension between the desire to prosecute and the need to achieve peace and reconciliation. These differing models of non-criminal accountability measures reflect the existing state practice and define the circumstances under which amnesties and truth commissions become legitimate vehicles of addressing past violations of human rights norms.

A. Latin American Amnesties and Truth Commissions

Because turbulence and civil strife have marked the political history of many Latin American countries, it is not surprising that this region's mandate has been to accept and redress its own past. The experiences of Argentina, Chile, and El Salvador portray some of the different amnesty laws and truth commissions and help clarify the various roles that these accountability measures have played in struggling democracies.

Argentina was ruled by several military regimes from 1976 to 1982. These juntas were responsible for serious human rights offenses including assassinations, illegal detentions, and forced disappearances of more than 10,000 people.[43] In 1983, Raul Alfonsin was elected President after the junta rulers granted themselves complete amnesty. Alfonsin refused to accept this wholesale amnesty and instead established the National Commission on Disappeared Persons.[44] In 1984, it published its report, "Nunca Mas" (Never Again), which specified the methods of human right abuses and recommended that the justice system be improved, that reparations be made to the families, and that safeguards be developed to protect from future abuses.[45] The report resulted in the prosecution of two former presidents and military leaders, but as the prosecutions started reaching mid-

40. *See id.* at 7. Some of these Latin American countries include Uruguay, Honduras, Guatemala, Nicaragua, Bolivia, Argentina, Chile, and El Salvador. *Id.*

41. *See generally* Schabacker, *supra* note 38, at 15-21 (providing a brief synopsis of South Africa's Truth and Reconciliation Commission and its objectives).

42. *See generally* William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145 (2004).

43. *See* Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledging Democracies: The Case of Argentina*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 161 (Naomi Roht-Arriaza ed., 1995).

44. *See* Schabacker, *supra* note 38, at 8. The Commission had access to government facilities, was provided funding for its staff, and ordered the military to cooperate with the ongoing investigation. However, the Commission had no subpoena powers and could not compel testimony. *See id.*

45. *See id.*; *see* Comision Nacional Sobre La Desaparicion De Personas, Nunca Mas: The Report of the Argentine National Commission of the Disappeared (1st Am. ed. 1986).

ranking military officials, the military embarked on a campaign of vocal opposition that entailed bombings and threats of another coup.[46] The government found itself unable to confront the military forces and passed a "Due Obedience Law" which exempted lower officials from liability.[47] President Saul Menem later pardoned officers not covered by the Due Obedience Law.[48] The Argentine truth commission, despite being the region's first and best known, represents an example of coerced pardon which prevented domestic violence, but which also fell short of accomplishing the goals of international justice.

Chile returned to democracy in 1990 after sixteen years of military dictatorship under General Augusto Pinochet. The newly elected President Patricio Aylwin created the Commission on Truth and Reconciliation, with the mandate to "contribute to the overall classification of the truth about the worst violations carried out in recent years."[49] However, the Commission's mandate precluded any judicial function and its report, released in 1991, focused on the victims of abuse rather than on its perpetrators.[50] A broad amnesty law that had been passed by Pinochet remained undisputed, and Pinochet himself retained control over the army until his appointment as Senator for Life in March of 1998.[51] The Chilean government never attempted to instigate criminal proceedings, citing amnesty laws passed by the Pinochet regime.[52] The commission thus accomplished its truth-seeking function, but failed to reach justice. The case of Chile illustrates that truth commissions may fall below the norms of international law unless they are coupled with other meaningful accountability mechanisms.

The Commission on The Truth for El Salvador was established as a result of a negotiated settlement between parties to the civil war. It was named by the United Nations itself in an effort to reach a peace agreement to a violent internal conflict.[53] The Commission focused on two types of cases: those involving serious human rights violations, and those revealing a pattern that indicated an intent to intimidate a particular societal group.[54] Even though the Commission employed an international staff of investigators and received testimony from over 2,000 people, it did not have access to security forces files and had no power to compel testimony.[55] The Commission released a report in March of 1993, detailing the offenses committed by both sides of the conflict and recommending human rights protection in El Salvador.[56] However, the report did not recommend criminal

46. Schabacker, *supra* note 38, at 9.

47. *Id.*

48. *Id.*

49. *See* Jorge Mera, *Chile: Truth and Justice Under the Democratic Government*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 172 (Naomi Roht-Arriaza ed., 1995).

50. Schabacker, *supra* note 38, at 10.

51. *Id.*

52. *See id.*

53. *See id.* at 11. The El Salvador Truth Commission was the first official international commission that investigated serious abuses since the Nuremberg and Tokyo trials after World War II. *See id.*at n.66.

54. Schabacker, *supra* note 38, at 12.

55. *Id.*

56. *Id.* at 13. The Peace Accords of El Salvador established the U.N. Commission on the Truth for

prosecutions because the Salvadoran judiciary would be unable or unwilling to handle prosecutions.[57] Five days after the report was released, the governing regime issued a sweeping general amnesty, claiming that the real wishes of the people were to "forgive and forget."[58] The Salvadoran Supreme Court refused to hear a challenge to the amnesty law, stating that this was a political question beyond its judicial reviewing powers.[59]

On the whole, the Latin American truth commissions served a truth-seeking function without going further and imposing individual liability for human rights violations. Because these commissions were stymied by their limited powers and by the everlasting threat of the return of the military, they tended to equate pardon with amnesty and truth-seeking with accountability. Thus, the Latin American paradigm illustrates a situation where non-legal measures for the redress of human rights abuses fall short of the internationally mandated norms.[60]

B. South Africa's Truth and Reconciliation Commission

South Africa was ruled by a policy of racial discrimination, also known as the apartheid regime, since 1948.[61] Human rights violations during this era were persistent and severe. Cases of abuse included murder, torture, suffocation, beatings, disappearances, and detentions without trial.[62] In 1991, the South African President, F.W. de Klerk, announced the abandonment of apartheid, and by November of 1993, talks between the de Klerk government and the opposing African National Congress ("ANC") had commenced. The ANC rejected a proposal for a blanket amnesty early on in the talks, and in July of 1995, the South African Parliament established the Truth and Reconciliation Commission ("TRC").[63]

The TRC's articulated objective was to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."[64] It began to accept amnesty applications in December of 1995, and by mid-1998, it had received 7,060 applications.[65] To be eligible for

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El Salvador. This resulted in a final agreement between the government of El Salvador and the Farabundo Marti National Liberation Front at Chapultepec, Mexico, signed on January 16, 1992. *See From Madness to Hope: The Twelve Year War in El Salvador*: Report of the Commission on the Truth for El Salvador, U.N. SCOR, 48th sess., Annex, at 10, 189-92, U.N. Doc. S/25500 (1993).

57. Schabacker, *supra* note 38, at 13.

58. *Id.*

59. *See* Scharf, *supra* note 2, at 42 n.8.

60. *See* Schabacker, *supra* note 38, at 14-15.

61. *See id.* at 17.

62. *See id.* at 16.

63. *See id.* at 17. The Truth and Reconciliation Commission was established through the Promotion of National Unity and Reconciliation Bill by the South African Parliament in July of 1995. *See* Promotion of National Unity and Reconciliation Act, No. 34 para. 2(1) (1995) [hereinafter Unity and Reconciliation Act], Truth and Reconciliation Commission, http://www.doj.gov.za/trc/legal/act9534.htm (last visited December 19, 2005).

64. *See* Unity and Reconciliation Act, *supra* note 63, at para. 3(1).

65. *See* Schabacker, *supra* note 38, at 19. Out of all the applications considered, 125 individuals were granted amnesty, 61 were rejected for substantive reasons, and 4,540 applicants were refused

amnesty the applicant had to fully disclose all relevant facts and meet the burden of proving that the acts committed were associated with a political objective. Individuals who failed to file with the TRC or who refused to disclose their acts in full remained subject to criminal prosecution, with the caveat that testimony given before the TRC could not be used against the individual in the criminal trial.[66] The Commission concluded its work in October of 1998 and presented a report which documented human rights abuses by all major South African political parties, including the ANC.[67] According to the TRC Chairman, Archbishop Desmond Tutu, "it is only on the basis of truth that true reconciliation can take place."[68]

Unlike the Latin American paradigm, the South African truth commission represents an example of a non-legal accountability method that rises to the standards of international law and that accomplishes both the mission of truth finding and the pursuit of justice.[69] In addition to its expansive investigatory powers, the TRC did not preclude further criminal prosecutions and did not in any way obscure the path toward accounting for human rights violations. The South African paradigm proves that a TRC can function better in an unstable and painfully divided country. In such a situation, one wonders whether certain types of amnesty can be an exception to the international duty to prosecute.

C. Sierra Leonian Truth and Reconciliation Commission

The civil war in Sierra Leone began in 1991 and lasted over a decade. The war was brutal: several military factions fought against each other while forcefully enlisting child soldiers, abducting and sexually abusing young girls, mutilating civilian populations, and burning entire villages.[70] The atrocities committed were vast; the number of lives taken or ruined immense. After two peace agreements collapsed, a third one was negotiated in 1999 in Lome, the capital of the neighboring country of Togo.[71] The Lome Peace Agreement, signed by all warring

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administratively, because of, *inter alia*, denial of guilt, actions for personal gain, actions without a political objective, actions outside the jurisdiction of the commissions. *Id. See also Amnesty Hearings and Decisions,* Truth & Reconciliation Commission: Amnesty Committee, http://www.doj.gov.za/trc/amntrans/index.htm (last visited October 30, 2005) (providing statistics of amnesty decisions).

66. *See* Schabacker, *supra* note 38, at 19. The Commission had significant investigative powers. It could subpoena persons and require the production of evidence. Furthermore, individuals who refused to comply with the TRC subpoenas could be fined or even imprisoned for up to a year. The mandate of the TRC however did not grant it the power to impose criminal punishment on individuals failing to meet the amnesty criteria. *Id.* at 18-19.

67. *Id.* at 20.

68. *Atrocious Things Were Done on All Sides*, WASH. POST, Oct. 30, 1998, at A32.

69. The South African Constitutional Court has upheld the Unity and Reconciliation Act, suggesting that democracy is the most important value and underlining the nature of the amnesty law in question--it conditions amnesty on confession to the TRC and on the determination by the TRC officials about the nature of the crime. *See* Azanian People's Org. and Others v. President of the Republic of South Africa, 1996 (8) BCLR 1015 (CC) (S. Afr).

70. *See* Daniel J. Macaluso, Note, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lome Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOKLYN J. INT'L L. 347, 363-66 (2001).

71. *Id.* at 348.

factions and endorsed by the United Nations,[72] contained a broad amnesty clause granting amnesty to all civil war participants, and in particular, to Foday Sankoh, the leader of the notorious Revolutionary United Front ("RUF"), which was responsible for most of the atrocities committed.[73] The Lome Peace Agreement also provided for the establishment of a Truth and Reconciliation Commission ("TRC"), which was to be established within 90 days and which was to issue a report within one year of the date that the agreement was signed.[74] The TRC's purpose was very similar to the one that had operated in South Africa: its goal was to document human rights abuses that had taken place during the civil war in an effort to bring about national healing, reconciliation, and to solidify the internal peace process.[75] The TRC began work in December of 2002 and issued a report in 2004.[76]

On its surface, the Sierra Leonian TRC could have been as successful as the South African model. Unlike the South African TRC, the TRC in Sierra Leone did not have the power to grant absolute amnesty to anybody who testified before it; thus, such witnesses could have been later prosecuted in Sierra Leonian national courts.[77] Furthermore, the political situation in Sierra Leone in 1999, when the TRC was established, seemed far more unstable than the situation in South Africa when its TRC began operating in 1995. Thus, a reconciliation mechanism that would strengthen domestic unity and bring closure to the internal conflict seemed like a decent idea for a war-torn country like Sierra Leone. Its TRC could have functioned successfully.

However, in the summer of 2000, Sierra Leonian President, Tejan Kabbah, wrote to the Security Council requesting that it establish an international criminal court to prosecute RUF leaders, who, according to the President, had reneged the Lome Peace Agreement by committing further human rights violations, and who no longer deserved the protection of the amnesty clause in the Lome Peace Agreement.[78] The Security Council endorsed this proposition and the Special Court for Sierra Leone was established in 2002 with a three-year mandate to

72. *See* S.C. Res. 1260, U.N. SCOR, 54th Sess., 4035th mtg., U.N. Doc. S/RES/1260 (1999).

73. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, *available at* http://www.sc-sl.org/lomeratificationact.html (last visited on Apr. 15, 2005) [hereinafter "Lomé Peace Agreement"]. In a peculiar twist, the United Nations representative appended a hand-written reservation, stating that the U.N. could not endorse amnesty for genocide, crimes against humanity, and other serious violations of international humanitarian law. No such reservation had been entered by the U.N. at the time of the 1996 Abidjan Peace Agreement, which had also contained a broad amnesty clause for all combatants, and which the U.N. had fully endorsed with no reservations. *See* Schabas, *supra* note 41, at 154-57.

74. Lomé Peace Agreement, *supra* note 67, art. XXVI.

75. "A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation." *Id.*

76. Schabas, *supra* note 41, at 152.

77. *See id.* at 152-53 (noting that perpetrators regularly appeared before the TRC to testify despite the fact that they had no amnesty to gain in return).

78. *See id.* at 153-54.

prosecute those most responsible for human rights violations in Sierra Leone.[79] The Special Court's Statute provided for a wider subject-matter jurisdiction: defendants could be prosecuted for a variety of crimes, going far beyond the "standard" crimes of genocide, war crimes, and crimes against humanity.[80] As such, the Special Court severely undermined the Lome Peace Agreement's amnesty clause.[81] Even if one were to interpret the Lome Peace Agreement in light of the evolving international custom that amnesty cannot be granted for genocide, war crimes, and crimes against humanity, the Special Court Statute remains problematic as it also provides for prosecution for other crimes, such as attacks on U.N. personnel, abducting a girl under 13, and setting fire to dwelling houses or public buildings.[82]

The Special Court began working in 2002, roughly around the same time as the TRC, and its work has somewhat undermined that of the TRC. For one example, the Special Court issued an indictment against Sam Hinga Norman, leader of the Civil Defense Force ("CDF"), one of the warring factions widely seen as having attempted to combat RUF's heinous atrocities. Sam Hinga Norman most likely would have been the perfect candidate to testify before the TRC; however, the Special Court has forbidden him to do so.[83] Furthermore, the Special Court judges ignored the amnesty issue and affirmed the court's legitimacy by announcing that the court's establishment is in accord with international law and standards.[84] Thus, the court's judges emphasized that the court's existence is fully valid and necessary under international law, thereby implicitly diminishing the TRC's role as an accountability mechanism.[85] The Sierra Leone paradigm exemplifies perfectly the difficulty of the amnesty versus prosecution issue and begs the question – is there an international duty to prosecute violators of human rights norms, and if so, what does that duty entail?

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79. *See id.* at 154, 157.

80. Macaluso, *supra* note 69, at 353-54.

81. It should be noted that the Special Court Statute only collides with the Lomé Peace Agreement's amnesty clause regarding crimes committed between 1996 and 1999, because the Special Court was granted jurisdiction as of 1996 whereas the Lomé Peace Agreement provided for amnesty until 1999, the date that the agreement was signed. However, note that according to the *lex posterioris* principle, the Special Court Statute would have most likely "trumped" the Lomé Peace Agreement. Schabas, *supra* note 41, at 159. Regardless of this conclusion, the fact remains that the two instruments collide with respect to the accountability mechanisms they provide for the period of 1996-1999.

82. *See* Statute of the Special Court for Sierra Leone, art. 4, 5 *available at* http://www.sc-sl.org/scsl-statute.html.

83. *See* Peter Penfold, *Limits to Transitional Justice*, ALL AFRICA GLOBAL MEDIA, Mar. 15, 2005.

84. *See* Prosecutor v. Kallon & Kamara, Joined Cases SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Special Ct. for Sierra Leone (Appeals Chamber), paras. 14, 42, 63 (Mar. 13, 2004) *available at* http://www.sc-sl.org/Documents/SCSL-04-15-PT-060-I.pdf (noting that the Lomé Peace Agreement was not an international instrument, whereas the Special Court is an autonomous and independent institution; noting also that the Sierra Leone government had not reneged the Lomé Peace Agreeement because the Special Court Statute is consistent with the developing norm of international law and with the U.N. reservation on the execution of the Lomé Peace Agreement).

85. *Id.* The Appeals Chamber declared that Sierra Leone could not legally declare an amnesty for "crimes under international law that are the subject of universal jurisdiction." *Id.* at para. 71.

IV. LEGAL OBLIGATIONS

While most commentators and scholars agree that some general duty exists to implement an accountability mechanism for human rights abuses, the content of that duty remains uncertain under the substantive body of international law.[86] Because the domineering concept of state sovereignty has shaped most international law discussions, human rights law has traditionally left substantial discretion to each individual state to address violations committed within its territory. Once the global awareness about the seriousness of human rights offenses grew, international law began to place higher duties on states to punish crimes inflicted inside their jurisdictional reach. Thus, a significant body of treaty law emerged in the aftermath of World War II, evidencing both clear legal obligations to redress human rights abuses and an absolute customary norm against such violations.[87] The major sources of the evolving international criminal law principles involve treaty law, specific human rights conventions, customary law, and other international documents, as well as United Nations reports and international compensation commissions.

A. Treaty Law

Several international conventions provide for a clear duty to prosecute human rights crimes. Under Article 27 of the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for failure to perform a treaty."[88] It follows that where these conventions are applicable, a state party would breach its treaty obligation by granting amnesty to a person responsible for human rights abuses. "Thus, an amnesty law or an exercise of prosecutorial discretion that is valid under domestic law may nonetheless breach a state's international obligations."[89] Conventions of notable importance in this regard include the Genocide Convention, the Geneva Conventions, and the Torture Convention.

The Genocide Convention was adopted by the U.N. General Assembly on December 9, 1948, and it came into force in 1951.[90] It is one of the most widely

86. *See generally* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2551-52 (1991) (discussing a state's duty to punish under international law).

87. *See e.g.*, Joyner, *supra* note 5, at 597 (noting that the body of international law developed since 1945 imposes a clear duty on states to prosecute violators of humanitarian law and of human rights crimes); *see also* Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 LAW & CONTEMP. PROBS. 93 (1996) (commenting on recent advancements in the struggle against human rights violations); Orentlicher, *supra* note 85, at 2554 (noting the recent "trend" in conventions to require states to punish certain crimes committed within their jurisdiction or under specific circumstances).

88. Vienna Convention on the Law of Treaties, May 23, 1969, art. 27, 1155 U.N.T.S. 331, 339, *reprinted in* BARRY E. CARTER ET AL., INTERNATIONAL LAW: SELECTED DOCUMENTS 57 (2003-2004 ed.).

89. Orentlicher, *supra* note 85, at 2553.

90. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

adhered to human rights instruments of the world.[91] The Convention recognizes genocide as an international crime, and further imposes an absolute obligation on state parties to prosecute persons responsible for genocide.[92] As the treaty itself did not establish a tribunal for such prosecutions, its provisions call for proceedings by "a competent tribunal of the State in the territory of which the act was committed."[93] It is important to note that under this approach, the responsibility for prosecuting persons having committed genocide lies exclusively on the state parties to the Convention. Furthermore, the Convention establishes universal jurisdiction over the crime of genocide and permits no derogation from any of its substantive provisions.[94]

The four Geneva Conventions, negotiated in 1949, attempted to codify the existing rules concerning the treatment of prisoners of war and civilians in occupied territories.[95] Each one of the Conventions enumerates the so-called "grave breaches," which are international war crimes and include, *inter alia*, willful killing, torture, inhuman treatment, and unlawful confinement of civilians.[96] State parties have an absolute obligation to prosecute and punish persons responsible for the grave breaches of the Conventions, unless they choose to extradite such persons to another state party. The commentary to the Conventions confirms that "state parties can under no circumstances grant perpetrators immunity or amnesty...."[97]

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (Torture Convention) entered into force in 1987.[98] It requires all state parties to establish torture as a crime under their domestic law, to provide for jurisdiction over such offenses, and to either extradite the alleged

91. *See* Schabacker, *supra* note 38, at 25 (noting that currently 122 states are parties to the Genocide Convention).

92. Contracting states agree that "persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 84, at art. 4.

93. *Id.* at art. 6.

94. *See id.* Note however that the Genocide Convention does contain two limitations that render it inapplicable in some cases: first, it requires the offender to have specific intent to destroy a substantial portion of the target group; and second, the victims must be representatives of one of the protected groups in the Convention, which include national, ethnic, racial, or religious groups. *See* Scharf, *supra* note 2, at 45. Thus, the Convention does not preclude attacks directed against political groups. *See id.*

95. Scharf, *supra* note 2, at 43.

96. Geneva Convention For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art 50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

97. *See* Scharf, *supra* note 2, at 44.

98. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

offender or instigate proceedings before competent state authorities.[99] The Torture Convention's *aut dedere aut judicare* formulation[100] signals a clear duty to impose some form of liability on the persons responsible for torture.[101] Furthermore, the Convention contains no derogation clauses and thus precludes state parties from enacting amnesty provisions immunizing torturers from prosecution.[102] Finally, a decision rendered by the Committee Against Torture in 1990, a body established to examine compliance with the Convention concerning Argentine amnesty laws, suggests that there exists an international duty to prosecute for crimes of torture.[103] The committee in dictum referred to various international human rights documents, stating that "there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture."[104]

B. Human Rights Conventions

Even though general human rights conventions are usually silent about the duty to punish abuses of these rights, they do obligate state parties to "ensure" such rights. Furthermore, authoritative interpretations of human rights treaties suggest that states have a clear obligation to investigate violations such as torture, extra-judicial killings, and forced disappearances in order to provide for individual accountability of those responsible.[105] This duty stems not only from the states' pledge to respect the enumerated rights, but also from the requirement that individuals whose rights were violated have an effective remedy before a legitimate judicial body. The most important human rights treaties include the International Covenant on Civil and Political Rights ("ICCPR"), the European Convention for the Protection of Human Rights and Fundamental Freedoms

99. *See id. at* art. 2, 4, 5, 7. For further information on the Torture Convention, see Joyner, *supra* note 5, at 605.

100. This formulation means that a country can either extradite the alleged offender or prosecute him under its own law. *See* Torture Convention, *supra* note 92, at art. 7.

101. *See* Scharf, *supra* note 2, at 46-47 (refuting the argument made by some commentators that the Torture Convention might allow for some amnesty laws); *see also* Schabacker, *supra* note 38, at 27 (noting the "explicit duty" for state parties to institute criminal proceedings which prevents the parties from enacting amnesty laws to exculpate alleged torturers).

102. *See* Schabacker, *supra* note 38, at 27. According to the Torture Convention's drafters, "[i]n applying article 4 [requirement to make torture punishable by severe penalties 'which take into account their grave nature'] it seems reasonable to require, however, that the punishment for torture should be close to the penalties applied to the most serious offenses under the domestic legal system." J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 129 (1988).

103. *See* Scharf, *supra* note 2, at 47-48; *see also* Schabacker, *supra* note 38, at 28.

104. *See* Report of the Committee Against Torture, U.N. GAOR, 45th Sess., Supp. No. 44, Annex V: Decisions of the Committee Against Torture under article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concerning Communications Nos. 1/1988, 2/1988 and 3/1988, at 111, U.N. Doc. A/45/44 (1990) *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/dd522d92ef0cc9fec12570380394764/$FILE/N9015475.pdf (last visited Dec. 10, 2005). ,

105. *See* Orentlicher, *supra* note 85, at 2568.

("European Convention"), and the American Convention on Human Rights ("American Convention").

Article 2(3) of the ICCPR illustrates three basic duties for member states: to "ensure that any persons whose rights or freedoms as herein recognized are violated shall have an effective remedy," to ensure that such remedy shall be "determined by a competent judicial, administrative or legislative authorities," and to ensure that the mentioned authorities "shall enforce such remedies when granted."[106] Even though the scope of these duties is unclear, several arguments signal that the state obligations under Article 2(3) are not to be construed as inconsistent with the duty to provide some accountability mechanisms for human rights offenders.

First, the drafters of the ICCPR sought to implement the broadest range of remedies for human rights violations. Thus, Article 2(3) was designed to ensure that states provided at least non-criminal remedies, such as restitution or an order to cease the wrongful conduct.[107] Second, the drafters attempted to avoid language that would suggest the same solution regardless of the seriousness of the state violation. Third, some commentators have argued that the duty to ensure rights implies the duty to prosecute because failure to criminalize human rights abuses creates a culture of impunity.[108] Finally, recent reports from the Human Rights Committee, a body created to monitor compliance with the ICCPR, suggest that a state's duty to ensure human rights would preclude the granting of amnesties.[109] The Committee has reiterated important principles regarding the duty to prosecute in recent communications to three state parties: Zaire,[110] Suriname,[111] and Uruguay.[112] In addition, the Committee issued a general comment in 1992 stating that amnesties exculpating the acts of torture "are generally incompatible with the duty of State to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."[113]

The European Convention does not provide for an explicit duty to punish violators of human rights.[114] However, it is clear that the Convention's guarantee

106. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(3), 999 U.N.T.S. 171(entered into force Mar. 23, 1976) [hereinafter ICCPR].

107. *See generally* Schabacker, *supra* note 38, at 22-23.

108. *See generally* Scharf, *supra* note 2, at 48-50; Schabacker, *supra* note 38, at 22-23.

109. Schabacker, *supra* note 38, at 23.

110. The Human Rights Committee stated that Zaire was "under a duty to . . . punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future." Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, Annex XIII, ¶ 13, U.N. Doc.A/39/40 (1984).

111. The government of Suriname was urged "to bring to justice any persons found to be responsible." Report of the Human Rights Committee, U.N. GAOR, 40th Sess., Supp. No. 40, Annex X, ¶ 16, U.N. Doc. A/40/40 (1985).

112. "The government of Uruguay should take immediate and effective steps . . . to bring to justice any persons found to be responsible." Report of the Human Rights Committee, U.N. GAOR, 38th Sess., Supp. No. 40, Annex XXII, ¶ 16, U.N. Doc. A/38/40 (1983).

113. Human Rights Committee, General Comment No. 20 (44) (article 7), para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992).

114. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms,

of fundamental rights includes a right to remedy when those rights have been violated. In X and Y v. Netherlands, the European Court of Human Rights found that the Dutch government had violated the right to respect for private life articulated in Article 8 of the Convention by not recognizing a rape victim's cause of action against the perpetrator.[115] The Court acknowledged that in this case, only criminal law could provide the appropriate remedy: "Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions."[116] The court thus recognized that a right, if it is to have any substantive value, needs to be assured by a duty to protect that right.

The American Convention, despite its lack of specific mention of a duty to prosecute human rights violations, has been interpreted to require state parties to investigate and punish serious abuses of physical integrity.[117] In its first case, Velasquez-Rodriguez, the Inter-American Court of Human Rights construed Article 1(1) of the Convention to impose on states "a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[118] The Court thus found Honduras responsible for the unresolved disappearance of Mr. Velasquez, basing its analysis on the above-mentioned duties stemming from Article 1(1).[119] In particular, the Court reiterated that as a consequence of the affirmative obligation to ensure those rights, the state parties must "organize the governmental apparatus and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[120] The Velasquez-Rodriguez decision has been cited as evidence of an implied duty to punish present in human rights instruments, such as the American Convention or the ICCPR.[121] Furthermore, since this judgment, the Inter-American Commission on Human Rights has interpreted the legality of amnesties in El Salvador, Uruguay, and Argentina.[122] In all three cases, the Commission has found that the amnesty law violated the American Convention's right to remedy and to due process.[123] "The Inter-American Commission approach suggests that even when the duty to punish

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Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1952); Schabacker, *supra* note 38, at 34.

115. For a fuller discussion of this case, see Orentlicher, *supra* note 85, at 2580-81; *see also* Schabacker, *supra* note 38, at 34.

116. X and Y v. The Netherlands, 91 Eur. Ct. H.R. (ser. A), para. 27 (1985).

117. Orentlicher, *supra* note 85, at 2576 & n.165; *see* American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 673.

118. Velásquez-Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (1988) *available at* http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf.

119. *See id.* at para. 194.

120. *Id.* at para. 166. The court further stated: "If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction." *Id.* at para. 176.

121. *See* Schabacker, *supra* note 38, at 31.

122. *Id.* at 32.

123. *Id.*

is not specifically stipulated in an instrument, parties to the Convention are bound by a duty to punish implied in the general obligations of the American Convention."[124]

C. Customary Law

Several scholars have suggested that there is an international custom against two types of human rights abuses. The first includes violations of physical integrity, such as torture, disappearances, and extra-legal executions, while the second involves crimes against humanity.[125] Even though the legal status of these prohibitions may be clear, their precise scope has been widely disputed. Experts disagree, *inter alia*, on how many violations trigger international responsibility and on whether there is a duty to prosecute or merely a prohibition on these types of conduct.[126]

The duty to prosecute perpetrators of grave violations of physical integrity is explicit in several recently drafted documents. These include the Inter-American Convention to Prevent and Punish Torture, a Draft Declaration on the Protection of All Persons From Enforced or Involuntary Disappearances, a Draft Inter-American Convention on the Forced Disappearances of Persons, and Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions.[127] These documents, while not conclusive, evidence the emerging customary norm that states have a duty to punish serious human rights abuses. Furthermore, a range of U.N. and other organizations' activities regarding punishment of these abuses indicate the global community's concern about the states' duty to ensure the respect for life and physical integrity.[128] Finally, the Restatement (Third) of the Foreign Relations Law of the United States presents the view that "a government may be presumed to have encouraged or condoned these acts... if such acts, especially by its officials, have been repeated or notorious and no steps have been taken to prevent them or to punish the perpetrators."[129] The above principle reiterates that failure to punish violations of human rights represents a breach of customary law and renders the government equally responsible. The view that there is an international custom against violations of physical integrity mandating prosecution of the implicated perpetrators has garnered sufficient support in the international community to suggest at the least the creation of an evolving norm.

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124. *Id.* at 33. For a full discussion on the Inter-American Commission approach, *see id.*; *see also* Scharf, *supra* note 2, at 51.

125. *See e.g.*, Orentlicher, *supra* note 85, at 2582-93; Scharf, *supra* note 2, at 52-59; Schabacker, *supra* note 38, at 36-44.

126. *See e.g.*, Scharf, *supra* note 2, at 58 (noting the problems relating to the argument that there is a customary duty to prosecute for crimes against humanity); Schabacker, *supra* note 38, at 37 (noting problems of divergent state practice); Orentlicher, *supra* note 85, at 2582 (noting scholarly disagreement about the range of protected human rights under customary law).

127. Orentlicher, *supra* note 85, at 2584.

128. *See* Roht-Arriaza, *supra* note 86, at 95-96.

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

The position that there is a customary duty to prosecute persons responsible for crimes against humanity is not novel. Several scholars have noted that the granting of amnesty to those who commit such crimes is a violation of international law.[130] The term "crimes against humanity" originated in 1915 in the joint declaration of the governments of France, Great Britain, and Russia, denouncing the massacre of a huge Armenian population in Turkey.[131] The Charter for the Nuremberg War Crimes Tribunal was the first international document to codify such crimes.[132] Even though the Charter required specific linkage between the crimes committed and the course of warfare, it is almost certain that the concept of crimes against humanity now extends to violations committed during peacetime.[133]

Customary international law arises in part from consistent state practice.[134] Because the granting of amnesties to those who commit crimes against humanity has become somewhat widespread, arguments have been made that state practice points *against* the alleged customary norm of imposing a duty to prosecute perpetrators of these crimes.[135] However, those who support the existence of the custom imposing an affirmative duty to prosecute maintain that states are generally aware of this custom and grant amnesty for other reasons. "Even those states which have adopted amnesty laws and thereby allowed impunity do not deny the existence, in principle, of an obligation to prosecute, but invoke countervailing considerations, such as national reconciliation or the instability of the democratic process."[136] This line of reasoning has also embedded itself in the International Court of Justice's decision in the Nicaragua Case and in the U.S. Court of Appeals

130. *See* Scharf, *supra* note 2, at 52 & n.67.

131. *See id.* at 52.

132. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 1 (1992); *see also* Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

133. *See* Scharf, *supra* note 2, at 53. For example, the Secretary General's Report on the Statute of the Yugoslavia Tribunal, prepared by the United Nations Office of Legal Counsel on the basis of rules considered to be customary international law, stated that crimes against humanity were now prohibited "regardless of whether they are committed in an armed conflict." *Id.*; *see* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th sess., at para. 47, U.N. Doc. S/25704 (1993) *available at* http://www.un.org/icty/basic/statut/S25704.htm (last visited December 10, 2005). Furthermore, the first decision of the Appeals Chamber of the Yugoslav Tribunal reiterated that the nexus requirement had become obsolete. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 72 (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995) *available at* http://www.un.org/icty/tadic/appeal/decision-e/51002.. Finally, the Statute of the International Criminal Tribunal for Rwanda defines crimes against humanity, without requiring a link between the acts committed and warfare. *See* Scharf, *supra* note 2, at 54-55.

134. For a fuller discussion of customary international law, see Schabacker, *supra* note 38, at 37-42.

135. *See* Scharf, *supra* note 2, at 57.

136. Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 21 (1994).

for the Second Circuit judgment in the Filartiga Case.[137] Thus, there has been substantial support for the position that under customary law, states have an affirmative duty to prosecute those responsible for crimes against humanity. Such an assertion, if not entirely true, suggests at the least the evolution of yet another customary norm. "The law proscribing crimes against humanity has commanded a uniquely powerful commitment by the world community, which has resolved emphatically that it will not countenance impunity for massive atrocities against persecuted groups."[138]

D. Other Sources

Outside of the context of treaty and customary law, there are a number of other documents that point toward an affirmative duty to prosecute human rights abuses. While not a binding source of international law, these documents signal the growing awareness about the seriousness of the violations committed and a genuine global concern about accountability. "These declarations pronounce the same standards: There must be an investigation; prosecution of those accused of serious violations of human rights; specific disallowance of blanket amnesties; and redress and compensation."[139]

The first type of international documents reflecting a duty to provide accountability for human rights violations is a series of compensation commissions, such as the Gulf War Compensation Commission.[140] A large number of U.N. declarations on forced disappearances and prevention of summary executions have all confirmed the principle that redress and compensation are essential in ensuring basic respect for human rights norms.[141] Second, the U.N. Human Rights Subcommission has published several reports against impunity, stating that truth, justice, and compensation are necessary requirements in the plight against non-accountability. In a 1989 report, the Subcommission concluded that "reparation for certain gross violations of human rights that amount to crimes under international law includes a duty to prosecute and punish perpetrators."[142] Third, other non-binding U.N. documents recognize a duty to punish grave abuses of human rights. These include the Declaration on the Protection of All Persons From Enforced Disappearances and the Principles on the Effective Prevention and

137. *See* Scharf, *supra* note 2, at 59 for a full discussion of the arguments that there is a duty to prosecute based on international custom as evidenced in the Nicaragua and in the Filartiga cases (noting however that this argument is factually and analytically incorrect).

138. Orentlicher, *supra* note 85, at 2595.

139. Peter A. Schey et al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325, 340 (1997). Note also that one of the most important non-binding documents of this sort is the Universal Declaration of Human Rights, which states that "[e]veryone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., at Art. 8, U.N. Doc. A/810 (1948).

140. *See* Schey, *supra* note 138, at 340.

141. *See id.*

142. Study Concerning The Right to Restitution, Compensation And Rehabilitation For Victims Of Gross Violations of Human Rights and Fundamental Freedoms, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 45th sess., Agenda Item 4, at para. 137(5), U.N. Doc. E/CN.4/Sub.2/1993/8.

Investigation of Extra-legal, Arbitrary, and Summary Executions.[143] Finally, several Security Council resolutions have called for states to bring individuals responsible for serious international crimes to justice.[144] The above documents establish a general tendency of international law to require prosecutions. "International law requiring punishment of atrocious crimes—and, more to the point, international pressure for compliance—can provide a counterweight to pressure from groups seeking impunity."[145] Thus, even though some of the international declarations and reports may not be binding in the legal sense, they nonetheless serve to induce compliance with the international standards and to strengthen those standards by pushing them toward the sphere of *erga omnes* norms and *jus cogens* rules.[146] Finally, the substantive body of documents reflecting the duty to prosecute help define its precise contours in an effort to answer a challenging question: when does international law require a state to provide for individual accountability regarding persons who have committed human rights abuses?

V. INTERNATIONAL LAW AND IMPUNITY

"To shew mankind, that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity...."[147] Most commentators would agree that impunity, particularly in cases of grave human rights abuses, is unwarranted in international law. However, the intricacies and complexities regarding the interrelations of the global community fail to provide an easy answer to the prevention of non-accountability. The difficult inquiry entails in particular the scope of states' duties to implement individual accountability methods for the punishment of human rights offenders. When does international law circumvent the principle of state sovereignty to affirmatively dictate that a state hold a person legally responsible for certain crimes? Furthermore, when and under what circumstances is the lack of criminal accountability justified? The following sections address the above questions in an attempt to clarify how international law could best achieve its ultimate mandate: the pursuit of justice.

143. *See* Orentlicher, *supra* note 85, at 2584.

144. *See* Scharf, *supra* note 2, at 59. For example, Resolution 748 required Libya to surrender two Libyan nationals charged with bombing Pan Am Flight 103 for prosecution in the United States or in the United Kingdom and Resolution 837 called for the arrest of a Somali national, Mohamed Farrah Aidid, charged with the murder of 24 U.N. peacekeepers. *Id.* Security Council resolutions establishing the criminal tribunals for the former Yugoslavia and Rwanda not only provided specific fora for the prosecution of human right offenders, but also further required all the U.N. member states to cooperate fully with the tribunals. *Id.*

145. Orentlicher, *supra* note 85, at 2549.

146. *See id.* at 2594 ("In the absence of effective enforcement machinery, international law's power to induce compliance with its prescriptions turns on the strength of the norms themselves.").

147. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT 158 (William Young 1793) (1793), *quoted in* Orentlicher, *supra* note 85, at 2606.

A. Liability and Accountability Norms

The law governing egregious violations of basic human rights has traditionally been left to domestic regulation. Furthermore, government officials carrying out official acts have traditionally enjoyed effective immunity from prosecution.[148] This inertia by international law to deal with government-sponsored human rights abuses began to change in the twentieth century. Two norms emerged as a result of the increasing global concern about human dignity and individual rights. First, liability rules were shaped creating state responsibility in cases where a state fails to abide by treaties and customary law, which require it to respect certain norms. Second, accountability rules appeared that applied directly to persons and prescribed individual criminal responsibility for certain heinous crimes against basic human rights.[149] However, not all liability rules correspond directly to accountability rules. For example, some violations of human rights trigger state, but not individual accountability whereas some breaches of those rights call for individual, but not state responsibility.[150] The difficult question is to determine when these two norms intersect - when does international law impose a liability on states to provide for individual accountability?

In answering the above question, it is important to keep in mind two basic principles of international law. First, a change in government does not relieve a state of its international obligations. Thus, the fact that a democratic regime succeeds a repressive dictatorship is irrelevant.[151] Second, the argument that prosecutions may be inefficient or difficult to implement is not an excuse for a government's international obligations. An amnesty law ratified through a democratic procedure could be valid domestically, and yet still result in the state's breach of international law.[152]

Despite the confusion in the current body of international criminal law regarding state duties to prosecute human rights offender, several conclusions can be drawn based on the developments in the aftermath of World War II. First, the world community has been united in affirming the law of crimes against humanity originally applied at Nuremberg.[153] Examples of this include the adoption of the Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity,[154] as well as the adoption of two other Conventions providing that crimes against

148. *See* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 710-11 (1999). The only areas of international law that addressed governmental violations of individual rights involved actions by governments against citizens of other states, as covered by the law of state responsibility, and the laws and customs of war. *Id.* at 711..

149. For a fuller discussion of liability and accountability norms, *see id.* at 714-48.

150. *See id.* at 715.

151. *See* Orentlicher, *supra* note 85, at 2595.

152. *See id.* at 2595-96.

153. *See id.* at 2592; *see also supra* Part III.C.

154. G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 79, U.N. Doc. A/9030 (1973). (These principles provide that "[c]rimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.").

humanity shall not be subject to any statute of limitations.[155] "While some aspects of the law relating to crimes against humanity remain ambiguous, the law's core principle is both clear and widely accepted: atrocious acts committed on a mass scale against racial, religious, or political groups must be punished."[156] Thus, it follows that international law imposes a general duty upon states to provide for individual accountability of perpetrators of crimes against humanity.[157]

Second, customary law would be violated by wholesale impunity for persistent and notorious instances of torture, extra-legal executions, and disappearances.[158] However, prosecution of every single individual committing such offenses would not be warranted; accountability imposed upon those most responsible for the design and effectuation of the system of atrocities would fulfill the state's international law obligations to prosecute.[159]

Third, states that are parties to specific treaties, in particular the Genocide Convention, The Geneva Conventions, and The Torture Convention have an international duty to abide by their treaty obligation which entails the prosecution of human rights offenders.[160] Similarly, arguments have been made that state parties to the ICCPR, the European Convention, and the American Convention are generally under a duty to investigate each violation involving the right to physical integrity. This follows from broad deterrence principles and from authoritative interpretations of these Conventions by the Human Rights Committee and the Inter-American Commission.[161]

Fourth, selective prosecution may be warranted in some circumstances. Full enforcement of the above treaty obligations - namely, the duty to prosecute each violation - would neither prevent past crimes nor deter the possibility of future abuses. Furthermore, treaties should be interpreted in a manner that avoids imposing harmful or impossible duties upon states. Thus, a program of "exemplary punishment" entailing limited prosecutions should be instituted.[162] Any risk of arbitrariness posed by selective prosecution could further be minimized through the establishment of appropriate selection criteria. These standards could embrace certain domestic law gradations, such as degrees of culpability, mitigation of

155. For a fuller discussion of these conventions, *see* Orentlicher, *supra* note 85, at 2593-94 & n.252.

156. *Id.* at 2594.

157. This duty would also apply to genocide, as evidenced through the Genocide Convention and through customary law. *See* discussion *infra* Parts III.A and III.B.

158. *See e.g.*, Orentlicher, *supra* note 85, at 2582 & n.195.

159. *See id.* at 2601.

160. *See supra* note 86 and the accompanying text.

161. *See* Orentlicher, *supra* note 85, at 2599-2601; *see also* Scharf, *supra* note 2, at 50; *see supra* Part III.B.

162. *See* Orentlicher, *supra* note 85, at 2601. "While limitations on prosecutions may be compatible with states' international obligations, a policy that exonerates large numbers of persons who committed atrocious crimes offends common standards of justice and diminishes respect for the law. The best means of accommodating competing values might be to combine a finite program of prosecutions with legislation establishing a statute of limitations governing further prosecutions." *Id.*

punishment, and priority to prosecute leaders. "Such legislation would minimize the destabilizing effects of trials while affirming the rule of law."[163]

The above principles reflect basic theoretical concepts that have emerged throughout this century regarding the duty to prosecute. However, state practice points toward amnesties and truth commissions as alternate methods for accountability. The relevant issue therefore becomes the need to define the circumstances under which an amnesty law remains compatible with international law norms of both state responsibility and individual accountability.

B. Amnesties and Truth Commissions: When Are They Justified?

As discussed above, international law imposes a general duty on states to provide for some kind of individual accountability for violators of human rights norms. Theoretically, amnesties and truth commissions could serve as such responsibility mechanisms. Yet, they should not become ways of procuring *de facto* impunity for the alleged offenders or facets of permitting states to evade their international obligations. It follows that amnesties and truth commissions can be legal under limited and carefully defined circumstances, which can account for both the particular country's political and social conditions, as well as for the need to redress the human rights violations.[164]

Impunity has been defined as "the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and if found guilty, convicted."[165] In the context of human rights norms, impunity signifies the failure to provide remedies for victims of abuses, or a complete pardon that spares the offender from serving his sentence. Amnesties, similarly, lead to the extinction of criminal prosecution and can represent direct forms of impunity.[166] Thus, it follows that amnesties should be prohibited in certain circumstances: if they are self-granted; if they are procured through coercion - for example, if a state of emergency is declared; or if the violation involves a non-derogable human rights norm, such as a crime against humanity or genocide.[167] Furthermore, blanket amnesties have been generally held illegal under international law.[168] Truth commissions, similarly, while successful in fostering

163. *Id.*

164. *See, e.g.*, Kritz, *supra* note 5, at 141-44 (discussing the use of truth commissions in the recent years and evaluating their strengths and weaknesses).

165. Joyner, *supra* note 5, at 595.

166. *Id.* at 612.

167. *See generally* Joyner, *supra* note 5, at 612-13; Kritz, *supra* note 5, at 134, Scharf, *supra* note 2, at 61 (noting that amnesties may be permissible under some circumstances).

168. *See* Joyner, *supra* note 5, at 613-14 (noting that certain crimes cannot be amnestied and that pardon is permissible only if it takes place after a substantial part of the sentence has been served); *see also* Schabacker, *supra* note 38, at 53 (noting illegitimacy of blanket amnesties unaccompanied by investigation). These assertions would suggest that amnesties granted within the Latin American paradigm were generally impermissible under international law, but that the South African Truth and Reconciliation Commission might be compatible with the international law duty to prosecute for human rights abuses.

peace and national conciliation, can be illegal if they do not produce full justice. That is, if their only goal is reconciliation, these commissions tend to become mechanisms of *de facto* impunity that exculpate serious offenders any time they come forward with the full truth about the abuse.[169] The mission of justice cannot be fulfilled by the sole pursuit of truth. Consequently, commissions that preclude any criminal prosecution fall short of satisfying the reach of international justice and accountability.

It is clear that amnesties and truth commissions under some circumstances represent states' violations of their international duties. The more difficult question however entails defining when - despite a country's treaty and customary obligations - amnesties and truth commissions are legal. For example, if instituting criminal prosecutions would cause a serious threat to a country's political and social stability, can a government then substitute its duty to punish human rights abuses by implementing amnesty laws and establishing truth commissions? Arguments have been made that the duty to prosecute is non-derogable because the substantive violations for which prosecution is demanded - as torture or crimes against humanity - are themselves *erga omnes* norms.[170] However, this argument fails to consider the two existing exceptions to states' international obligations, as well as the assertion that specific country situations might dictate an alternative approach to the duty to prosecute.

First, the customary doctrine of necessity allows a state to derogate from its international obligation if "the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril."[171] It follows from the above principle that under limited circumstances, states can justify suspension of prosecution and institute amnesty laws or truth commissions to address human rights abuses. Furthermore, the doctrine of *force majeure* provides for an additional exception to the duty to prosecute. A state can act inconsistently with international law if "the act was due to an irresistible force...which made it materially impossible for the State to act in conformity with that obligation."[172] The two above excuses suggest not just that the duty to prosecute is after all a derogable norm, but also that the derogation should only be permitted in extenuating and exceptional circumstances.

Second, in some countries, military conduct might imperil an essential state interest and threaten national security. When states emerge from periods of military dictatorship, and when armed forces continue to control the civilian government, "a rule requiring civilian authorities to prosecute armed forces may

169. *See* Joyner, *supra* note 5, at 610 ("Truth commissions do not produce full justice.").

170. *See, e.g.,* Orentlicher, *supra* note 85, at 2608.

171. *See Report of the International Law Commission to the General Assembly*, 32 U.N. GAOR, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n 33, Art. 33(1)(a), U.N. Doc. A/CN.4/SER.A/1980/Add.1.

172. *See Report of the International Law Commission to the General Assembly*, 32 U.N. GAOR, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n 33, Art. 31(1), U.N. Doc. A/CN.4/SER.A/1980/Add.1.

seem inappropriate, and even nonsensical - if not downright dangerous."[173] Because excusing such a state completely from its human rights obligations poses itself highly troubling prospects, an alternate mechanism of individual accountability, such as a carefully drafted amnesty law or an effective truth commission, might provide the best solution.[174]

Certain conclusions about the contours of the duty to prosecute evolve from the above discussion. In order to redress human rights violations, amnesty laws and truth commissions must provide for an effective accountability mechanism.[175] However, because no single formula of accountability can apply to all types of conflicts, the most sensitive conclusion seems to suggest that the international duty to prosecute can never be precisely defined.[176] Criminal prosecutions, amnesty laws and truth commissions represent different methods of achieving the desired accountability. These mechanisms are not mutually exclusive, but rather, complimentary, and which combination will be chosen should depend on the particular conflict and the specific situation. "[W]hichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part, justice, and, wherever possible, reconciliation, and ultimately, peace."[177]

VI. CONCLUSION

A Talmudic commentary states that if justice is realized, truth is vindicated and peace results.[178] One of the major aims of international justice is to prevent human rights abuses and to ensure that those rights are respected. From the viewpoints of both deterrence and retribution, it becomes imperative that perpetrators of such heinous international crimes be held accountable. Mechanisms utilized toward the accomplishment of individual responsibility may differ depending on the circumstances of each case. Thus, carefully tailored amnesty laws or effective truth commissions can help bring about the desired accountability. Blanket pardons and powerless investigative bodies can, contrarily, provide for *de facto* impunity and obscure the path to justice.

It is essential for states to recognize that there is an international duty to prosecute persons responsible for grave human rights abuses. However, it is equally important to realize that there is no single model of accountability that can

173. Orentlicher, *supra* note 80, at 2611.

174. An example of this kind of non-legal mechanism might be South Africa's Truth and Reconciliation Commission. *See, e.g.* Schabacker, *supra* note 38, at 53 (noting that the TRC could provide "an excellent model for future governments making the transition to democracy").

175. *See, e.g.* Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 870 (1995) (suggesting three minimum requirements under which amnesties and truth commissions could satisfy the international law duty to prosecute: "[F]irst, an affirmative inquiry into the facts by the relevant authorities; second, an opportunity for victims to come forth and tell their stories; and third, an adjudication of sorts--a formal finding of the facts and conclusions of relevant law.").

176. *See, e.g.* Schabacker, *supra* note 38, at 53 (noting that the duty to prosecute human rights abuses does not bind all states equally).

177. Bassiouni, *supra* note 1, at 23.

178. *Id.* at 9.

be applied in each situation. Rather, states should seek to fulfill their international law obligations by respecting human rights norms and by implementing the best possible accountability mechanisms to address breaches of those norms. If there is peace, and if truth is affirmatively sought, justice will hopefully result.