Amnesty for Crime in International Law and Practice

by

Andreas O'Shea

Kluwer Law International

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To Millicent

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FOREWORD

Until recent times few restraints were placed on the granting of amnesty. New governments had little difficulty in granting amnesty to the leaders of predecessor regimes, however atrocious their crimes, where peace or national reconciliation so required. Today this practice is called into question in respect of conduct constituting a crime under international law as a result of the creation of international criminal courts and the emergence of a possible customary international law obligation upon States to try or extradite those guilty of committing international crimes. The position is by no means clear as illustrated by the 1998 Rome Statute establishing an International Criminal Court which fails to consider the question whether a national amnesty may be treated as a bar to prosecution before the ICC. A further complicating factor is the Truth and Reconciliation Commission, employed in South Africa, to introduce a form of qualified amnesty. While international law may not permit recognition of an unqualified national amnesty, is the position different where, as in the case of South Africa, amnesty is conditional upon a full investigation into the circumstances of the crime, after an application for amnesty by the wrongdoer?

These troubling questions form the subject of O'Shea's study. After a careful examination of the history of amnesty (with special reference to Latin America and Africa) and its rationale, in the context of theories of punishment, O'Shea addresses the position of amnesty in international law. Here he considers the question of prosecution and amnesty before international tribunals (Nuremberg, ICTY, ICTR and ICC) and then turns to the vexed question of the duty to prosecute international crimes, under treaty and custom. In the course of his study O'Shea provides a thorough analysis of developments in international criminal law. A theme running through O'Shea's book is the failure of national courts and lawmakers to properly take account of international law on the subject of amnesty. The study concludes with a proposed Protocol to the Rome Statute in which the author suggests circumstances in which a state might be exempted from the duty to prosecute those guilty of international crimes and permitted to grant amnesty in respect of such crimes. This is a thoughtful and challenging proposal that should receive full attention by the international

community. Amnesty is often the price for peace in societies in transition. It will not go away. Both international criminal courts and the courts of third States will be compelled to address the question whether to accept national grants of amnesty as a defence to prosecution for international crimes. The silence of the Rome statute on this subject is both unhelpful and dangerous. It is in this context that O'Shea's proposed Protocol demands serious consideration.

South Africa's own experience features prominently in O'Shea's study. Both legislation and judicial decisions on amnesty (in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995) are analysed and criticized. The study does, however, have a wider comparative perspective and the experience of other countries, particularly Argentina, Chile, El Salvador, Uruguay and Uganda, are considered.

Andreas O'Shea's book appears at an opportune time as the International Criminal Court will soon be a reality. I strongly recommend it as a thoughtful and thought-provoking study which raises important issues for our time.

John Dugard SC
Emeritus Professor of Law in the Universtiy of Witwatersrand
Professor of Public International Law, University of Leiden
Member of the International Law Commission

Leiden, October 2001

PREFACE

Amnesties are a recurring feature of societies in transition from conflict or oppression. The formulators of these frequently fail to have proper regard to international law. For its part the international law applicable to amnesties has been characterized by a lack of coherence and clarity for domestic policy makers. At the same time significant normative and institutional development have taken place in the field of international criminal law that may have a profound impact on the legitimacy and effectiveness of national amnesties.

This work aims to place the growing domestic practice of adopting amnesty laws within the context of the developing international legal framework. It pursues a path towards defining the legitimate parameters of amnesty in terms of international law and reconciling the national practice with the initiatives of the international community of states.

I analyze the domestic and international legal context of amnesty and reach findings on the international framework. Owing to international obligations, an amnesty may not be recognised by other states or the international criminal tribunals. In particular, a national amnesty will have no effect on the jurisdiction of the forthcoming International Criminal Court. Given the necessity of amnesty in some conflicts and the usefulness of some amnesties in themselves promoting the aims of human rights, this work suggests clear guidelines on amnesty and some limited recognition by the international community, while maintaining a form respect for the international rule of law.

The mechanism suggested for this purpose is a Protocol to the Rome Statute establishing the International Criminal Court. This would set out the limits to domestic amnesty, but, in exceptional circumstances where transition or peace would otherwise be severely compromised, exempt the state from the need to prosecute and or extradite an international offender.

Andreas O'Shea
Durban
September 2001

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This work is the product of three years of writing and more than ten years of exposure to the field of international law. It is also the culmination of a long and privileged education and upbringing. There are therefore many people who I acknowledge without naming them.

I acknowledge my parents for all their care. *Aux soeurs de Val Dieu, je vous remercie pour vos prières et l' encouragement.*

In the production of this manuscript, I am particularly indebted to Professors John Dugard, Shadrack Gutto, Ian Currie and Derry Devine to whom I owe special thanks. Professor Dugard has also been a great source of inspiration for me through his work. His thoughts on transitional justice have had a strong influence on the development of my own views on the subject. Furthermore, his editorial of my articles has assisted me in developing my knowledge of and approach to amnesty and international criminal law.

Both Professors Gutto and Currie have given me invaluable guidance during the course of my writing. I am additionally thankful to Professor Currie for his tips on using the computer, which have saved me immeasurable hours.

My partner, Millicent Atujuna deserves a special mention for her patience and understanding at my almost total commitment to my work, as well as for helping me sustain the pace in good health and spirit. I am especially in debt to her for assisting me in the final stages of production of this book, especially with respect to putting it into camera-ready format.

Two other people deserve praise for their role in the final preparation of this book. Phillip Daniel did an outstanding job in the final editing of the work and Shainaaz Mahomed is responsible for the preparation of the very extensive and useful index.

I need finally to express special thanks to the following people who have each given me support in their own way: Professor James Mowatt, Professor Noel Zaal, Professor John Daniel, Mr David Hulme, Professor Managay Reddi, Miss Lipuo Moteetee, Professor Chris Roederer, Dr John Mubangizi, Mr Ronald Razwinani and Mrs Kabitha Maharaj.

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ABBREVIATIONS

AC ..... The Law Reports: Appeal Cases
AD ..... Annual Digest of Public International Law Cases
AFDI ..... Annuaire français de droit international
All ER ..... All England Reports
AJIL ..... American Journal of International Law
ATF ..... Affaires Trimestrielles Francais
AZAPO ..... Azanian People's Organisation
BBC ..... British Broadcasting Corporation
Cal LR ..... California Law Review
CAT ..... Convention against Torture
CCPR ..... International Covenant on Civil and Political Rights
CILJSA ..... Comparative and International Law Journal of Southern Africa
CNN ..... Cable News Network
ECOSOC ..... Economic and Social Council
EHRR ..... European Court of Human Rights Reports
F Supp ..... Federal Supplement
F 2d ..... Federal Reporter, Second Series
GAOR ..... General Assembly Official Records
HRQ ..... Human Rights Quarterly
ICRC ..... International Committee of the Red Cross
ICJ Reports ..... International Court of Justice Reports
ICLQ ..... International and Comparative Law Quarterly
IHRR ..... International Human Rights Reports
ILM ..... International Legal Materials
ILR ..... International Law Reports
Inter-Am CHR ..... Inter-American Commission on Human Rights
MLR ..... Modern Law Review
LJIL ..... Leiden Journal of International Law
LNTS ..... League of Nations Treaty Series
PCIJ Reports ..... Permanent Court of International Justice Reports
QB ..... The Law Reports: Queen's Bench Division
Recueil des Cours ..... Recueil des Cours de l'Academie de Droit International
RIAA ..... Reports of International Arbitration Awards
SA ..... South African Law Reports
SALJ ..... South African Law Journal
SAJHR ..... South African Journal of Human Rights
SAYIL ..... South African Yearbook of International Law

UK ..... United Kingdom
UKTS ..... United Kingdom Treaty Series
UNHCR ..... United Nations High Commissioner for Refugees
UNTS ..... United Nations Treaty Series
US ..... Reports of the United States Supreme Court
Va JIL ..... Virginia Journal of International Law
WLR ..... Weekly Law Reports
Yale LJ ..... Yale Law Journal
YECHR ..... Yearbook of the Commission on Human Rights

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CHAPTER 1

INTRODUCTION

Amnesties are a recurring feature of societies in transition from conflict or oppression. Yet, the formulators of these frequently fail to have proper regard to international law. For its part the international law applicable to amnesties has been characterised by a lack of coherence and clarity for domestic policy makers. At the same time significant normative and institutional developments have taken place in the field of international criminal law that may have a profound impact on the legitimacy and effectiveness of national amnesties.

This work aims to place the growing domestic practice of adopting amnesty laws within the context of the developing international legal framework. It pursues a path towards defining the legitimate parameters of amnesty in terms of international law and reconciling the national practice with the initiatives of the international community of states.

Chapters two and three are an analysis of amnesty as a concept and national practice. The fourth chapter examines the rationale of legal liability as the ante-thesis of amnesty, while the fifth chapter emphasises the importance of the global context and attempts to describe it, particularly in terms of institutional developments for the punishment of international offences. The next four chapters seek a degree of clarity on the international legal norms that limit amnesty by requiring prosecution. Chapter ten deals with the international normative context of civil liability and reparations. The eleventh chapter moves towards reconciling international developments with national practice, while the final chapter seeks to develop a set of principles on the limitation of municipal amnesties. It also considers mechanisms for reconciling developments in the national and international arena.

One may define amnesty as immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the

past in a political context.[1] The immunity is in law because it has the force of law. This may derive from an amnesty law or from an exercise of power that is founded in law. One may distinguish the concept of impunity, which is a broader notion that incorporates amnesty and does not necessarily depend on legal authority.[2] The reference is to legal consequences rather than liability because in a sense amnesty depends on the pre-existence of criminal or civil liability, although not necessarily conviction or judgement.[3]

The political context is an important element in the definition of amnesty because it distinguishes amnesty from pardon (although in the broad sense, amnesty is a form of pardon). Amnesty and pardon share the same consequence in law. Both these devices result in a person obtaining immunity under the law from criminal or civil legal consequences. Both may take their effect at any stage of legal proceedings.[4] Finally, both do 'not affect the legality of the act done', but merely release the accused from trial or 'a guilty person from the legal consequences of his admittedly illegal act'.[5] They also share the same religious element of forgiveness for those who choose to speak of amnesty and pardon[6] in those terms.

However, they have a different purpose and origin. Amnesty promotes peace or reconciliation. Pardon provides a discretionary mechanism for sidestepping the courts. This may acknowledge the absolute power of a head of state or serve some undefined public

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[1] Cf. *The Oxford English Dictionary*, 2nd ed.: 'An act of oblivion, a general overlooking or pardon of past offences, by the ruling authority.'

[2] Thus, Steiner and Alston list impunity and amnesty as distinct issues: see Henry J. Steiner and Philip Alston, *International Human Rights in Context - Law, Politics, Morals*, 1996, at 1021.

[3] *Black's Law Dictionary* defines liable as 'bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation or restitution': see *Black's Law Dictionary*, Revised Fourth Edition, 1968, at 1060.

[4] See S. B. O. Gutto, 'Some Legal Comments on Hon. Waruru Kanja's Petition for Executive Clemency' (1982) *Verfassung und Recht in Ubersee: Law and Politics in Africa, Asia and Latin America* 289, at 295.

[5] R. F. V. Heuston, *Essays in Constitutional Law* (2nd ed) (1964) cap. 3 at 70, as quoted by Gutto: see note 4 *supra*, at 293.

[6] See Van Leeuwen's *Commentaries on Roman-Dutch Law*, 1678 (1780 edition, 1881 translation by Chief Justice Kotze), at 350.

purpose.[7] It usually involves obtaining something useful from the beneficiary of the pardon, or preventing or correcting a mistake in the conviction of an innocent person.[8]

Amnesty has its origins in early attempts to promote peace between warring states or the state and rebels, and to ensure lasting victory over conquered territory. Pardon, on the other hand, originates in the absolute power of sovereigns.[9] This is partially reflected in the modern practice of pardons. Gutto notes that,

> in general constitutional law and practice, the exercise of mercy is reserved to the head of state, the Chief executive, be it monarch, an aristocrat, a popularly democratically elected ruler or any other head of state depending on the form of government.[10]

However, in modern democracies the exercise of discretion is no longer absolute. The learned author acknowledges this later when he observes that the prerogative is not 'a simple matter of personal whims of a head of state but rather a necessary public and legal power that enables a ruler to do justice beyond what the ordinary laws of the land may offer'.[11]

The United States Court of Claims noted in *Knote v US* that the word 'amnesty' properly belongs to international law.[12] While this statement is only partially germane to modern practice, pardon is clearly an institution of national law.

There is perhaps an area of overlap between the two concepts. Arguably, when Pontius Pilate asked the people of Judea which prisoner he should release[13] this was both a pardon and a form of amnesty. Both Barabbas and Jesus were perceived as potential instigators of rebellion against Roman rule. Gutto observes that 'pardon and reprieve by the Head of State are normally made in sensitive cases

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[7] See Grotius, *Introduction to the Jurisprudence of Holland*, 1631 (1903 translation by Maasdorp entitled *The Introduction to Dutch Jurisprudence*), at 653; Puffendorf, *De jure nat. et gent.*, lib. 8, cap. 3, para. 26.

[8] See generally C.H. Rolph, *The Queen's Pardon*, 1978.

[9] See Bracton, *De Legibus Et Consuetudinibus Angliae*, vol. 2, at 369; Grotius, note 7 *supra*, at 652.

[10] See note 4 *supra*, at 292.

[11] *Idem*.

[12] 10 Ct.Cl. 407.

[13] See Mark 15: 9-11; Luke 23: 16-24; John 18: 40; Matthew 27: 17-21.

that have strong public appeals'.[14] The prerogative of mercy might be exercised within a political context and embraced within its public purpose elements that effectively convert its exercise into a grant of amnesty.

According to Wolff:

> Amnesty is defined as complete and lasting forgetfulness of wrongs and offences previously committed. Therefore, when an amnesty is given, since all deeds are consigned to perpetual oblivion and everlasting silence, no one can be accused or punished for acts before committed.[15]

This was a laudable definition in its time but is no longer appropriate in the light of modern practice. Amnesty has become integrated into the general project of obtaining and preserving the truth for future generations, so that forgetfulness and oblivion have become antiquated factors in the perceptions of the role of amnesty.

North defined amnesty as:

> A law that no man should be called in question nor troubled for things past ...[16]

This definition reflects the tendency of early amnesty laws to incorporate a prohibition on persons seeking retribution for past deeds.[17] This prominent dimension of the early provisions fell away with time and modern amnesties have concentrated on the effects of the law.

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[14] See note 4 *supra*, at 294.

[15] Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, V. II. 1764, para. 989.

[16] North, *Plutarch*, 1676, at 1020.

[17] See *infra*.

CHAPTER 2

THE PRACTICE OF AMNESTY: ITS EMERGENCE, DEVELOPMENT AND RATIONALE

1. *The Emergence of the Practice of Amnesty*

One can trace the legal use of mercy for past offences as far back as the second millennium before Christ. In 1286BC the pharaoh Rameses II of Egypt fought the battle of Kadesh with the Hittites. This was followed by the conclusion of one of the oldest existing records of a peace treaty.[1] Archaeologists have interpreted one of the inscriptions as follows:

> But as for the man who shall be brought to the great ruler of Egypt, do not cause that his crime be raised against him; do not cause that his wife or his house or his children be destroyed; do not cause that he be slain; do not cause that injury be done to his eyes, ears, arms, mouth or legs.2

This sub-clause seems to have formed part of a clause for the repatriation of refugees. The context may indicate that the provision was intended to apply only to the political offences of the war, thereby bringing it within the purview of amnesty as defined above, but this is not entirely clear.

The word 'amnesty' has its origin in the Greek word *amnestia* meaning oblivion. In 404BC, after the Spartans had defeated the Athenians in the Peloponnesian War, they established an oligarchic

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[1] See Barbara Mertz, *Temples, Tombs and Hieroglyphs: A Popular History of Ancient Egypt*, 1999, at 272.

[2] *Idem.*

provisional government in Athens.[3] It consisted of thirty men who came to be known as the 'Thirty Tyrants' owing to the oppressive nature of their rule. Within eight months approximately they executed 1,500 and banished 5,000.[4] A revolt led by Thrasybulus led to the defeat of the 'Thirty'. After the civil war Athens had been on the brink of chaos owing to resulting divisions. An agreement was brokered, the principles of which included the prosecution of criminal acts, such as murder, and amnesty for all other acts associated with the war. Following a proposal by Thrasybulus to the Athenians, an amnesty law was passed. According to Cicero, this was called the law of forgetfulness. It stated that no one should be accused or punished after oblivion had been decreed of wrongs and offences committed on either side.[5] According to Robinson 'the Thirty and their worst agents were excepted'.[6] The citizens of Athens were all made to take an oath to respect the amnesty and the first man to violate the terms of the amnesty was executed.[7] The Athenian Constitution records that after this man's execution the amnesty was never again violated. It adds that:

> on the contrary, the Athenians seem, both in public and in private, to have behaved in the most unprecedentedly admirable and public-spirited way with reference to the preceding troubles. Not only did they blot out all memory of former offences, but they even repaid to the Lacedaemonians, out of the public purse, the money which the Thirty had borrowed for the war, although the treaty required each party, the party of the city and the party of the Piraeus, to pay its own debts separately.[8]

Amnesties appear to have been subsequently employed as an incentive to quell rebellions or riots.[9] Grotius notes that 'Pompey finished the war with the Pirates in great part by means of treaties, promising to them their lives, and plans in which they might live

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[3] See N.G.L. Hammond, *A History of Ancient Greece to 322 B.C.*, 3rd ed., 1986, at 443.
[4] Ibid., at 444.
[5] *Idem.*
[6] Cyril E. Robinson, *A History of Greece*, 9th ed., 1957, at 294-5.
[7] Hammond, note 3 *supra*, at 447.
[8] Athenian Constitution, Part 4, Section 40 (*http://www.yale.edu/lawweb/avalon/athe4.htm#31*).
[9] Ibid. at para. 1016.

without plundering.'[10] Caesar apparently wrote in the third book of the *Civil War* that the Roman commanders made an agreement with the brigands and deserters who were in the Pyrenees mountains.[11] Julius Caesar, as dictator of the Roman Republic, often granted amnesty to his former political enemies,[12] possibly to his peril.[13] His successors were more wary of the practice.

The strategy, however, thrived as a means of maintaining peace between former warring states. It became a strong feature of peace settlements. Wolff notes that when parties conclude a peace treaty, amnesty is provided for in the first article of the treaty and, even where not expressly mentioned, is tacitly agreed to.[14]

2. *Development of the Use of Amnesty*

A. *European wars*

The institution of amnesty retained its traditional form as a component of peace settlements as long as inter-state wars were prominent in international relations. Here we shall focus on European developments in the use of amnesty, which were pronounced and well recorded. European state-practice, from its inception some 500 years ago, heralded the development of modern international law. From this grew a trend of incorporating amnesties in peace treaties, following a number of European wars. Given the European nature of the early international law that developed into the modern regime for international relations, a close analysis of the European practice of amnesty will also inform our later discussion of custom.[15]

The Thirty Years War was one of the worst in the modern history of Europe, engulfing the Holy Roman Empire and its neighbours.[16] It arose out of the Revolt of Bohemia,[17] which had been rooted in

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[10] Grotius, *De Jure Belli ac Pacis*, 1652, 794.

[11] Ceasar, the Civil War III.xix.2, cited by Grotius *idem*.

[12] See Michael Grant, *The Twelve Caesars*, 1975, at 45.

[13] See Michael Grant, *Julius Caesar*, 1969, at 227-8.

[14] See Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1764, V. II, para. 989.

[15] See chapter 8 *infra*.

[16] See generally G. Pagès, *The Thirty Years War 1618-48*, 1939 (1970 translation).

[17] Ibid., at 41-67.

religious tensions exacerbated by the Peace of Augsburg of 1555.[18] For Germany, it was the last of a series of civil wars stretching back nearly 150 years.[19] The circumstances required a radical oblivion of the war's offences if a sustainable peace was to be achieved, and this led to an amnesty being agreed as a component of the Peace at Westphalia. Article II of the Treaty of Westphalia of 1648 provided:

> That there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd, in such manner, that no body, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any Trouble to each other; neither as to Persons, Effects and Securitys, neither of themselves or by others, neither privately nor openly, neither directly nor indirectly, neither under the colour of Right, nor by way of Deed, either within or without the extent of the Empire, notwithstanding all Covenants made before to the contrary: That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well as before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.[20]

It is not clear what was thought at the time to be the distinction between oblivion, amnesty and pardon. However, if one assumes that this is an accurate representation of the clause, then the use of the co-ordinating conjunction 'or', as opposed to 'and', suggests a belief that the words could be interchanged, but that each had a distinct nuance and therefore should be individually expressed. In the 17th century the word 'pardon' was probably specifically associated with the power of kings and emperors. Amnesty and oblivion may have been practically synonymous, except that an amnesty would have been understood to be a specific form of oblivion in the context of war.[21]

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[18] Ibid., at 36.

[19] Ibid., at 239 and 237.

[20] *http://www.yale.edu/lawweb/avalon/westphal.htm.*

[21] Cf. the 18th-century amnesty clause in the Treaty With the Delawares of 1778, at 16 *supra*, where the word oblivion but not amnesty is used.

This was an amnesty from both criminal and civil liabilities and incorporated a prohibition on all acts of retribution. There was here, as with the Athenian amnesty, an emphasis on preventing acts of retribution by any person, including a private citizen. As was previously indicated in addressing the definition of amnesty, with time this emphasis seems to have petered out of the practice of amnesty and amnesties since have generally focused on immunity from legal process. It is difficult to judge the contribution of the amnesty to this, but the Peace of Westphalia appears to have worked. Pages remarks that 'they were strongly attached to the peace, and it lasted'.[22] The provisions of the Treaty of Westphalia were later incorporated into the peace settlement between Britain and Spain, to which Portugal acceded, as expressed in the Treaty of Paris of 1763.[23]

The Treaty of Westphalia set the stage for a regular inclusion of amnesty clauses in European peace treaties throughout the 17th and 18th centuries. France appears to have adopted a penchant for amnesty clauses after its wars of the 17th century, during the reign of Louis XIV. Three major peace treaties between France and other European powers during this period incorporate amnesty clauses. Article IV of the Treaty of the Pyrenees of 1659 between France and Spain provided that, 'whatsoever hath been done, or hath happen'd, upon occasion of the present Wars, or during the same, shall be put into perpetual oblivion'.[24]

After Louis XIV's failed attempts to conquer the northern (United) Netherlands, although he was successful in expanding France's frontiers, a peace was concluded at Nijmegen (Nimeguen) in 1678. In terms of article III of the Treaty of Nijmegen, 'There shall be perpetual friendship between the said king and states, and their subjects, and no resenting of damages, or offences, during the war.'[25]

The Grand Alliance of 1689 spearheaded by William of Orange, who had succeeded to the English throne in 1688, marked the frustration of Louis XIV's ambitions and the beginning of a century of Anglo-French rivalry for European and global conquest. The Treaty of Ryswick of 1697 removed much of France's conquests from its

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[22] See Pagès, note 16 *supra*, at 247.

[23] See *infra*.

[24] Arnold Toynbee, *Major Treaties of Modern History, 1648 - 1967*, Vol. 1, at 55.

[25] Ibid., at 129.

sovereign control[26] and article III contained an amnesty clause to the effect:

That all Offences, Injuries, Damages, which the said King of Great Britain and his Subjects, or the said most Christian King and his Subjects have suffered from each other during this War, shall be forgotten, so that neither on account of them, or for any other cause or pretence, neither Party, or the Subjects of either, shall hereafter do, cause or suffer to be done any Hostility, Enmity, Molestation or Hindrance to the other, by himself or others, secretly or openly, directly or indirectly, by colour by Right or way of Fact.

Some significant 18th-century peace treaties contained amnesty clauses, but the first important and successful peace treaty of the period, notably, did not. The debilitation of the Spanish Empire led to the War of Spanish Succession (1702-13), concluded by the Treaty of Utrecht of 1713. This treaty contained no amnesty clause and, bar relatively minor conflicts,[27] the Peace at Utrecht inaugurated a period of stability in Europe until 1740.

In that year, the death of Emperor Charles VI without male heir and the invasion of the Austrian Silesia by Frederick II, King of Prussia, ignited the War of Austrian Succession, which was ended in 1748 by the Peace of Aix-la-Chapelle concluded between Great Britain, France, Spain, Sardinia, Hungary, Modena, the Republic of Genoa and the United Provinces. Article II of the Treaty of Aix-La-Chapelle of 1748 stipulated that 'There shall be a general oblivion of whatever may have been done or committed during the war, now ended.'[28]

The next major conflict in Europe was the Seven Years War, which started in 1756 as a result of alliances made through Austria's desire to recover Silesia, and the Anglo-French conflict over North America. This war was concluded with the Treaty of Hubertsburg and the Treaty of Paris, respectively, of 1763. Both treaties contained amnesty clauses. Article II of the Treaty of Hubertsburg contained one of the most detailed and extensive amnesty clauses since the Treaty of Westphalia of 1648. It read:

> Both sides shall grant a general amnesty and totally wipe from their memory all hostilities, losses, damages and injuries whatever their nature, committed or sustained on either side during the recent

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[26] See Daniel Riviere, *Histoire de La France*, 1986, at 166.

[27] Spanish incursions into Italy and the War of Polish Succession (1733-35).

[28] Toynbee, note 24 *supra*, at 272.

> disturbances. Hostilities shall nevermore be alluded to nor shall any compensation be claimed under any pretext or in any name. No subject on either side shall ever be troubled but shall enjoy this amnesty and all its effects to the full. despite the decrees sent out and published; all orders for confiscation shall be withdrawn and goods confiscated or sequestrated shall be returned to their owners. from whom they were taken during the recent disturbances.[29]

The Treaty of Paris provided more generally that 'there shall be a general oblivion of every thing that may have been done or committed before, or since the commencement of the war, which is just ended'.[30] It additionally renewed the Treaty of Westphalia of 1648 as between the parties.

The remainder of the 18th century was marked by a brief change in the dynamics of European politics. The Eastern powers were preoccupied with the partition of Poland, while national revolutions became the preoccupation of kings. France's revolution gave new fervour to its desire to expand but its conquests were initially simple and peace treaties with amnesties were not the order of the day. The Treaty of Campo Formio of 1797 confirmed France's rapid victory over Italy but contained no amnesty clause.

Nineteenth-century European conflict and peace negotiations are most remembered for the struggle against French hegemony under the emperor Napoleon, Russia's wars with the Ottoman Empire (especially the Crimean War), and Prussia's wars with Denmark, Austria and France. The peace treaties of the early years of the 19th century, associated with the second and third coalitions against Napoleon, did not contain amnesty clauses, in contrast to the older treaties signed by Louis XIV. One must clearly distinguish the amnesty clause, which promoted oblivion of the conflict and an absolute bar on punishing past offences, from clauses requiring the exchange of prisoners of war, which involved a practical measure for the return of combatants, forming part of almost every peace treaty ever signed.

Given former French practice, and since these peace negotiations involved no clear victor, one cannot help wondering why amnesty appears to have formed no part of the negotiations. Some historians might answer, particularly in relation to the Treaties of Luneville and Amiens, concluded respectively between Austria and France in 1801

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[29] Ibid., at 330.
[30] Ibid., at 307.

and Britain and France in 1802, that there was no real desire on either side to establish a lasting peace. One current historian refutes this in a fascinating work on 19th-century European politics.[31] Schroeder accepts Austria's surprising persistence in the war,[32] as well as the fact that, after Luneville, Austria retained its territorial integrity and nominal position as a great power.[33] However, he asserts that Austria saw Luneville, unlike Campo Formio, as a final peace by which it wished to live.[34] Similarly, while Amiens was severely criticised in Britain and very one-sided, the British government wanted the settlement to last.[35]

On the other hand, Napoleon's appetite for expansion would not easily be satisfied and lasting peace was certainly no priority for him. The other great powers must have known this. War, especially with France, was in a sense inevitable and a tool of 19th-century politics. The Anglo-Russian plans of 1804-5 of co-ordinating a war and peace with France, which would be fought by Austria, showed that the great powers believed wars could benefit them, sometimes without cost. Moreover, individually, the Napoleonic wars were not of such great length as to lead to a determined quest for lasting peace, as opposed to momentary truce. This could explain why amnesty clauses did not, initially, really feature, since these were designed to extinguish all enmity. Neither the Treaty of Pressburg of 1805 nor that of Tilsit of 1807 contained an amnesty clause. The Treaty of Vienna of 1809 did include a clause of pardon for those involved in the insurrection of the inhabitants of Tyrol and Vorarlburg.[36]

It is not easy to discern the consequences of the non-inclusion of amnesty in the negotiations of the period. However, given the warlike character of Napoleon and the nature of the politics of the time one can hardly attribute the failure of the peace initiatives to the absence of amnesty clauses.

For a real desire for lasting peace to emerge, some years of war would need to pass and Napoleon's advantage would have to abate.

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[31] Paul W. Schroeder, *The Transformation of European Politics: 1763-1848*, 1994 (part of the series *The Oxford History of Modern Europe*, edited by Alan Bullock and F.W.D. Deakin)

[32] Ibid., at 210.

[33] Ibid., at 213.

[34] Ibid., at 213.

[35] Ibid., at 228.

[36] Toynbee, note 24 *supra*, vol. 2, at 492.

This happened in time for the First Peace of Paris of 1814, where the desire for genuine peace is reflected in article xiv, which declares that,

> The High Contracting Parties, desirous to bury in entire oblivion the dissensions which have agitated Europe, declare and promise that no Individual, of whatever rank or condition he may be, in the countries restored and ceded by the present Treaty, shall be prosecuted, disturbed or molested, in his person or property, under any pretext whatsoever, either on account of his conduct or political to opinions, his attachment either to any of the Contracting Parties, or to any government which has ceased exist, or for any other reason, except for debts contracted towards Individuals, or acts posterior to the date of the present Treaty.[37]

As with previous amnesties, this one was agreed in circumstances where there was no absolute victor. France could still fight and remained in control of most of France and important areas outside of it.[38] The Congress of Vienna 1815 was the follow up to the First Peace of Paris and confirmed in its article xi, a 'full, general, and special Amnesty' for all individuals.[39]

The independence of Greece from the Ottoman Empire gave rise to conflict between the Turks and Russians, culminating in the Russo-Turkish War of 1828-9 and concluded by the Treaty of Adrianople of 1829. Despite the short duration of the war and the Turkish defeat, the fate of the Ottoman Empire was of crucial importance to Russia and the other great powers. The Greek question had also been resolved in favour of Greek independence. Accordingly, both sides genuinely desired lasting peace. It was in this context that the treaty contained a clause granting:

> a general pardon and full and entire amnesty to all those of their subjects of whatever condition they might be who in the course of the war, luckily terminated today, should have taken part in the military operations or manifested either by their conduct or by their opinions their attachment to one or the other of the Contracting Powers.[40]

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[37] Toynbee, note 24 *supra*, at 509.
[38] Schroeder, note 31 *supra*, at 477.
[39] Toynbee, note 24 *supra*, at 523.
[40] Ibid., at 938.

Russia again found itself at war with the Turks, after the Turks made concessions to France over the Holy Places.[41] No state except France (Napoleon III needed to break Russo-British relations to upset the prevailing international order, enabling him, or so he thought, to restore France to its former glory[42]) wanted this conflict, not even Russia. It is also clear that no state really gained from it.[43] It is understandable, therefore, that the Treaty of Paris of 1856 should include an amnesty clause for the belligerents.[44] Amnesties made sense in both these Russo-Turkish wars within the framework of a new international order that gave priority to durable peace, after the competitive fatigue produced by the Napoleonic wars.

The second half of the nineteenth century marks the glory of the Prussian army under Otto von Bismarck in decisive victories against Denmark,[45] Austria[46] and France,[47] culminating, in 1871, in the foundation of the German 'empire' at Versailles. It is perhaps the decisive nature of these victories that explains the absence of amnesty as a component of the peace with Denmark at Vienna in 1864,[48] that with Austria at Prague in 1867[49] and that with France at Frankfurt-on-Main in 1871.[50] Germany had secured its position as a great power and after the fall of Bismarck in 1890 events in Germany built up to the First World War (1914-18).[51] This war would change the European attitude to war and to peace treaties indefinitely.[52]

The Treaty of San Stefano of 1878 and the Treaty of Constantinople of 1879 ended Russia's final conflict with the Ottoman Empire. Both contained amnesty clauses[53] in the same spirit, although potentially

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[41] See generally Norman Rich, *Why the Crimean War - A Cautionary Tale*, 1991.

[42] Ibid., at 6-7.

[43] Ibid., at 182-209.

[44] See Article v: Toynbee, note 24 *supra*, at 948.

[45] See Tenbrock, *A History of Germany*, 1968, at 202-3.

[46] Ibid., at 204.

[47] Ibid., at 206-9.

[48] See Toynbee, note 24 *supra*, at 611 *et seq*.

[49] See Tenbrook, note 45 *supra*, at 205.

[50] Ibid., at 208.

[51] Ibid., at 233-42.

[52] See page 15 *infra*.

[53] Article xvii of the Treaty of San Stefano and Article ix of the Treaty of Constantinople: see Toynbee, note 24 *supra*, at 968 and 1001, respectively.

broader in that they applied not only to combatants and supporters but to all those compromised by the war.

The European experience of the seventeenth to nineteenth centuries appears to demonstrate that amnesty was most likely to be adopted as a measure when there was no clear victor, and where the negotiating parties had a firm and genuine determination to establish a lasting peace.

Twentieth-century Europe was characterized by two major international conflicts involving ultimate victory for one side. While both conflicts ended with the search for justice through prosecution, the final outcome differed in each case depending on the political feasibility of criminal proceedings. The Treaty of Versailles contained provisions for the prosecution of the Kaiser. Article 227 of the Treaty of Versailles of 1919, provided that:

> The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused...

The treaty failed in its objective owing to the refusal of The Netherlands to grant his extradition. The Treaty of Sevres of 1920[54] envisaged the prosecution of Turks for the massacre of Armenians but was terminated by the Treaty of Lausanne of 1923,[55] which provided for a general amnesty. This is a notable example of amnesty being granted for the worst excesses of inhumanity. The Peace of Brest-Litovsk of 1918 between Russia and Germany also incorporated an amnesty provision.[56]

After the prohibition of the use of force found its place in international law, principally by virtue of the Kellogg-Briand Pact of 1928, and especially since it became an established norm of international law, the perceived need for amnesty provisions in peace treaties appears to have gradually subsided. One example, during this period, of amnesty agreed between states was the informal understanding linked to the accord between Germany and Austria of 11 July 1936, which promised amnesty to all Nazis, save those convicted

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[54] (1920) *UKTS* No 11.

[55] (1923) *UKTS* No 16.

[56] Articles 23-7 of the supplementary agreement: See 3 *Encyclopedia of Public International Law* 79.

of the most serious offences.[57] The Austrian government subsequently announced the amnesty on 15 January 1937. Further to this, in February 1938, Hitler summoned Chancellor Kurt von Schuschnigg to Berchtesgarden to demand the appointment of a Nazi sympathiser to the Austrian government and the release imprisoned Nazis. Four days later Schusschnigg announced the amnesty. Inside of a month Hitler had invaded Austria which became part of the Third Reich.[58]

Amnesty as a means of reconciliation with the enemy did not form a major component of the ending of the Second World War. The victors deliberately sought the international prosecution of those who had waged the war of aggression. The allies concluded the Agreement for the Prosecution and Punishment of Nazi War Criminals of the European Axis of 1945. The armistice agreements with Italy in 1943,[59] Rumania in 1944,[60] Bulgaria in 1944[61] and Hungary in 1945[62] contained no amnesty provisions. In fact, in the case of the agreements with Bulgaria, Rumania and Hungary, they required collaboration in the apprehension and trial of alleged war criminals.[63]

In contrast and exceptionally, General Douglas MacArthur, Supreme Commander of the Allied Occupation Forces in Japan, granted amnesties to some Japanese officials, after they had been sentenced to death. He also exempted the Emperor of Japan from any punishment.[64] This move appears to have done much to reconcile the Japanese with the Americans.

By contrast to the treatment of the enemy, the Allies of both the major wars ensured complete amnesty for those who acted in support of the war effort against the enemy. This was achieved through clauses in

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[57] Nuremberg Trial Proceedings, Vol. 1, Indictment, Count One at IV (F) 3 (b).

[58] In relation to the sequence of these events, see Philip Waller and John Rowett, *Chronology of the 20th Century*, 1995, at 172, 174 and 180.

[59] *www.yale.edu/lawweb/avalon/wwii*.

[60] *Idem*.

[61] *Idem*.

[60] *Idem*.

[63] See Article six of the Armistice Agreement with Bulgaria and article 14 of the respective armistice agreements with Hungary and Rumania.

[64] See Frank E. Smitha, *World History*, Chapter 23: 'Hate, Spiritualism and the Conclusion of World War II' (*http://www.eurekanet.cau/~fesmitha/*)

peace settlements[65] and national legislation.[66] Not being the aggressors and emerging as victors, the Allies undoubtedly felt at the time that it was unnecessary and undesirable for such persons to be punished for their political offences.

B. *Non-European Conflicts*

This study has not embraced a comprehensive survey of world history. The emphasis has been laid on European historical developments. Nonetheless, a limited search outside Europe has revealed that it is difficult to identify recorded examples of peace treaties involving non-European powers where amnesty was part of the settlement. The conception of amnesty to secure durable peace may have been a peculiarly European trend. It may be that the perceived need for amnesty, and indeed to some extent a peace treaty, was most evident when there was no clear victor. This was common in European wars owing to the balance of power politics, which militated against total defeat and encouraged the negotiation of peace before that point could be reached.

Peace treaties concluded in the context of two famous pre-20th-century non-European conflict situations, not surprisingly, generally fail to include amnesty. The Treaty of Shimonoseki of 1895,[67] between the Emperor of Japan and the Emperor of China, had no amnesty provision. Likewise, most of the peace treaties concluded between the United States government and the indigenous Indians of the territory of the present-day United States contained no such clause. One may include in this list the Treaty With the Cherokee of 1785;[68] the Treaty With the Chocktaw of 1786;[69] the Treaty With the Shawnee of 1786;[70] the Treaty With the Wyandot and others of 1789;[71] the Treaty With the

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[65] See Armistice Agreement with Germany of 1918: (1919) 13 *AJIL*. Supp.. 97 (1919); Paris Peace Treaty of 1947: Toynbee, note 24 *supra*. at 2421; Bulgarian Peace Treaty of 1947: ibid., at 2525; Hungarian Peace Treaty of 1947: ibid.. at 2553; Romanian Peace Treaty of 1947: ibid.. at 2585; Finnish Peace Treaty of 1947: ibid., at 2615.

[66] See e.g. 1951 French amnesty law, cited by De Zayas. in 3 *Encyclopedia of Public International Law* 14, at 15.

[67] See Toynbee. note 24 *supra*, at 1101 *et seq.*

[68] See *www.yale.edu/lawweb/avalon/ntreaty*

[69] *Idem.*

[70] *Idem.*

[71] *Idem.*

Cherokee of 1794;[72] the Treaty With the Comanche, Kiowa, and Apache of 1853;[73] and the Treaty of the Little Arkansas of 1865, concluded with the Cheyenne and Arapaho. The Treaty With the Creeks of 1790[74] and the Treaty With the Cherokee of 1791[75] both provided that ' ... all animosities for past grievances shall henceforth cease',[76] but stopped short of an amnesty.

The early government of the United States of America, however, could not completely escape its European heritage, as illustrated by one of the first peace treaties to be concluded with the indigenous groups. Article I of the Treaty with the Delawares of 1778 provided,

> That all offences or acts of hostilities by one, or either of the contracting parties against the other, be mutually forgiven, and buried in the depths of oblivion, never more to be had remembrance.

It was implied that no criminal or civil proceedings could emanate from past offences.

It was to be expected that the European powers would export their amnesty tradition in peace treaties. The Treaty of Nanking of 1842,[77] between the Emperor of China and the Queen of Great Britain, incorporated an amnesty clause for Chinese subjects in Her Majesty's service during the preceding hostilities.[78] On the other hand, the Treaty of Addis Ababa of 1896[79] was between one European and one non-European power, that is Ethiopia and Italy, but had no such provision.

Article VII of the Treaty of Peace between the United States and Spain of 1898[80] provides an example of an amnesty involving one non-European power, but it is also an early example of an amnesty confined to civil liability. Article VII provides that:

> The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, or either Government, or of its citizens or subjects, against the other

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[72] *Idem.*
[73] *Idem.*
[74] *Idem.*
[75] *Idem.*
[76] Articles XI and XIII, respectively.
[77] Ibid. at 1059 et *seq.*
[78] Article ix.
[79] Ibid., at 1111 *et seq.*
[80] *http://www.yale.edu/lawweb/avalon/sp1898.htm.*

> Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

This provision further envisages an alternative mechanism for the reparation of American citizens. It states that:

> The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

The Treaty of Vereeniging of 1902 ended the war in South Africa between the burgher [Boer] forces and Britain. It contained a broad and progressive amnesty clause, which not only covered criminal and civil liability, but also exempted acts contrary to the usages of war from the protection of the amnesty. It provided,

> No proceedings, civil or criminal, will be taken against any of the burghers so surrendering or so returning for any acts in connection with the prosecution of the war. The benefit of this clause will not extend to certain acts contrary to the usage of war which have been notified by the Commander-in-Chief to the Boer generals, and which shall be tried by court-martial immediately after the close of hostilities.[81]

Notwithstanding the European notion that Africa was uncivilised and therefore *terra nullius*,[82] it would appear that European colonial powers, and especially Britain, made regular use of treaties to subjugate local tribes,[83] not always, however, with the intention of honouring them. Few of the recorded examples of treaties relate to peace treaties following upon hostilities. However, Omer-Cooper appears to make reference to a form of amnesty component in a peace agreement between the Sotho of Moshoeshoe (founder of the Basutho nation, present-day Lesotho) and the British. The British attacked the Sotho

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[81] Toynbee, note 24 *supra*, at 1146.

[82] This doctrine, meaning 'land belonging to no-one', formed the legal and political justification of colonialism.

[83] See John Flint (ed.), *The Cambridge History of Africa*, from c. 1790 to c. 1870, vol. 5, at 15, 19, 25, 28, 41, 110, 121, 122, 174-5, 178, 179, 180, 181, 184, 192, 208, 218, 219, 275, 381, 390, 402, 408, 413, 452, 275; David Kimble, *A Political History of Ghana, 1850-1928*, 1963, at 11-12, 268, 269 n., 272, 272 n., 273, 275, 280-2, 290, 292, 297-8, 316, 323 n.

after an ultimatum demanding compensation in cattle and horses for losses caused by past hostilities and retreated with some captured cattle. An agreement was reached to the effect that the captured animals would be 'adequate punishment for past misdeeds'.[84]

C. *Civil wars*

There are recorded examples of amnesty after civil rebellion dating back to the 18th century. The American war of independence is a prominent revolution of the period that was characterized by successful rebellion and ended in a peace treaty that incorporated an amnesty provision. Article 6 of the Paris Peace Treaty of 1783[85] stipulated:

> That there shall be no future confiscations made nor any prosecutions commenced against any person or persons for, or by reason of, the part which he or they may have taken in the present war, and that no person shall on that account suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges at the time of the ratification of the treaty in America shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Just a year later, in 1784, in another part of the world, modern-day Romania, emperor Joseph II granted a general amnesty to all the participants in a feudal rebellion except certain leaders. These leaders were tortured and publicly executed. The context of this amnesty differed from that of the American Civil War where amnesty followed an unsuccessful rebellion.

In contrast to the constant practice of including amnesty in peace treaties following international war, the practice in internal conflicts has been more varied. Revolutions have possessed their own unique characteristics depending on the particular country and setting of civil unrest. Two famous early civil wars culminated in quite different approaches to dealing with the former enemy. The French Revolution was marked by the brutal execution of the French royal family. The American Civil War was concluded with a proclamation of amnesty in

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[84] See J.D. Omer-Cooper in Flint, ibid., at 381.

[85] *http://www.yale.edu/lawweb/avalon/paris.htm.*

1865 and another in 1868.[86] The first was conditional[87] and that of 1868 unconditional. In 1872 the Republican Congress of the United States passed a general amnesty act applying to all but about 500 of the former Confederate leaders of the American Civil War.[88] One should see this in the context of the time. The period between the conclusion of the war and this amnesty has been described as one of hatred.[89] The war had taken the lives of a quarter of a million soldiers[90] and Abraham Lincoln was assassinated as it closed.[91] During the course of the war, Lincoln had proclaimed an amnesty for all participants in the rebellion.[92] However, Confederate leaders and traitors were exempted from its purview.

In the South American region one can cite an example of 1894 when President Jose de Marais became the first civilian president of Brazil and negotiated the end of a war in the south partly by granting amnesty to the rebels.

Such wars differ from international wars in that the enemy is completely vanquished. In international wars the sovereignty, and thus potential menace, of the enemy state usually remains intact. So the peace treaty and amnesty are perceived as necessary measures for securing a lasting peace.

D. *Modern practice*

A number of factors have led to a reduction in inter-state wars and the risk of their resurrection. These include the prohibition on the use of force, the general development in the law of war, the co-operation of the international community in matters of international peace and security, and the changing nature of war. At the same time, amnesty has become a less obvious option for those negotiating modern peace settlements following international wars. There are notable examples of

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[86] See Randall, *The Civil War and Reconstruction*, 1937, at 711-12. One sees the term pardon being employed, although the 1968 amnesty referred to 'pardon and amnesty'.

[87] According to Randall (*idem*), the conditions were similar to those of Lincoln's earlier proclamation: see *infra*.

[88] Thomas A. Bailey and David M. Kennedy, *The American Pageant*, 7th ed., at 457-8.

[89] See Randall, note 86 *supra*, at 689.

[90] Ibid., at 693.

[91] Ibid., at 706.

[92] For the text of the proclamation, see Randall, note 86 *supra*, at 696-7.

post-Second World War peace agreements, both European and non-European, that do not contain amnesty clauses. One could mention, on the question of Indo-China, the Agreements on the Cessation of Hostilities in Cambodia, Laos and Vietnam of 1954;[93] on the Middle East question, the Camp David Accords of 1978;[94] and, on the question of the former Yugoslavia, the Dayton Peace Accords of 1995.[95]

On the other hand, in the context of civil wars amnesty has remained a tool for quelling or discouraging rebellion. Today's world is characterized by the global filtering of knowledge relating to internal conflicts and the consequent imitation of political strategies adopted in the internal affairs of foreign states. The utility of amnesties in civil strife has therefore received wide recognition and one can find a number of examples of their use in post-war internal conflicts. Amnesties have been employed in Albania, Algeria, Angola, Argentina, Burundi, Bhutan, Bolivia, Brazil, Bulgaria, Cambodia, Chad, Chile, Columbia, the Comoros, Croatia, Cyprus, Ecuador, El Salvador, Ghana, Haiti, Jordan, Mauritania, Mauritius, Nepal, Oman, Poland, Romania, Russia, Sierra Leone, South Africa, Spain, Sri Lanka, Syria, Serbian Republic of Yugoslavia (as at 24 December 1998: Republika Srpska) and Zaire (now the Democratic Republic of Congo).[96] Sometimes these have taken the form of exercises of presidential discretion but there are also a noticeable number of amnesty laws promulgated in recent years. The progression from somewhat arbitrary exercises of presidential discretion to properly introduced laws is in itself a triumph for the rule of law.

In the former category, President Yoweri Museveni of Uganda has made use of amnesties at various times to persuade rebels to come forward and halt their activities. Other such presidential amnesties have been declared by Tombalbaye in Chad, Ronas in the Philippines in 1948, Akkafo in Ghana and Taya in Mauritania. Albania, Algeria, Angola, Argentina, Chile, El Salvador, Nicaragua, Poland and South Africa have all promulgated amnesty laws. Most recently, Sierra Leone and Uganda have considered the introduction of such a law.

Following, the rejuvenation of the philosophy of reconciliation, the peace agreements for Burundi and Sierra Leone perhaps even evidence

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[93] *http://www.yale.edu/lawweb/avalon/intdip/indoch.*

[94] *http://www.yale.edu/lawweb/avalon/mideast/campdav.l.*

[95] *http://www.yale.edu/lawweb/avalon/intdip/bosnia/daymenu.htm.*

[96] Some of the less well-known amnesties are referred to in the United States Library of Congress Country Reports.

a revival of amnesty clauses in peace treaties. This is not in the context of international wars but internal conflicts. This results from rebel movements having developed limited status under international law, as well as from third states and international organisations becoming proactive in such conflicts. The ruling government within the state would have to implement these amnesties through presidential decrees or amnesty laws.

The following chapter will provide a brief insight into some of these municipal amnesty laws. Special attention will be given to South Africa because of the recent, unique and progressive nature of its law. The fact that its transition to democracy follows a unique history of oppression that united the world in common disgust makes it a suitable case study. The amnesty laws in the Latin American region will also be given particular attention because of their relatively recent nature, as well as the controversy and jurisprudence that arose out of them.

In terms of the development of amnesty the progression from the Latin American models to that in South Africa is most enlightening. Both processes gave rise to significant jurisprudence on the legitimacy of amnesty in terms of constitutional and international law. Yet, the South African model is more refined and gives a serious challenge to anyone wishing to dismiss impunity as indefensible.

3. ***Rationale***

The principal justifications for amnesty are transition, peace, reconciliation, forgiveness and truth. These various justifications have been employed individually and in conjunction with each other. They intertwine into one coherent objective of the lasting peaceful coexistence of human kind. In this sense the goal of amnesty is the achievement of a state of affairs in a particular political context that reflects the ultimate goal of humanity. The underlying assumption is that in a particular context, amnesty is a more appropriate means of achieving this goal than punishment.

Achieving a better society may involve a process of transition from a state of war to a state of peace, or from one type of government to another. To facilitate such transition, it is often necessary or expedient to obtain the co-operation of the key figures in the maintenance of the former state of affairs, be it government officials, military personnel or agitators. Amnesty provides an incentive to such role players to co-operate in a process of transition. Peace or the establishment of a new government may only be possible with the consent of these former

players.[97] Hannibal is reported as exclaiming that 'it is the part of him who grants peace not of him who sues for it, to lay down the conditions'.[98] In South Africa,[99] whatever points one may raise about truth, reconciliation and forgiveness, the reality remains that the principal reason for amnesty was to facilitate the initial transition from the old regime to a new democratic government.[100] Therefore, whatever incidental functions the amnesty provision may serve, it was a component in a political settlement for the handing over of the reigns of power, which some would perceive as a necessary evil to ensure transition to democracy. Similar claims can be made with respect to the amnesties in Argentina, Chile, El Salvador and Uruguay.[101]

Even where amnesty was not politically an absolute necessity, it has been used to ensure lasting peace. This is the main underlying rationale of amnesty clauses in peace treaties.[102] Grotius explains this rationale in the following way:

> The same principle does not apply to the right to inflict punishment (Gail, *De Arrestis*, chap. xiv, no. 7). For this right, in so far as it concerns Kings or paples, ought to be considered as held in abeyance, from fear that the peace will not be a perfect peace if it leaves the old causes of war.[103]

Where amnesty is perceived as a political necessity, it carries with it this incidental benefit. In South Africa there were also political parties other than the ANC and the National Party that required reassurance. Their inclusion in the process of political change was necessary, if the peace was to last.

It has long been recognised that lasting peace can only be achieved by quelling the need for vengeance of those who were conquered before peace was established. Wars ended by compromise and forgiveness may be said to foster peace more effectively than those followed by

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[97] See chapter 10 *infra*, at 379-80, in relation to the South African amnesty process.

[98] See Gentili, *De jure Belli Libri Tres*, 1598 at 576.

[99] See chapter 2 *infra*, at 53-70.

[100] See H. Marais, 'The skeletons come out of the cupboard: The amnesty debate goes on trial' (1993) Vol. 91 *Work in Progress* 10-13.

[101] With respect to which see chapter 2 *infra*, at 70-80.

[102] This is clear from the emphasis on eternal oblivion in the early treaties: see *supra*.

[103] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, at xvii.

recounting scores and revenge. Duaren is recorded to have said that 'as a comedy usually ends in a marriage so is it with the most serious wars'.[104] After a war the victors have a primary role in establishing the conditions for peace. Alexander is reported as saying to Darius that 'conditions are made by the victor and accepted by the vanquished'.[105] If those conditions involve crushing the dignity of the vanquished the peace will not last. The victors of the First World War imposed such conditions of indignity on Germany through the Treaty of Versailles that war was re-ignited only 21 years later. The tempered approach of the Greeks and Romans to their vanquished populations surely contributed to the success of these respective empires. The Romans strove for lasting and not ephemeral peace with their vanquished foes. Gentili cites Dionyius of Halicarnassus VI in recording the declaration, 'Let there be peace between the Romans and the peoples of the Latins as long as heaven and earth keep the same position.'[106]

In answering the question as to what ensures lasting peace, St. Augustine says:

> by punishing past offences we glut our anger; by being compassionate we ensure the future.[107]

The justifications for amnesty are frequently countered with arguments of justice. Yet even justice needs to be pursued within the context of its associated goal of lasting peace. Gentili notes:

> Therefore there is but one enduring principle, namely ustice, which has been preserved in punishment and should be preserved also in taking vengeance and making conditions for the future. For one who has been injured beyond his deserts will not be tranquil, but will continually desire revenge; and one who is forced to accept pitiless conditions will carry the burden only so long as he is under the necessity of obedience.[108]

It is difficult to conceptualise a meaningful peace without reconciliation. As long as former enemies continue to be hostile to each other, the root causes of war continue to foreshadow the peace

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[104] See Gentili, note 98 *supra*, at 581.
[105] See ibid., at 576.
[106] *Idem*.
[107] Augustine, *Letters*, ccii.
[108] Gentili, note 98 *supra*, at 576.

settlement and peace itself is fragile, assailable and ultimately ephemeral. Reconciliation is therefore a catalyst for lasting peace. As a gesture of atonement for past wrongs, amnesty – by implication if not expressly – always, inter alia, serves the function of reconciliation. When given its most auspicious meaning, reconciliation refers to the process of making friends again or re-instituting alliances after estrangement. The reconciliatory function of amnesty is, however, more modest. The aim is not so much one of creating friendly relations as one of doing away with enmity resulting from previous hostilities. The government that gives amnesty to rebels or agrees to amnesty in a peace treaty usually has no desire to form alliances with its former foes. It merely wishes to diminish or extinguish the hostility that feeds the desire for war, by providing an incentive to individuals to participate in the peace process.

Although reconciliation is by implication a function served by all amnesties, the term itself has not traditionally been employed in this context. The Latin American states that established truth commissions and granted amnesty made express use of this terminology. The concept appears to be deeply rooted in Christian theology.[109] Yet despite the firmly entrenched Roman Catholic tradition in Latin America, the concept as applied to political transition appeared to have taken on a more secular than religious, and a more forensic than spiritual, meaning.

The spiritual element was far more prevalent in the South African amnesty process. This is explicable by the structure and make up of the Truth and Reconciliation Commission. Rather than having one Truth Commission and a separate amnesty process, as in the Latin American models, the South African model is divided into an Amnesty Committee, a Committee on Human Rights Violations and a Committee on Reparations and Rehabilitation, while all form part of a composite whole.[110] The Nobel Peace Laureate Archbishop Desmond Tutu chaired the Human Rights Violations Committee and four of the seventeen commissioners of the Truth and Reconciliation Commission were Christian ministers. The spiritual dimension to reconciliation was therefore bound to have a prominent place in the understanding of the South African process. Archbishop Tutu developed the spiritual understanding of reconciliation by his constant reference to the

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[109] See Robert J. Banks (ed.), *Reconciliation and Hope*, 1974.

[110] See chapter 2 *infra*, at 53-56.

Christian notion of forgiveness.[111] Indeed, forgiveness has become a common point of entry into the debate over the South African truth and reconciliation process.[112] It has been observed that Commissioners often went beyond the statutory mandate in actively encouraging perpetrators to repent and victims to forgive.[113]

In Europe, the gradual exclusion of the Church from politics accompanied the emergence of the state. The South African truth commission evidences a brief renaissance of the insertion of Christian values into the process of political change. This is questionable at two levels. First, South Africa does not consist of one religion but a variety. In this sense, the imposition of Christian values on a national political process may be an affront to some. The concepts of forgiveness and reconciliation, while central to Christianity, do not seem to have a prominent place in Hinduism, which focuses on the attainment of spiritual perfection through self-improvement.[114] It also seems not to be so fundamental to Judaism, which places more emphasis on punishment for wrongdoing.[115]

On the other hand, a number of African traditional religions and Islam[116] contain compatible ideas and persons following these religions are more likely to relate to the Christian perspective of the amnesty process. One should note that Hindus and Jews have not in fact openly protested against the emphasis placed on forgiveness in the South African process. The Jewish community has debated the truth commission and appears to have embraced the concept of forgiveness as compatible with, although not central to, the Jewish faith.[117] South African traditional religions encompass ancestor ritual. Those following these faiths often believe that if a person becomes sick they may have

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[111] See Desmond Tutu. *No Future Without Forgiveness*. 1999. This is also reflected in television inverviews with the Archbishop: see for instance. in a debate between the present author and Archbishop Desmond Tutu (Tuesday Night Debate at 9.30. 5th November 1996. on SABC3. alluded to by Anthea Bristowe in the *Sunday Times* of that wee c: On the Small Screen).

[112] See e.g. Brian Frost. *Struggling to Forgive*. 1998.

[113] David Dyzenhaus. *Truth, Reconciliation and the Apartheid Legal Order*. 1998. at 3.

[114] See Madeleine Biardeau. *Hinduism: The Anthropology of a Civilisation*. 1989. at 17; see generally *The Bhagavad-Gita*.

[115] See Max Weber. *Ancient Judaism*. at 218-219. 245; see generally *Exodus* 21.

[116] See Farouk Asvat. 'Forgiveness' (1988) 10 *Sesame* 38-9.

[117] See (1996) 51 *Jewish Affairs* 30.

offended the ancestors and the illness is a form of punishment. Healing rituals involve communicating with ancestor spirits to reconcile the living with the spirits.[118] There is therefore some convergence of doctrine between the healing of the sick sinner, re-establishing harmony across the secular and spiritual world, and the healing of the nation often referred to in the context of the truth and reconciliation process.

On another level, one must question the relevance to the political structure and process of concepts that pertain to the relationship between God and human beings. What, one may ask, is the relevance of personal notions of forgiveness as between God and human to a person's interaction with the political structures of a state, an abstract entity. Yet, it may be viewed as artificial to view theology merely from a personal perspective when human conduct expresses itself not merely through personal relations but through human-made structures. 'Grace', as a composite notion of reconciliation and forgiveness is a response to sin. Sin is not only manifested through the person but also through abstract forms of organisation, the legal personality of which the sinner hides behind. In this sense human beings sin in two separate but inter-related dimensions, the personal and the organisational. On a personal level Jesus tells us that the sinner should offer grace to receive grace. Similarly, on an organisational level it may be argued that the sinner should offer grace to receive grace. According to Leonado Boff,

> When Christians take cognizance of the link between the personal and the structural levels, they can no longer rest content with the conversion of the heart and personal holiness on the individual level. They realize that if they are to be graced personally, they must also fight to change the societal structure and open it up to God's grace.[119]

There are no express references to the concept of 'reconciliation' in the Old Testament, although there was, in fact, repeated reconciliation between God and the Israelites; but usually not without some attendant punishment. Paul introduced the term into theological terminology in the New Testament. The word is a translation from the Greek noun *katallage* and verbs *katallasso* and *apokattallaso*. *Allos* in Greek means other or different. Ditmanson notes that in classical Greek the word acquired a meaning signifying 'the change from a state of enmity to one

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[118] David Chidester. *Religions of South Africa*. 1992. at 9.
[119] Leonardo Boff. *Liberating Grace*. 1976. at 85.

of friendship'.[120] Paul uses the word on a number of occasions to describe the reunion between God and human beings. In I Corinthians, chapter 7, verse 11 he uses the word to describe the reunion of spouses. One feature which Paul's use of the word seems to have in common with its use in the context of amnesty is that he describes God and humans as enemies before reconciliation.[121] Such reconciliation puts an end to the hostility.[122] Reconciliation with God goes hand in hand with forgiveness of sins. So Paul said that, 'God was in Christ reconciling himself, not counting their trespasses against them ...'

Archbishop Tutu brought a new dimension into the rationale for amnesty when he spoke of forgiveness. God's forgiveness infers in theological terms 'justification', which is taken to mean the acquittal of sinners on judgement day. Where a person is a sinner to begin with and through forgiveness of those sins avoids punishment, this amounts to an amnesty from God. To this extent, the theological analogy seems appropriate.

However, there are certain respects in which the analogy between Paul's conception of reconciliation, or the Christian conception of forgiveness, and the purposes of amnesty in the secular world is not always exact. In the context of incomplete rebellion or the end to a war between states, the government reconciles with the rebels or the other government through amnesty, but in that context the term is not used. It is used rather in the context of a change of government, where the purpose of amnesty is not to reconcile the government with the people, but the people among themselves. The wrongs were committed against the people and not the state. One would therefore expect that forgiveness would come from the victims of wrongs, if they can genuinely reconcile with their former oppressors. It is artificial to speak of forgiveness in this context. While the government may forgive, the victims may not, and therefore there may not be true reconciliation between the victims and the perpetrators or former oppressors.

Further, God can forgive because the sin is a wrong against God. Since the government was not the direct victim of the wrong, while it may punish or refrain from punishing on behalf of the victim, it is not in a position to forgive that wrong on behalf of the victim. Only the victim can do that. Even God does not forgive on behalf of a wronged individual, but forgives in his own name for the 'sins' against himself.

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[120] Harold H. Ditmanson, *Grace in Experience and Theology*, 1977, at 195.
[121] Romans 5:10-11.
[122] Ephesians 2:13-16.

Forgiveness and reconciliation also have a subjective aspect. Amnesty in terms of law is a forensic mechanism. The state is a structural apparatus with a legal rather than biological or spiritual personality. Therefore, it has no heart or feelings from which to forgive or reconcile in the sense attributed to those terms by Paul.

One might also observe that in theological terms there is a category of sin that can never be forgiven. This is a sin against the Holy Spirit.[123] While undefined this refers to 'continuing blasphemy against the Spirit of God by one who consistently refuses God's gracious call'.[124] The Athenians' amnesty exempted certain wrongs from its ambit. In the context of modern amnesties, as will be seen, international legal norms necessarily exclude certain categories of crimes from the legitimate scope of amnesty.[125]

The analogy also cannot be exact with respect to the South African amnesty process because Christianity conditions forgiveness by God and reconciliation with him on repentance of sins. Repentance requires more than mere admission. It requires sorrow and the wish to reconcile with God and to receive forgiveness. Paul beseeched the Corinthians to be reconciled to God.[126] The South African National Unity and Reconciliation Act 34 of 1995 requires full disclosure of one's wrong but it does not require remorse or the wish to reconcile with the victims.

However, notwithstanding these flaws in the application of theological concepts to the secular and forensic process, reconciliation and forgiveness do provide some justification for an amnesty process in a context and manner similar to that exemplified in South Africa. It is chiefly the parties to the former conflict who reconcile, and through them the nation is reconciled in the sense that the hostilities have been brought to an end. The South African-style amnesty hearings have demonstrated that apologies and requests for forgiveness can accompany the confessions of the perpetrators. These are capable of leading to a public declaration of forgiveness from the victims. This no doubt has a therapeutic effect on those listening to such an example of noble grace. Archbishop Tutu has certainly introduced a valuable element into the amnesty process. One should, however, see the process for what it is and not be fooled into believing that the state can in any

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[123] Matthew 12:31; Mark 3:28; Luke 12:16; John 5:16.

[124] Douglas, J.D. et al. *The Bible Dictionary*, 2nd ed., 1982, at 391.

[125] See chapters 5, 6, 7, 8, 9 and 11, *supra*.

[126] 2 Corinthians 5:17-21.

realistic theological sense forgive on its own behalf or that of the people.

Whereas the theological notion of forgiveness may fit uneasily into the reality of amnesty, one cannot exclude a more religiously neutral application of the term. O'Shaughnessy observes that in deciding whether a particular case may be described as one of forgiveness, one needs to pay attention to the way in which the people concerned employ it and associated concepts.[127] The term is sometimes associated with the decision not to retaliate, notwithstanding continued feelings of bitterness. O'Shaughnessy cites Prospero in Shakespeare's play *The Tempest*, where he says,

> For you, most wicked sir, whom to call brother
> Would infect my mouth, I do forgive
> Thy rankest fault . . .[128]

The need to elicit the truth forms the other main justification for amnesty,[129] in cases where the beneficiary of amnesty must first disclose the truth. Victims and their families have an inalienable right to know the truth about past suffering and losses. It is apposite here to cite the Inter-American Commission on Human Rights' general point of view with respect to past human rights violations, as expressed in its Annual Report of 1985-1986. The Commission stated that:

> Every society has the inalienable right to know the truth about past events, as well as the motive and circumstances in which aberrant crimes came to be committed, in order to prevent a repetition of such acts in the future.[130]

The unravelling and discussion of the truth do more than answer an inalienable right and put nations on their guard to prevent future repetition. Psychologists may argue that it also serves as a form of therapy for the healing of an individual's invisible but debilitating inner

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[127] R.J. O'Shaughnessy, 'Forgiveness' (1967) *Philosophy* 336, at 351.

[128] Ibid., at 340.

[129] In the South African context, this is reflected in the adoption of the slogan 'Truth: the road to reconciliation', which covered the wall behind the commissioners in hearings.

[130] Cited with approval by the same Commission in its report on Uruguay's amnesty law: see Report No. 29/92, Uruguay, Oct. 2, 1992 at para. 37.

wounds caused by negative experiences of the past. As one eminent psychologist has put it,

> The wounds that we acknowledge openly and minister to through therapy or support groups can become a deep source of wisdom, sensitivity and information about ourselves and others. It is the wounds that we try to deny and keep secret that will continue to drive us to repeat behaviour patterns that keep us in depression, anxiety and bad relationships.[131]

One could argue that on a macro-scale what applies to an individual also applies to a collection of individuals or even a nation. Is it not the collective recounting of atrocities by victims and perpetrators alike that will liberate the minds and hearts of individuals? Perhaps this is what one means by the phrase 'the healing of the nation' that so often spills from the lips of South African celebrities.

In the context of changes in government, records become destroyed and the truth may remain buried in the secret cavities of the hearts and minds of perpetrators and victims alike. The direct alternative to amnesty is the institution of criminal proceedings. These can be costly and ineffective. The evidence may be old or destroyed, the witnesses reluctant and the judges may be partial.[132] In South Africa, the trial of the former defence minister, General Magnus Malan, in 1996 involved state-funded defence costs alone approaching $2 million,[133] lasted for four months and ended in acquittal. The prosecution of Eugene de Kock (nicknamed Prime Evil), former commander of a police death squad based at the infamous Vlakplaas, cost nearly $1 million[134] and required 18 months of testimony before De Kock finally admitted to 121 charges.[135] The South African amnesty process has had marginal

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[131] Susan Forward, 'From wounds to Healing' (1994) 18 *Journal of Psychology and Judaism* 13.

[132] Kritz observes that 'in most cases of transition from totalitarian or authoritarian regimes, the judiciary was severely compromised and was very much part of the old system, implementing the repressive policies and wrapping them in the mantle of the rule of law': Neil Kritz, 'The Dilemmas of Transitional Justice', in Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, xix at xxv-xxvi.

[133] See Tutu, note 111 *supra*, at 27.

[134] *Idem*.

[135] *Mail and Guardian*, 2 August 1996: 'Yes I did it, says Eugene de Kock'.

success in helping to discover truths that otherwise may have never been unearthed.

4. *The Current Phase of Development: the International Legal Question*

The latter years of the 20th century have seen momentous developments in international criminal law and human rights protection. Simultaneously, academics and the families of victims have raised serious questions about the legitimacy of municipal amnesty laws in the light of such developments. The question arises whether and to what extent amnesty is compatible with international law, having regard to its rationale. The negotiators of amnesty laws seldom have the time and cannot usually afford the luxury of giving this question the attention that it clearly deserves. A negotiating party cannot insist on compliance with what after all, in the absence of clarity, amounts to its own subjective interpretation of international norms. It is hoped that attempting to develop principles on the international legality of amnesty laws, this work can make a meaningful contribution to the developing jurisprudence in this area.

Before the concept of an amnesty law is tested against the sources of international law, it is put in its rightful context. It is a mechanism that is increasingly employed as an alternative means of transitional justice to punishment, in a world that increasingly demands the punishment of individuals that commit international crimes. Accordingly, the next chapter introduces prominent examples of amnesty laws in recent state-practice, before proceeding to place amnesty within the framework of punishment and international law.

CHAPTER 3

NATIONAL AMNESTY LAWS

1. *Introduction*

Broadly speaking, states that have gone through a political transition have adopted one of four alternative approaches to dealing with the perpetrators of past human rights violations, singly or in combination.[1] One choice has been to prosecute those responsible for infringing individual rights.[2] Another option involves non-criminal sanctions against the former elite. *Lustration laws* are a prominent example of this. They enable job candidates to be screened with a view to excluding them from government employment or other privileges.[3] These alternatives have been preferred when political change has been achieved through revolution or liberation and the new government has secured a strong power base. The third alternative has been to refrain from prosecuting the alleged perpetrators of human rights violations without any accompanying formal guarantee of amnesty, i.e. simple and unofficial impunity. This has the most profound impact on the

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[1] See Daan Bronkhorst, *Truth and Reconciliation, Obstacles and Opportunities for Human Rights*, 1995, at 90-106; Mark S. Ellis, 'Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc' (1996) 59 *Law and Contemporary Problems* 181; Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 *Law and Contemporary Problems* 81; Huyse Lue, 'Justice after Transition: On Choices Successor Elites Make in Dealing with the Past' (1995) *Law and Social Inquiry* 51.

[2] As in the Soviet Union in 1921; Belgium, France and the Netherlands after the defeat of Nazi Germany; the People's Republic of China in 1949; Ethiopia in the 1990s; and Albania, Bulgaria, Germany and Romania, after the collapse of communism.

[3] As in Albania, Bulgaria, Czechoslovakia (The Czech Republic and Slovakia), Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Russia and Ukraine.

maintenance of the rule of law because it amounts to an unreasoned and undefined attack on notions of justice. Amnesty, as a formal and defined measure of exception, has been elected as an option when perceived as necessary to ease the transition to peace and democracy.

Although amnesties have featured in peace initiatives throughout the world, the experience of the last 25 years has shown that this mechanism has been most prominent in the African[4] and Latin-American regions.[5] These two regions have perhaps suffered a greater share of the world's civil strife and dictatorships. They have also been the showcases for modern transitions to peace and democracy. The former Soviet Union and Eastern Europe also went through a period, in the late 1980s and early 1990s, of widespread political transition to democracy. However, these examples generally differed from the Latin American and certain African examples, where there were two clearly identifiable sides, i.e. an emergent civilian democratic government and the outgoing military dictatorship or minority rulers. The change in the former communist regimes was more one of ideology where change was generally achieved through internal governmental reforms or where, at least, individuals in the new government had loyalties or past associations with the ideologies or structures of the old. The situation was therefore more complex than the negotiated handover that could not be achieved without the promise of amnesty. The former communist regimes also differed from some of the African examples where amnesty was used as a means of dissuading armed rebellion. The transitions in most of the Central and East European countries were characterised by political trials and lustration laws.

The examples of amnesty laws are few.[6] Governments have more frequently issued ad hoc proclamations of amnesty, especially in

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[4] e.g. *Angola*: Neto's amnesty for political prisoners and those in exile in 1978; *Algeria*: the amnesty of political prisoners in the mid-1980s; *Lybia*: the 1976 amnesty for those members of the monarchical regime convicted by the 'People's Court' in 1971; *Mauritius*: the Abdullah regime's general amnesty for political prisoners in the 1980s; *Somalia*: the 1974 amnesty of political prisoners and the 1983 amnesty for Somali exiles; *Sudan*: the amnesty of Sadiq al Mohdi, following the 1977 eight point agreement: *Zaire*: Mobutu's amnesty guarantee to Pierre Mulele (whom he subsequently had executed);

[5] Argentina, Brazil, Chile, Columbia, El Salvador, Honduras, Peru, Uruguay: see *infra*.

[6] Such laws have been passed, for example in Albania, Algeria, Argentina, Chile, Croatia, El Salvador, Haiti, Peru, Poland, the Republic of Yugoslavia (Serb Republic), Romania, South Africa, Uganda and Uruguay.

Africa.[7] It is likely that amnesty laws will become more prevalent in the future owing to the increased global emphasis on democratic process as well as to the extensive interest in the Latin American and South African processes.

The truth and reconciliation process in South Africa clearly derived inspiration from similar processes in Latin America. The amnesties in these two regions also contrast each other starkly in terms of their role in the national plan for the promotion of human rights. South Africa passed its amnesty law as part and parcel of the human rights imperative. This is far from evident in the Latin American examples, in terms of the laws themselves, the framework within which they were passed and their potential consequences for human rights protection.

Amnesty laws in the Latin American region and South Africa gave rise to unprecedented controversy and jurisprudence. As models they provide rich sources of inspiration for our understanding of the inter-relationship between international law and national transitional priorities. This facilitates a realistic approach to the formulation of principles on the international legal limitation of domestic laws.

The aim of this work is to contribute to the development of general principles.[8] Therefore, in order that the analysis of national laws forms a meaningful basis for discussion of the broader picture, the focus is on selected examples. Thus, in this chapter, emphasis is placed on a sample of African and Latin American processes. Other examples are discussed in less detail, but without in any way purporting to undermine the significance of these laws for the countries where they were promulgated.

2. *Amnesty Laws in Africa*

Africa continues to be the focal point of successful as well as unsuccessful transitions to democracy within an uncertain cycle of civil strife and transition. The last twenty years of African history have witnessed both horrors and marvels in an effort to build a democratic and peaceful continent. Governments use amnesty to subdue rebellions and the former rebels use it to facilitate the consolidation of power and the transition to peace. The examples of presidential proclamations of amnesty are many. However, rarely have these been formulated into laws of general application.

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[7] See see chapter 2 *supra*. at 22.

[8] See chapter 12 *infra*.

The use of punishment, both judicial and extrajudicial, has been even more prevalent. A shocking picture of extrajudicial killings emerged from Idi Amin's Uganda and more recently in Algeria and Sierra Leone. Atrocities by deposed regimes have been the subject of trials in a number of African states. In Rwanda a substantial part of the population was party to the most horrific of all crimes, that of genocide, against a million of its citizens. Yet the government opted for punishment, rather than pardon. The country's history of impunity could not endure a general amnesty. Ethiopia's new government tried 3,000 or so individuals, including the former president Mengistu Haile-Mariam (in absentia) for, inter alia, 1,922 murders and 194 disappearances,[9] as well as the arbitrary imprisonment of opponents and the systematic and widespread torture of political prisoners.[10] Malawi also charged its former president, Kamuzu Hastings Banda, with the murder of four politicians while in power.[11] South Africa unsuccessfully tried Magnus Malan, former Minister of Defence, and successfully obtained guilty pleas from Eugene de Kock, the former Vlakplaas death squad leader (although he applied for amnesty, successfully in some but not all cases).

Amnesty has recently been incorporated into the peace agreements for Sierra Leone[12] and a proposed peace agreement for the Democratic Republic of Congo. The latter would grant amnesty to those who disarmed, but would exclude from its purview those accused of genocide.[13] Domestic legislation would be required to give effect to such amnesties.

In Africa, the experiences of Uganda and South Africa serve as constructive examples of amnesty laws. Amnesties have generally been quite straightforward in the sense that they have had general, and more or less immediate, application. Uganda's amnesty law is a very recent example of its kind. It also differs from other amnesty laws in that it is

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[9] See Greg Mills, 'Africa's Nuremberg Trials' (1995) 35 *Africa Institute Bulletin* 1.

[10] See Amnesty International, 'South Africa: Mengistu – the opportunity for justice must not be lost' *Amnesty News*, 7 December 1999.

[11] See note 9 *supra*.

[12] See *http://www.sierra-leone.org/lomeaccord.htm*; *see also* chapter 5 *infra*, at 120-121; and chapter 11 *infra*, at 315.

[13] See David Smock and John Prendergast, 'Congo-Kinshasa: Complex war, ambitious peace' *Africa Confidential*, Vol 40, No 18 of 10 September 1999.

less designed to ensure transition to democracy and more aimed at securing peace in a subsisting political system.

The South African amnesty process embodies a new, but welcome, development. This is the amnesty law that includes among its conditions the requirement on the prospective beneficiary to apply for amnesty make a full disclosure of the events surrounding the application. South Africa's law has great attractions in that it has the scope for genuinely advancing reconciliation by eliciting the truth. The objectives and mechanisms of the South African amnesty process fall more easily than other such laws into the general plan of the international community to promote global respect for human rights.[14]

It contrasts sharply with amnesty provisions in two other parts of Southern Africa. Zimbabwe's earlier amnesties were brought into effect under similar circumstances to those in South Africa. The amnesty agreed at the Lancaster House conference in London in 1979, which applied to all offences committed during the course of the war, not only required no disclosure, but was implemented in such a way that human rights violations were not investigated.[15] The Indemnity and Compensation Act of 1975, which remained on the statute books for a short period after independence, and which indemnified the security forces and government officials for acts carried out in good faith in defence of national security, similarly stifled discovery of the truth.[16]

Lesotho passed an amnesty law[17] in 1980 to immunise offenders from prosecution for a number of serious political offences. This followed a long period of political instability after the annulment of the 1970 elections. The King could grant amnesty unconditionally. The only mitigation for victims lay in the fact that the Act did not, in contrast to the South African law, include civil liability.

While bearing in mind this latter aspect, it is likely and it is hoped that, with some adjustments, the South African approach will serve as a basic model for future amnesty laws.

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[14] See also chapters 10 and 11 *supra.*

[15] See Richard Carver, 'Zimbabwe: Drawing a Line Through the Past', in Roht Arriaza, *Impunity and Human Rights in International Law and Practice*, 1995, at 253–4. The agreement was implemented through the Amnesty Ordinance 3 of 1979 and the Amnesty (General Pardon) Ordinance 12 of 1980. Later amnesties included the Clemency Order No. 1 of 1988 and that of 2000.

[16] *Idem.*

[17] Amnesty Act No. 7 of 1980.

A. *Uganda's amnesty law*

Uganda opened its new millennium with the Amnesty Act, 2000,[18] a simple piece of legislation aimed at ending the hostilities that have been plaguing Northern Uganda for more than a decade. It is not the first time that amnesties have been used to persuade the rebel Lord's Resistance Army to disarm – President Yoweri Museveni has proclaimed general amnesties in the past. The latest is in the form of a law of general application and was due to precede a referendum on the question of multiparty or one-party democracy. So-called 'one-party democracy' is defended vigorously by the president and his supporters, and is referred to in the constitution as a non-partisan system or the 'Movement' political system, named after the NRM (National Resistance Movement).

Uganda's amnesty law needs to be understood in the context not just of the current hostilities, but also in the light of a long history of dictatorship and suffering.[19] The Ugandan thirst for peace is unquenchable. The state gained its independence, after seventy years of British rule, on 9 October 1962. The 1960s were characterized by Dr Milton Obote's physical oppression.[20] After a military coup in early 1971, Major-General Idi Amin ruled through a mixture of fear and atrocity until 1979.[21] In 1980, Dr Obote, whose first government had been overthrown by Amin, became president after controversial elections but once again protracted civil war led to the death of countless Ugandans, until Obote was ousted yet again by a military coup in 1985.[22]

From 1986 onwards, the country moved gradually from its long painful period of dictatorship to a limited form of democracy.[23] In the early part of 1986, Museveni's NRM seized power and has remained in

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[18] This statute is on file with the author.

[19] See generally Francis A. W. Bwengwe, *The Agony of Uganda: From Idi Amin to Obote*, 1985.

[20] Ibid., at 3.

[21] *Idem*.

[22] Ibid., at 263-324.

[23] Amnesty International noted in 1989 'the return of security to many parts of the country, the improved behaviour of the army, increased respect for the law': see Amnesty International, *Uganda, the Human Rights Record 1986-1989*, 1989; see also M. Louise Pirouet, 'Human rights issues in Museveni's Uganda' in Holger Bernt Hansen and Michael Twaddle, *Changing Uganda: Between Decay and Development*, 1991, at 198.

office ever since. Museveni won the first presidential election on 9 May 1996. NRM members won the majority of the seats in Parliament on 27 June. A ban was imposed on political party activities until 2000, when a referendum was held that resulted in the retention of the existing system.

Relative peace and stability has reigned in most of the country, with a festering micro-civil war in the North of the country. The new constitution of 1995 contains a progressive bill of rights that includes the right to freedom of association even for political organisations, but severely limits this right by opting for a one-party 'democracy', which is not described as such but as 'non-partisan'. The people can choose through a referendum or elections to allow any political party to compete for power. Those that support the Movement argue that the country already is a democracy and that the multiparty system is excluded because it leads to factional fighting. Those that oppose it argue that democracy will only be attained once parties can compete for power. Accordingly, the amnesty law may be viewed as a measure to facilitate transition to democracy. For those supporting multiparty democracy, the law might have served this purpose if the referendum had successfully culminated in free elections. For Museveni's supporters, it facilitates the consolidation of a particular brand of democracy. Alternatively, it may be viewed as merely a means for integrating and reconciling with the rebels who wish to undermine an existing, so-called, democratic government. This latter interpretation is reflected in the preamble, which reads:

> WHEREAS it is common knowledge that hostilities directed at the Government of Uganda continue to persist in some parts of the country, thereby causing unnecessary suffering to the people of those areas;
> AND WHEREAS it is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities;
> AND WHEREAS it is the desire and determination of the Government to genuinely implement its policy of reconciliation in order to establish peace, security and tranquillity throughout the whole country:

The amnesty covers the period from 26 January 1986 to the expiry of the Act.[24] It applies to those engaged in 'war or armed rebellion'

[24] Section 3(1).

against the government. This includes actual participation in combat, collaboration with the perpetrators of the 'war or armed rebellion', committing other crimes in furtherance of the 'war or armed rebellion', and assisting or aiding the 'conduct or prosecution' of the rebellion.[25] The law is therefore directed at political offences, but refrains from expressly requiring that the offence be of a political nature.[26] This may have implications in terms of the question whether offences committed for financial gain or with no political motive are included. For instance, rape and pillage may not have been strictly political offences but may have furthered the war or amounted to assisting in the prosecution of the war, however unlawful that prosecution. The words are, however, ambiguous, and it would presumably be open to a judge to exclude purely gratuitous acts from the scope of the provision. Despite concerns raised over the inclusion of rape, murder and other serious human rights violations within the scope of its provisions,[27] the law is a blanket amnesty covering all offences.

There is little room for excluding crimes against international law from the scope of the words 'assisting or aiding the conduct or prosecution of the war or armed rebellion', since this phrase says nothing of the lawfulness of the conduct of the war in terms of international law.

Amnesty is defined in the Act as 'a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State'.[28] The amnesty does not therefore cover immunity from civil liability.

To benefit from the amnesty one need only report to the authorities,[29] renounce and abandon involvement in the rebellion and surrender one's weapons.[30] The amnesty therefore has the effect of closing the doors to any state investigations into the crimes covered by the amnesty. However, the Act establishes an 'Amnesty Commission' to, among other things, 'consider and promote appropriate reconciliation mechanisms in the affected areas' and 'promote dialogue and reconciliation within the spirit of this Act'. Investigations to

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[25] *Idem.*

[26] Contrast the South African amnesty law: see 45-6 *supra*; for a discussion of the concept of the political offence see also chapter 11 *infra*, at 301-7.

[27] See Amnesty International Report 2000: Uganda (*www.amnesty.org*)

[28] Section 2.

[29] In the sense set out in section 4(1)(a).

[30] Section 4(1)(b) & (c).

unearth the truth, at least in relation to the fate of victims, might perhaps be initiated under this guise.

The Amnesty Commission is also mandated to co-ordinate a programme of sensitization of the general public on the amnesty law. This is no doubt recognition of the fact that many ordinary Ugandans will find it difficult to understand why a person who has caused great suffering to others should be immune from punishment. Although no such provision existed in South African law, a programme of sensitization existed de facto through the words on forgiveness expressed by clerics like Archbishop Tutu, the public showcase of the truth commission and Amnesty Committee hearings, and the Truth and Reconciliation Commission of South Africa report.

The Ugandan Amnesty Commission is also, in addition to any other functions stipulated in the Act,[31] required to monitor programmes of demobilization, reintegration and resettlement of 'reporters'.[32] A 'Demobilization and Resettlement Team' is established to draw up programmes for the decommissioning of arms, demobilization, resettlement and reintegration.[33]

All this notwithstanding, and despite the law's admirable political objective, legally it is tantamount to a blanket amnesty that allows for, but fails to guarantee as a parallel measure, any thorough investigation of gross human rights violations.

B. *Amnesty in South Africa*

The post-apartheid amnesty process in South Africa is undoubtedly one of the most significant developments in this field.[34] Its benefits and fame will ensure the survival of the institution of amnesty for some time to come. However, amnesty has an even earlier history in South Africa. The Dutch East India Company (*Vereenigde Geoctroyeerde Ooost-Indische Compagnie*) occupied the Cape of Good Hope between 1652 and 1795, on behalf of the United Republic of the Netherlands, and general amnesties were granted from time to time by the *Raad van Politie* which administered the territory.[35] A Nationalisation and

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[31] Section 9(e)

[32] Section 9(a)

[33] See sections 11 & 13.

[34] See further chapter 10 *infra*, at 286-292 and chapter 11 *infra*, at 295-301.

[35] For instance placaat of 18 June 1709, referred to in Leibbrant, *Precis, Journal*, 1699-1732, at 221.

Amnesty Act was also passed some time after the industrial revolt of 1922.[36] Section 2 of this Act provided that,

> Any disqualification imposed on any person by any law by reason of his conviction, of any offence committed in connection with the industrial disturbances upon or in the neighbourhood of the Witwatersrand in 1922, is hereby removed.

Before 1994, South Africa's government represented the minority and oppressed the majority. The society had been ruled on the premise of legalised racial discrimination. This led to an internal conflict principally between the state and the dominated and oppressed minority.[37] The conflict led to a plethora of human rights violations. Internal strife was accompanied by international isolation. It became increasingly clear that the structure of society could not be maintained for much longer without devastating effects for the country.

At the height of the apartheid era, the parliament passed two self-protecting amnesties – in 1961 and 1977 – for offences committed while maintaining public order. In early 1960 there were nationwide demonstrations against the infamous pass laws, with blacks burning passbooks and then offering themselves for arrest at police stations. On 21 March, police panicked and opened fire on unarmed members of the Pan-Africanist Congress (PAC) demonstrating at Sharpeville, south of Johannesburg, killing 69 and wounding 186.[38] Police also fired on demonstrators at Langa, a suburb of Cape Town. On 30 March a state of emergency was declared and the PAC and African National Congress led by Nelson Mandela were banned shortly afterwards. The parliament then passed the Indemnity Act of 1961.[39] This granted immunity from civil and criminal liability to the State President, members of the Executive Council, officers or members of the defence forces, as well as any persons employed in the public services, the railways, harbour service, police forces or prison service. The immunity would cover any 'act, announcement, statement, or information advised, commanded, ordered, directed, done, made or published' by such persons in good faith on or after 21 March 1960 and before the commencement of the Act.

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[36] Act No. 14 of 1932.

[37] See generally Nelson Mandela, *Long Walk to Freedom*, 1994.

[38] See Muller C. F. J., *500 Years: A History of South Africa*, 3rd ed., 1981, at 499-500.

[39] Act No. 61 of 1961.

The Indemnity Act of 1977[40] came after violent demonstrations by students. On 16 June 1976, 10,000 schoolchildren had taken to the streets of Soweto and other townships to protest against the enforced use of Afrikaans as a medium of classroom instruction.[41] Seventy-six students died in clashes with armed security forces. The Indemnity Act afforded immunity from both criminal and civil liability, in relation to the same types of conduct as the 1961 Act, done on or after 16 June 1976 and before the commencement of the Act. Those coming within the scope of the immunity included the state, members of the Executive Council, persons in the service of the state and persons acting under the authority or by the direction or with the approval of such members or persons.

In 1990, the policy of apartheid was finally renounced and the 30-year ban on the African National Congress was lifted.[42] At this historic juncture the Indemnity Act of 1990[43] was passed into law but, whereas previous amnesties consolidated the position of the oppressors, this one could benefit the oppressed. The preamble to this Act justifies immunity as a means of reconciliation and a means to facilitate the search for common goals and peaceful solutions in South Africa. The Act gave the State President the discretion to grant temporary immunity from criminal and civil proceedings. The immunity would cover acts or omissions committed during such period as he specified, if he was of the opinion that it was 'necessary for the promotion of peaceful constitutional solutions in South Africa or the unimpeded and efficient administration of justice'. The State President was also given the power to grant indemnity, presumably in the sense of permanent immunity, from criminal or civil proceedings.

In the early 1990s the state entered into negotiations with those fighting for freedom and those negotiations ultimately led to the interim Constitution passed in the form of a statute in 1993. Democratic elections took place in South Africa from 26 to 29 April 1994.[44] The

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[40] Act No. 13 of 1977.

[41] See Muller, note 38 *supra*, at 533.

[42] See State President F. W. De Klerk's address to Parliament in *Debates of Parliament*, 2 February 1990, col. 2.

[43] Act No. 35 of 1990.

[44] See O'Shea, 'The Making of a New South Africa', *New Law Journal*, May 1994.

new interim Constitution[45] contained a bill of rights.[46] The epilogue to the constitution, entitled 'National Unity and Reconciliation', required amnesty to be granted in respect of acts, omissions or offences 'associated with a political objective and committed in the course of the conflicts of the past'. To give effect to this, Parliament passed the Promotion of National Unity and Reconciliation Act 34 of 1995.[47] This Act established a truth commission[48] consisting of three committees – the Committee on Human Rights Violations,[49] the Committee on Amnesty[50] and the Committee on Reparation and Rehabilitation.[51]

The Amnesty Committee decides on amnesty applications either on paper or after a public hearing.[52] However, this innovative amnesty law does not permit the Amnesty Committee to give amnesty lightly. Individual perpetrators of past wrongs must give a full account of what they had done and the context within which it was done. The Act refers to this as 'full disclosure'. [53] Such disclosure of the facts, it was believed, would contribute towards remembering, not forgetting, the full truth about the past in the hope that this would reconcile the nation and ensure that the future was secure. In addition, the applicant must have acted in support of a publicly known political organisation, the state, or in furtherance of a *coup d'etat* in terms of section 20 (2) of the Act. The application must also be in respect of acts, omissions or offences associated with a political objective, and committed in the course of conflicts of the past.[54]

In terms of section 20 (3) of the Act, the question whether an act, omission or offence is 'associated with a political objective' is answered having regard to the following criteria:

> (a) The motive of the person who committed the act, omission or offence:

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[45] Act No. 200 of 1993, as amended by Acts 2/1994, 3/1994, 13/1994, 14/1994 and 29/1994.

[46] Chapter 3, entitled 'Fundamental Rights' (ss. 7-35).

[47] Act No. 34 of 1995 as amended by Acts 87/1995, 104/1996, 18/1997, 47/1997 and 84/1997.

[48] 'The Truth and Reconciliation Commission': section 2 (1).

[49] See section 12 to 15.

[50] See sections 16-22.

[51] See sections 23-7.

[52] See section 19.

[53] Section 20(1)(c).

[54] Section 20(1)(b).

> (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
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> (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
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> (d) the object or objective of the act, omission or offence and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
>
> (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
>
> (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.

In order to exclude personally motivated offences, it is then stated that an act, omission or offence associated with a political objective does not include,

> any act, omission or offence committed by any person referred to in subsection (2) who acted
>
> (i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
>
> (ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.

The effect of the granting of amnesty is set out in section 20 (7) of the Act, which provides that,

> (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the state shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.
>
> (b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence on any criminal liability of any other person contingent on the liability of the first-mentioned person.

In recognition of the fact that deceased persons will not have the opportunity to apply for amnesty, and to exclude liability of third persons for eligible acts or omissions of such deceased, the section further provides that,

> (c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by any person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act omission or offence.

C. *South African decisions on the validity of amnesty*

In 1996, the Azanian People's Organization (AZAPO), a political grouping that was part of the liberation movement, brought an application before the Constitutional Court to challenge the constitutionality of section 20 (7) of the Promotion of National Unity and Reconciliation Act.[55] AZAPO and relatives of political activists killed during the apartheid era also applied to the Cape Provincial Division for an injunction against the Truth and Reconciliation Commission and members of the Amnesty Committee in their

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[55] See *Azanian People's Organization (AZAPO) and others v. President of the Republic of South Africa and others* (1996) 1 BHRC 52. See Braude and Spitz, 'Memory and the Spectre of International Justice: A Comment on AZAPO (1997) 13 *SAJHR* 269; Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question.' (1997) 13 *SAJHR* 258; Moellendorf, 'Amnesty, Truth and Justice: AZAPO' (1997) 13 *SAJHR* 283; O'Shea, 'Should Amnesty Be Granted to Individuals Who Are Guilty of Grave Breaches of Humanitarian Law? - A Reflection on the Constitutional Court's Approach', (1997) 1 *HCLJSA* 17.

individual capacities. This was aimed at preventing the granting of amnesties pending a decision of the Constitutional Court on the validity of the Promotion of National Unity and Reconciliation Act.[56]

The test for granting a temporary injunction in South Africa (locally referred to as an interim interdict) is expressed in the joint judgment of Friedman JP and Farlam J in the Cape Provincial Division in the following terms:

> the following requirements have to be established by the applicants, namely a clear right or a right *prima facie* established, though open to some doubt; injury actually committed or reasonably apprehended and the absence of any other ordinary remedy. If the applicants fail to establish a clear right, but establish a *prima facie* right which is open to some doubt, it is then necessary for them to establish that the balance of convenience is in their favour.[57]

In the event, it was held that the applicants had failed to establish either a clear right or even 'a *prima facie* right open to some doubt'.[58]

The applicants contended that the Act[59] was inconsistent with those provisions of the Constitution[60] relating to the function of the judiciary and the powers of the courts to deal with disputes.[61] Section 22 of the interim Constitution[62] is of particular interest. It provides as follows,

> 22. Access to court
> Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.

The court conceded that the Act constitutes an infringement of the right of access to the courts contained in section 22 of the interim Constitution but held that it was justified by the need for reconciliation

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[56] See *Azanian People's Organization (AZAPO) and others v. Truth and Reconciliation Commission and Others* 1996 (4) SA 562.

[57] Ibid., at 568-9.

[58] Ibid., at 576.

[59] In particular s. 20 (7), s. 20 (8) and s. 20 (10).

[60] Interim Constitution: see *supra*.

[61] Sections 7(4)(a), 22, 96(1), 96(3), 98(2), 98(3) and 101(3)(b).

[62] The constitutionality of the Act or amnesty decisions would now be determined in terms of the provisions of the new Constitution. Section 34 contains the right of access to court.

and reconstruction as expressed in the epilogue.[63] The submission to the effect that the word 'amnesty' in the epilogue only covered criminal liability and not civil liability was also rejected. The applicants relied strongly on an article by Professor Zyad Motala of Howard University, Washington.[64] Two passages are cited from the exposition of the learned author. At one point the author states that,

> .....in suspending and cancelling any civil action the victims of war crimes may bring against alleged offenders, the Act violates a peremptory norm of international law which provides rights to individual victims of war crimes regardless of the attitude of the State.[65]

At another point the author states that,

> the Act, to the extent that it grants amnesty to war crimes, violates a cardinal rule of international humanitarian law, namely that there can be no amnesty for war crimes.[66]

The author appears to have given an unduly broad interpretation of the notion of *jus cogens* (peremptory norms of international law), which is unfortunately reflected in the court's express reference to 'the peremptory rule prohibiting an amnesty in relation to crimes against humanity'.[67] Although the contents of the Geneva Conventions of 1949 have undoubtedly entered into the corpus of customary international law, the concept of *jus cogens* is far more limited.[68]

The court answered the point by referring to the provisions of the Constitution that suggest that acts of parliament take precedence over treaties[69] and customary international law.[70] It further relied on Protocol

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See *AZAPO v. Truth and Reconciliation Commission*, *supra*, at 570, paras E-E-F.

[64] See Motala, 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 *Comparative and International Law Journal of Southern Africa* 338.

[65] Ibid., at 339.

[66] *Idem.*

[67] See *AZAPO v. Truth and Reconciliation Commission*, *supra*, at 572, para D.

[68] See John Dugard, *International Law, A South African Perspective*, 1994, at 35; Andreas O'Shea, *International Law and Organization, A Practical Analysis*, 1998, at 23-4.

[69] Section 231 (1).

[70] Section 231 (4).

II to the Geneva Conventions which relates to armed conflicts within the territory of one state. Article 6 (5) of the Protocol provides that,

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

This article was relied upon in support of the proposition that there is an exception to the peremptory rule prohibiting amnesty for crimes against humanity, applicable in relation to conflicts such as the one in South Africa. Although the court recognized the existence of a *prima facie* presumption that Parliament does not intend to act in breach of international law, it found it unnecessary to consider further 'the applicability of *jus cogens*' to the interpretation of the Constitution because of this exception.

The court's misguided reference to *jus cogens* as if it referred to a broad range of crimes was unfortunate.[71] It might be partly due to this that it failed to consider the possibility that although the provisions of the Act were not unconstitutional *per se*, in so far as and only to the extent that they contravened rules of *jus cogens*, they might be. Article 6 (5) of Protocol II would not affect such a conclusion since it relates to humanitarian law as a whole, of which rules of *jus cogens* form a small part.

The court referred to norms of *jus cogens* but did not consider whether customary international law not constituting *jus cogens* has any bearing on the question. Article 6(5) of Protocol II would not prove the non-existence of a customary rule since, unlike *jus cogens* which invalidates a treaty provision to the contrary, parties to a treaty may agree to a provision between them which contravenes the normal custom quite intentionally. Article 6(5) does not therefore prove or reflect a general rule of international law. In the event that article 6(5) does not reflect a customary rule to the same effect, it cannot apply to

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[71] Professor Dugard points out that the obiter dictum that the 'Interim Constitution would "enable Parliament to pass a law, even if such is contrary to the jus cogens" was both unnecessary (as the Court itself conceded) and unwise as it seriously undermines the Constitution's clear intention of establishing harmony between international law and municipal law': see Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question', note 55 *supra*, at 264-5.

the situation as it pertained in South Africa during the era of apartheid. This is because South Africa was not a party to Protocol II during that period.[72]

The court was referred to the Geneva Conventions of 1949 and properly relied on Protocol II in its analysis, despite the fact that Protocol II was not binding on the Republic during apartheid. Yet, the analysis did not include international human rights treaties, some of which South Africa have ratified, some of which they have signed but not ratified; and others which they have not signed or ratified, but which have influenced the Bill of Rights of the Constitution. In *S v. Makwanyane*, Chaskalson P, commenting on section 35(1) which requires reference to international law in the interpretation of the Bill of Rights,[73] said,

> In the context of s35 (1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for the purpose decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Court of Human Rights and, in appropriate cases, reports of specialized agencies such as the International Labour Organization may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.

Precedents from some of the above-mentioned jurisdictions actually exist in relation to the question of amnesty and its consistency with international human rights treaties with provisions similar to the South African Constitution and it is unfortunate that reference was not made to them.

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[72] South Africa only acceded to the Protocols on 21 November 1995.

[73] Section 35(1) of the interim constitution provides that in the interpretation of Chapter 3, a court '... shall, where applicable, have regard to public international law applicable to the rights entrenched in this Chapter, and may have regard to comparable foreign case law'. Accordingly, section 35(1) does not in principle apply to the epilogue of the interim constitution. However, it is submitted that since it applies to s.22 in so far as it limits the fundamental right proclaimed therein, both provisions must be interpreted applying the test in s. 35(1).

The manner in which international law was employed in the interpretation of the constitution was little improved upon by the Constitutional Court. The argument that the amnesty process contravened section 22 of the Constitution was pursued before the Constitutional Court. The Court held that section 22 could be limited by another provision of the Constitution or by the limitation clause contained in section 33. It found that it was effectively limited by the express reference to amnesty in the epilogue to the Constitution entitled 'National Unity and Reconciliation'.

Submissions were made on the applicability of the 1949 Geneva Conventions and the applicability of customary international law was an issue that was at least indirectly referred to in the heads of argument and/or oral argument.[74] Mahomed DP addressed the question of the applicability of international law in the following passage:

> The issue which falls to be determined in this court is whether s 20(7) of the Act is consistent with the Constitution. If it is, the inquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law.

The second sentence of this paragraph is unfortunate, but it is clear from the following sentence that the Constitutional Court recognized its duty to have regard to international law in the interpretation of the Constitution. Unfortunately, one is left with the impression that the Court felt that the provisions of the Constitution were so clear that it was unnecessary to consider the implications of international law. This is reflected in the following passage:

> The exact terms of the relevant rules of the Geneva Conventions relied upon on behalf of the applicants would therefore be *irrelevant if, on a proper interpretation of the Constitution*, s. 20(7) of the Act

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[74] An article dealing with the question was before the Court: see *AZAPO* decision, *supra*, at 691, footnote 32; see Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *100 Yale L.J* 2537, at 2584-5, 2591-3.

> is indeed authorised by the Constitution, but the content of these Conventions *in any event* do not assist the case of the applicants. [emphasis added].

The extent to which the Act is consistent with the interim Constitution is not so clear. The epilogue states that, in order to advance reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with a political objective and committed in the course of the conflicts of the past. It then specifically invites Parliament to lay down 'criteria' for dealing with amnesty applications. Since the epilogue does not expressly refer to 'all' acts, omissions and offences, the reference to criteria may be interpreted as an invitation to Parliament to refine the conditions for the granting of amnesty and therefore exclude certain categories of applicants from eligibility.[75] The statement, 'in order to advance reconciliation and reconstruction' might also be interpreted as giving Parliament the discretion to deem certain amnesties as not advancing reconciliation. The reference to political objective might further be interpreted as excluding acts that violate certain norms of international law.[76] This approach is commonly taken with respect to certain classes of acts in extradition matters on the basis that there would not be a sufficiently close and direct link between the crime and the alleged political purpose.[77] Further, 'amnesty' is not defined and it is unclear from the epilogue whether it applies to only criminal or to criminal and civil liability.[78] The fact that this provision limits the effect of section 22 gives further weight to these possible interpretations of the epilogue.

The other provision that the Court relied on was section 33. This is the limitation clause of the interim Constitution. It provides that rights

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[75] The Act in fact does this by defining categories of persons entitled to amnesty in s. 20(2). For instance, a person acting in support of an organization which was not 'publicly known' would not qualify for amnesty even though his act was associated with a political objective and committed in the course of the conflicts of the past.

[76] See chapter 11 *infra*, at 301-7.

[77] See e.g. *T. v. Secretary of State for the Home Department* [1996] 2 All ER 865, at 899, per Lord Lloyd. Legislation (e.g. the *Australian Extradition Act 1988* with respect to, inter alia, genocide, torture, hijacking and hostage-taking) and Treaties (e.g. *European Convention on the Suppression of Terrorism of 1977*) expressly exclude certain international crimes.

[78] The Constitutional Court made no reference to international law in addressing this question.

in the Bill of Rights may only be limited by a law of general application, that is reasonable and justifiable in an open and democratic society based on freedom and equality. One might question the extent to which it can be reasonable and justifiable in an open and democratic society based on freedom and equality[79] to limit the right of access to court in a manner that violates a state's international obligations. International law is, after all, both a source and guardian of democracy.

The constitution is therefore open to more than one interpretation and the Constitutional Court ought to have given more pre-eminence to the relevance of international law.

It is further submitted that there is an obligation to 'have regard' to international law[80] that goes beyond not lightly presuming that Parliament would authorise a law in conflict with South Africa's international obligations. International treaties obviously influenced the content of the South African Bill of Rights. The history of South Africa's struggle emphasizes both the role of and internal contempt for international law. The events leading up to the negotiation of the interim Constitution embraced a significant input from the international community. It is therefore suggested that the constitution must have been concluded in the belief that it was consistent with South Africa's international obligations and that any reasonable interpretation consistent with international law should be preferred. Indeed, section 233 of the new constitution provides that,

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[81]

Apart from the light which this sheds on the significance of international law in the interpretation of a South African constitution in

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[79] These words must also be interpreted having regard to international law.

[80] Section 35(1) of the Interim Constitution.

[81] The Constitutional Court could have made reference to this since the new Constitution was adopted on 8 May 1996 and the Court delivered its judgment on the 25 July. It would not however have been bound to apply it unless it was deemed that the interests of justice so required (arguably so): Para. 17 of Schedule 6 to the Constitution provides that, 'All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.'

the new era, the interim Constitution is also in the form of legislation[82] which is arguably subject to section 233.

The Constitutional Court in the AZAPO case also failed to consider the significance of customary international law[83] or international human rights treaties; not to mention making reference to the Latin American case law on the interpretation of such treaties.[84]

Thus, one can see that neither the Cape Provincial Division nor the Constitutional Court adequately addressed the question of the compatibility of the South African process with international law. It is perhaps not surprising therefore that the Amnesty Committee has also failed to give the application of international law any attention. Its role in this regard would be to interpret the provisions of the statute, having regard to the limits imposed by international law. It remains to be seen whether and how the matter will be canvassed in the final report of the truth commission.[85]

In the chapters that follow, some of the issues that were inadequately addressed in the South African domestic forums will be analysed with respect to amnesty laws generally. Chapter 10 will consider how South African law can be reconciled with the state's international obligations. It is envisaged that this case study will assist in formulating international principles for the limitation of domestic amnesty laws that can realistically operate in harmony with domestic priorities.[86]

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[82] See *Magano v. District Magistrate, Johannesburg (2)* 1994 (4) SA 172; cf. *Government of the Republic of Namibia v. Cultura 2000* 1994 (1) SA 407.

[83] As to which see Dugard 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question' (1997) *SAJHR* 258.

[84] Although it did in fact make reference to selected Latin American countries to support the legitimacy of the amnesty process.

[85] Although the final report has been released, the section on amnesty remains undone owing to the extended amnesty hearings.

[86] See Chapter 12 *infra*.

3. *The Latin American Amnesty Laws*

In the 1980s Latin American states resurrected the Athenian dimension[87] to the concept of the amnesty law when new governments introduced or retained amnesty laws for human rights violators of the prior regimes. This dimension has given amnesty a modern meaning that is likely to endure. These laws retained the feature of generality and immediacy of effect. They were also designed, in a fashion similar to the peace treaty clauses, to maintain peace and stability.

Subsequent challenges before the Inter-American Commission on Human Rights brought to light how these laws may not have been in line with other international developments in terms of state obligations to investigate and punish human rights violations. In earlier times, the legality of amnesties was not questioned but endorsed and encouraged. Before the innovative marriage of the concepts of impunity and human rights, initiated by the South African transition, it was conceivable that these legal challenges might have been the beginnings of the death knell for an ancient legal concept.

The concept of an amnesty law and the subsequent debate over its legality infected the Latin American region like the amnesty clause in the peace treaties had infected Europe centuries before.[88] Here, we briefly examine amnesty laws in Argentina, Chile, El Salvador and Uruguay.

A. *Argentina*

From March 1976, Argentina[89] experienced seven years of military dictatorship after a coup deposed President Isabel Peron. Just before the democratic elections of 1983 that brought Raoul Alfonsin's Radical Party to power, the former regime introduced an amnesty law, known as 'the Law of National Pacification'. This indemnified those suspected of acts of state terrorism and members of the armed forces for offences committed between 25 May 1973 (which saw his return to power of General Juan Peron) and 17 June 1982 (the resignation of President Galtieri after the war with Britain over the sovereignty of the Falklands

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[87] See Chapter 2 *supra*, at 5-6.

[88] See Chapter 1 *supra*, at 7-15.

[89] For a discussion of the duty to prosecute in the Argentinian context, see Nino, 'The Duty to Punish Past Human Hights Put into Context: The Case of Argentina' 100 *Yale LJ* 2619.

islands).[90] The pacification law excluded from its benefits members of 'terrorist or subversive' organizations, who demonstrated an intention to continue to be connected with those organizations.[91] It is recorded that many political prisoners immediately refused the benefits of the law,[92] which had the effect of preventing both criminal and civil proceedings and had immediate unconditional application to persons eligible to its provisions.[93]

Days after taking office on 10 December 1983, President Alfonsin issued a decree ordering the arrest and prosecution of high-ranking military officers.[94] On 27 December, Congress repealed the amnesty law created by the previous regime.[95]

Alfonsin established[96] the National Commission on the Disappeared (*Comision Nacional para la Desaparicion de Personas*).[97] The Commission did not incorporate any amnesty process akin to the South African mechanism but in fact forwarded information on disappearances to the justice system.[98] Its report (*Nunca Mas*) was widely disseminated.

Trials began before the Supreme Council of the Armed Forces[99] for acts committed between 24 March 1976 and 26 September 1983. However, on 5 December 1986 Alfonsin declared that it was time to extinguish 'interminable suspicion' attached to military officers, who must start to take part in rebuilding a democratic society. On 29 December 1986 the 'full stop law' (*ley de puncto final*) was passed imposing a 60-day deadline for lodging formal charges and issuing summonses for crimes 'related to the establishment of political

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[90] Law No. 22.924 of 22 September 1983: reproduced in Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, vol. III, *Laws, Rulings, and Reports*, 1995, at 477.

[91] Ibid., article 2.

[92] See Americas Watch, *Trust and Partial Justice in Argentina*, 12 August 1987, cited by Kritz, ibid., vol. II, Country Studies, at 327, note 68.

[93] See articles 5 and 6.

[94] Decree 158: see Kritz, note 90 *supra*., vol. II, *Country Studies*, at 332-3.

[95] See Law No. 23.040 of 27 December 1983: reproduced in Kritz, note 90 *supra*; Smulowitz, 'Argentina' in Boraine and Levy (eds.), *The Healing of a Nation?* 1995, at 61.

[96] Decree No. 187/83, promulgated 15 December 1983.

[97] See Hayner, 'Fifteen Truth Commissions - 1974 to 1994', (1994) *Human Rights Quarterly* 597.

[98] Ibid., at 60.

[99] The highest military tribunal

action'.[100] This law, as with the previous amnesty, had immediate effect. They did not, as in South Africa, require the beneficiaries to apply for amnesty and give full disclosure of the events surrounding the commission of the offences. Full advantage was taken of the deadline to institute further proceedings.

On 4 June 1987, in the face of pressure resulting from internal revolt within the army and the failure of army officials to respect court orders, Congress passed the *due obedience* law.[101] This created a presumption that, 'without proof to the contrary being admitted', officials were following orders and had no possibility of resisting those orders, which would thus render them innocent. This was not called an amnesty law, but it would ultimately have a similar effect in ensuring that those subordinates responsible for violations of human rights remained unpunished. It excluded crimes of rape, kidnapping and hiding of minors, change of civil status and appropriation of immovable property through extortion.

Unconditional amnesties were finally granted in 1989 and 1990 to specified persons, through the adoption of presidential pardons.[102] This was justified in order to 'overcome the deep divisions that still remain in the heart of our society'.[103] In April 1998, the *due obedience* law was repealed, although not annulled.[104]

B *Chile*

Between 1973 and the end of 1989 Chile suffered sixteen years of military dictatorship under General Augusto Pinochet. The new government of 1990, led by Patricio Aylwin, did not reverse an amnesty law which had been introduced by the old military regime in 1978. This law covered the period 1973 to 77,[105] and differs radically

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[100] Law 23.492 of 23 December 1986: reproduced in Kritz, note 90 *supra*, vol. III, *Laws, Rulings, and Reports*, at 505.

[101] See Law No. 23.521 of 4 June 1987: reproduced in Kritz, note 90 supra, vol. III, *Laws, Rulings, and Reports*, at 507.

[102] See Decree 1002/89 of 6 October 1989 and Decree 2741/90 of 29 December 1990, both reproduced in Kritz, note 90 *supra*, vol. III, *Laws, Rulings, and Reports*, at 529 and 531 respectively.

[103] See preamble to Decree 1002/89, ibid.

[104] Naomi Roht-Arriaza and Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *HRQ* 843, at 859.

[105] See Zalaquet, 'Chile' in Boraine, Levy and Scheffer (eds.), *Dealing with the past: truth and reconciliation in South Africa*, 2nd ed., 1997, at 47-53.

from the negotiated process in South Africa. Apart from being self-awarded, the Chilean amnesty was unconditional for those to whom it applied. Furthermore, it extended to 'all persons who, as principals or accessories, have committed criminal offences during the period of state of siege ... '[106] However, it excluded common crimes such as infanticide, armed robbery, rape, incest, fraud, embezzlement, crimes of dishonesty and drunk driving.[107] The list of exceptions notably did not include homicide, kidnapping and assault,[108] nor did it apply to civil proceedings, although this had theoretical value to the victims of crimes long past.

Unlike Argentina's ephemeral self-amnesty, annulled in the context of an army that was demoralised and weak owing to the Falklands War and lack of popular support, the new democratic government could not easily revoke the Chilean self-amnesty. It had been in existence for a long time. The army had lost power through a plebiscite that it had introduced, but it remained strong and influential. The old regime continued to muster minority support and the right-wing elements had a sufficient stronghold in the Congress to block moves to delegislate the law.[109] Aylwin's reference to making efforts to have the law repealed met with fierce opposition suggesting that this would breach the compromise requiring respect for the institutional framework established by the prior regime.[110]

As in South Africa and Argentina, serious attempts were made to ensure that the failure to prosecute did not culminate in the burial of the truth about past human rights violations. The difference from the South African model lies in the fact that amnesty, truth and reparations were not treated as an integrated process and amnesty was not employed as a mechanism for eliciting the truth.[111] Six weeks after President Aylwin's

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[106] See Americas Watch, *Human Rights and the "Politics of Agreements": Chile during President Aylwin's First Year* (Human Rights Watch, 1991), 40-4, 50-2: reprinted in Kritz, note 90 *supra*, vol. II, Country Studies, 499 at 500.

[107] See Robert J. Quinn, 'Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model' (1994) 62 *Fordham L. Rev.* 905, at 906, 918.

[108] See note 106 *supra*.

[109] Ibid., at 501, see also Jorge Correa S., 'Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship' (1992) 67 *The Notre Dame Law Review* 1457-64.

[110] *Idem*.

[111] For the implications of the differences for the international acceptability and legality of the respective processes, see chapters 10 and 11 *infra*.

inauguration, the government established the Commission on Truth and Reconciliation. It had several functions. It would create as complete a picture as possible of human rights violations and identify the victims and their fate. It would further recommend measures of reparation for the families of victims, vindicate the reputation of victims and recommend legal and administrative measures to prevent similar deeds from being committed in the future.[112] It had nine months in which to produce a report. The Commission was directed to forward evidence of criminal activity to the courts. President Aylwin called for 'justice to the extent that is possible'. The Commission further recommended the creation of a body to encourage and co-ordinate the compensation of the victims.

The Commission's report was submitted to the Supreme Court by the government and the court was directed to hasten investigations into individual responsibility for human rights violations.[113] Prosecution would not be possible for those cases covered by the amnesty law, the legality of which had been confirmed by the Supreme Court.[114] However, prosecutions were instituted for offences committed after 1978 and for one offence committed in the United States before 1978 which was not covered by the amnesty law.[115]

In 1998, the former military dictator of Chile, General Pinochet (as he then was) travelled to the United Kingdom for medical treatment but found himself subject to arrest, following the issuing in Spain of an international warrant for his arrest. The geographical limitations of the amnesty from which he benefited suddenly became patently clear.[116] During legal proceedings in the United Kingdom challenging the validity of his arrest and possible extradition, it was never in issue that the amnesty law had any effect outside of Chile.[117] When Pinochet eventually was able to return to Chile, not only did he to face an

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[112] See Aylwin, 'Chile' in Boraine and Levy (eds.), *The Healing of a Nation?* 1995, at 38.

[113] See ibid., at 41.

[114] See note 106 *supra*.

[115] See Zalaquett, ibid., at 52-3.

[116] On this issue see Andreas O'Shea, 'Pinochet and beyond: the international implications of amnesty' (2000) 4 *SAJHR* (in print at the time of writing); see also chapter 12 *infra*.

[117] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening)* [2000] 1 AC 61; *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147.

increasing number of civil actions but the Supreme Court overruled the old amnesty law.[118] In two previous decisions, the Supreme Court had upheld the legality of the amnesty, relying, *inter alia*, on the fact that there was no non-international armed conflict within the meaning of the Geneva Conventions of 1949, and on article 6(5) of Protocol II to the same Conventions.[119]

C *El Salvador*

El Salvador's transition to democracy was achieved through international agreements and the assistance of the United Nations.[120] The Treaty of Esquipulas was signed on 7 August 1987 and provided for a general amnesty. Therefore, the mechanisms and safeguards of the South African process, including the requirement of full disclosure, were distinctly absent. In December 1989, the government of El Salvador and the liberation movement[121] approached the United Nations Secretary-General for assistance. The San José Accord[122] led to the creation of the Observer Mission in El Salvador (ONUSAL).[123] This was followed by further agreements for the consolidation of peace in El Salvador.[124]

The Commission on Truth for El Salvador was created by the Mexico Agreement of 27 April 1991, with the mandate of 'investigating serious acts of violence which took place after 1980 and whose impact on society demands, as a matter of the greatest urgency, public knowledge of the truth'.[125] The Commission had six months to

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[118] See 'Chilean Supreme Court strips Pinochet of immunity', 8 August 2000 (*www.cnn.com/2000/WORLD/america/08/chile.pinochet.02/*)

[119] See Roht-Arriaza and Gibson, note 104 *supra*, at 848 and 864. On the question of the application of article 6(5) see 63-64 *supra*, and chapter 6 *infra*., at 208-9. On the application of the Geneva Conventions, see generally chapter 6 *infra*.

[120] See Tappata de Valdez, 'El Salvador' in Boraine and Levy (eds.), *The Healing of a Nation*, 1995, at 66-77.

[121] Frente Farabundo Marti para la Liberacion National (FMLN).

[122] Signed 26 July 1990.

[123] Security Council Resolution 693 of 1991.

[124] New York Agreement signed 25 September 1991; Mexico Agreements signed 16 January 1992 (ONUSAL's authority was extended to the implementation of these agreements by Security Council Resolution 729 of 1992)

[125] UN Doc. S/25500 (April 1, 1993): reprinted in Kritz, note 90 *supra*., vol. III, *Laws, Rulings, and Reports*, at 174.

complete its work, but again had no role to play in the amnesty process. It produced its report to the Secretary-General of the United Nations in March 1993.[126]

The Law of General Amnesty for the Consolidation of Peace of 1993 implemented the amnesty on a national level.[127] This replaced an earlier more restricted amnesty[128] 'in order to be consistent with the development of the democratic process and the reunification of the Salvadorian society' and 'in order to drive toward and to achieve national reconciliation'. The law provides that 'a broad, absolute and unconditional amnesty' is to be granted to those who participated in 'political crimes, crimes with political ramifications, or common crimes committed by no less than twenty people, before 1 January 1992'.[129] Kidnapping, extortion, drug-related offences and certain crimes committed with a view to profit are excluded from its scope. This differs from the models of Argentina, Chile, South Africa and Uganda by excluding certain serious categories of crimes and differs specifically from the South African in the important respect that there is again no accompanying condition of disclosure. As in South Africa, the law covers civil as well as criminal responsibility.[130]

When the legality of amnesty was challenged before El Salvador's Supreme Court, the Court held itself incompetent to rule on the matter because it considered that to rule on a purely political question would contravene the principle of separation of powers.[131] As with the supreme courts of other countries, it further incidentally referred to article 6(5) of Protocol II to the Geneva Conventions of 1949 encouraging 'the broadest possible amnesty' after non-international hostilities.[132]

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[126] See *From Madness to Hope: The Twelve-Year War in El Salvador: Report of the Commission on Truth for El Salvador*, UN Security Council, U.N. Doc. 2/2500 at 18 (1993).

[127] Decree No. 486 (20 March 1993): reproduced in Neil J. Kritz, *Transitional Justice, How Emerging Democracies Reckon With Former Regimes*, 1995, at 546-8.

[128] The Law of National Reconciliation, Legislative Decree #147, Official Journal #14, Volume 314.

[129] Article 1.

[130] Article 4 (e).

[131] See Proceedings No. 10-93 of 20 May 1993: reprinted in Kritz, note 90 *supra*, at 549-55.

[132] As to which see 49-51 *supra*, and chapter 6 *infra*, at 154-55.

D *Uruguay*

Uruguay endured more than a decade of military oppression before a change effected through the so-called Naval Club Pact of 1984. This followed a plebiscite in 1980, which rejected the adoption of a constitution that would have formalized the army's governmental authority.[133] In 1985, one of the first acts of Uruguay's new democratic government under Julio Sanguinetti was to enact an amnesty law for former political activists.[134] It covered 'political, common and related military crimes committed after 1 January 1962'.[135] However, as in the case of El Salvador, it exempted murders and the crimes of police or military officials 'who may have been perpetrators, co-perpetrators or accomplices in inhuman, cruel or degrading treatment, or in the detention of persons who subsequently disappeared, and about whom they may have concealed any of this behaviour'.[136] It also excluded crimes committed for political motives by those 'acting with the backing of the power of the State in any form, or under orders of the government.[137] In the case of murders, individuals would receive reductions in their sentences.[138] Although the law does not expressly deal with this point, it seems relatively clear from the wording and the context that it, like the laws of Argentina and Chile, does not cover civil liability.[139]

Although proceedings were instituted against army officials, it became increasingly difficult for President Sanguinetti to fulfil his former campaign assurance of justice. The army had left power voluntarily and intact, and became increasingly agitated by the prospect of prosecution before the civilian courts. Officers were instructed not to respect court subpoenas and the prospect of civil disobedience loomed large.[140] This ultimately culminated in the limited effect of the former

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[133] See Kritz, note 90 *supra*, vol. II, *Country Studies*, at 383-4.

[134] Law 15.737 of 8 March 1985: reproduced in Kritz, note 90 *supra*, vol. III, *Laws, Rulings and* Reports at 808.

[135] Article 1

[136] Article 5

[137] *Idem.*

[138] Articles 1 and 9.

[139] See especially article 6.

[140] See Americas Watch, Challenging Impunity: *The Ley De Caducidad and the Referendum Campaign in Uruguay*, 1989 at 14-17, reprinted in Kritz, note 90 *supra*, at 385; Lawrence Weschler, *A Miracle, A Universe: Settling*

amnesty law being extended. Uruguay's *Ley de Caducidad* was adopted in 1986[141] to prevent prosecution of agents of the state for acts committed before 1 March 1985 for political motives, or in the performance of their functions pursuant to orders.[142] The law excluded judicial proceedings in which indictments had already been issued and crimes committed 'for personal economic gain or to benefit a third party'.[143]

However, as with the other models, it did not include any condition similar to the unique South African requirement of full disclosure. This notwithstanding, the evidence in all pending prosecutions was to be forwarded to the 'executive branch', which would fully investigate the matter and forward the results of those investigations to the victims.[144] This law, again, did not affect civil liability.[145]

E. *Latin American regional jurisprudence on the legality of municipal amnesty laws*

International bodies, including the UN Human Rights Committee, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, have developed jurisprudence on the consequences under international law of the failure to administer justice in transitional societies.[146] This jurisprudence, in contrast to that of the Supreme Courts of these societies, condemns quite strongly the practice of amnesty for human rights violations. Chapter 6 will focus on the normative analysis of international human rights treaties and will include reference to the decisions of the Human Rights Committee as the principal global arbiter of human rights. This chapter contents itself with an overview of the decisions of the Latin American regional bodies relevant to the laws discussed in the previous section.

Needless to say, other regional human rights bodies in Europe and Africa have not yet had the opportunity to consider the international legality of amnesty in transitional societies. In particular, the South

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Accounts with Torturers, 1990, reprinted in Kritz, note 90 *supra.*, vol. II, *Country Studies*, 393, at 395-400.

[141] Law No. 15,848 of 22 December 1986: reproduced in Americas Watch, ibid., and in Kritz, note 90 *supra.*, vol. III, *Laws, Rulings, and Reports*, at 598.

[142] Ibid., article 1.

[143] Ibid., article 2.

[144] Ibid., article 4.

[145] Ibid., article 1.

[146] See also chapters 6 and 10 *infra.*

African model, with its unique permutations, has not been the subject of international adjudication. More generally amnesties in Africa have avoided international judicial scrutiny as yet. An African Court on Human and Peoples' Rights is close to the point of establishment,[147] but the well-established African Commission on Human and Peoples' Rights has not addressed the question.

In contrast, the institutions of the Organization of American States (OAS) have made an indelible stamp on amnesty jurisprudence. In 1986 the Inter-American Commission gave a tentative opinion on the international legal status of amnesty laws.[148] It felt that in principle states should determine this question having regard to their special need to reconcile the nation. The Commission did, however, recognize the right of the families of victims to know the truth and the Commission considered that states are under a duty to investigate past human rights violations.

The cases of *Velasquez Rodriguez*[149] and *Goninez Cruz*[150] held that it was the responsibility of states to deal with violations of the American Convention of Human Rights by its agents. Both cases concerned the failure of the state to properly address deaths and disappearances and the Inter-American Court of Human Rights rendered very similar judgments in both cases. It is true that neither of these cases directly concerned the legality of amnesty laws, but they gave the legal foundation for future challenges before the Inter-American Commission on Human Rights.

In the *Rodriguez* case the Inter-American Court gave the impetus for condemning amnesty laws. It held that article 1 (1) of the American Convention on Human Rights put state parties in the position where they 'must prevent, investigate and punish any violation of the rights recognised by the Convention'. Moreover, they should, if possible, 'attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation'.[151]

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[147] See generally John Mubangizi and Andreas O'Shea. 'An African Court on Human and Peoples' Rights' (1999) 24 *SAYIL* 256.

[148] Amnesty Laws: The Opinion of IACHR. IACHR Annual Report of the Inter-American Commission. 1985-6. OEA/SER. L/V/11. 68. Doc. 8 rev. 1. 192-92.

[149] Series C. No. 4. para 170; [1989] 28 I.L.M. 291.

[150] Series C. No. 5. para 179.

[151] [1989] 28 I.L.M. 291. 324.

In a series of decisions, the Inter-American Commission has developed a fairly consistent stance on the question of the international legality of transitional amnesty laws under the American Convention on Human Rights. Each of the selected countries discussed above have had their amnesties reviewed before the Commission. In *Consuelo et al. v. Argentina*[152] the petitioners challenged the 60-day deadline law[153] establishing a presumption that military personnel were acting in the line of duty,[154] and also the Presidential Decree of Pardon of 1989.[155] The Argentine government argued that the events being complained about, i.e. the human rights violations, occurred mainly in the 1970s before Argentina ratified the American Convention on Human Rights.[156] The Commission held that the alleged violations were violations of the right to judicial protection under articles 1 (1), 8 and 25 of the American Convention. These violations occurred as a result of laws passed in 1986, 1987 and 1989, after the Convention became binding for Argentina. The petitions were therefore admissible *ratione temporis*.[157]

Argentina argued that it had best dealt with the difficult problem of a solution to human rights violations through a response that came from the very sectors of the nation that were affected. It asserted that the relevant laws were passed by democratic bodies because of a compelling need for national reconciliation and consolidation of a democratic system.[158]

The Commission held Argentina to have violated the petitioners' right to a fair trial under article 8 (1) read in the light of article 1 (1) when it 'denied their right to a recourse, to a thorough and impartial judicial investigation to ascertain the facts'. It was pointed out that in Argentina the victim of a crime has the right to be a party to a criminal charge, which therefore constituted a fundamental civil right to go to court.[159]

The Commission also found article 25 of the American Convention to have been violated without analysing the applicability of the article

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[152] Report No. 28/92, OEA/Ser. L/V/II.83 Doc. 14 at 41 (1993).
[153] Law 23, 492: see note 100 *supra*.
[154] Law 23, 521: see note 101 *supra*.
[155] Decree No. 1002, of October 7, 1989: see note 102 *supra*.
[156] Argentina deposited its instrument of ratification on 5 September 1984.
[157] Report No. 28/92, *supra*, at paras 15-19.
[158] Report No. 28/92, *supra*, at para 25.
[159] Ibid., at paras. 33-4.

to the situation.[160] It further held that Argentina had violated its obligation to ensure the free and full exercise of the rights recognized by the Convention in terms of Article 1(1) of the Convention, citing with approval the statements of the Inter-American Court in the *Velasquez Rodriguez* case.

In *Masacre Las Hojas v. El Salvador*,[161] the Commission received a petition relating to a massacre of about 74 people who were abducted by members of the security forces and shot at close range. Criminal proceedings were pending before the criminal courts when on 28 October 1987 the Amnesty decree was passed.[162] On 18 July 1988, the Supreme Court of El Salvador held the amnesty to be applicable to the Las Hojas massacre.

The Commission held that the Amnesty decree violated article 1 (1) and the right to judicial protection under article 25 of the American Convention. It further held that the right to life protected under article 4, and the right to personal integrity under article 5, are non-derogable rights, and that article 27 prohibits the suspension of guarantees indispensable to the protection of non-derogable rights.

In its 1992 decision on the compatibility of the Uruguay amnesty law with the American Convention on Human Rights,[163] the Commission found that the *ley de caducidad* violated the right to a fair trial under article 8 (1) of the American Convention on Human Rights. The Commission held that it prevented individuals from exercising their rights upheld by this article. It stated that 'the victim's next of kin or parties injured by human rights violations have been denied their right to legal redress, to an impartial and exhaustive judicial investigation that clarifies the facts, ascertains those responsible and imposes the corresponding criminal punishment'.

Further, it held that Uruguay had violated its obligation under article 1(1) of the Convention to 'ensure' the full and free exercise of these rights and its obligation to ensure an effective remedy for the victim under article 25. With respect to its interpretation of article 1 it cited with approval the judgment in the *Rodriguez* case[164] where the court had emphasized the need for punishment and state-controlled investigation.

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[160] Ibid., at paras 38-9.
[161] Report No. 26/92, OEA/Ser. L/V/II.83 Doc. 14 at 83 (1993).
[162] Decree N805, passed by the Legislative Assembly on 27 October 1987.
[163] Report No. 29/92, 2 October 1992, OEA/Ser.L/V/II.82.
[164] See note 151 *supra*.

In *Juan Meneses et al v Chile* the Commission consolidated its previous jurisprudence in relation to Chile's self-amnesty notwithstanding Chile's truth commission and efforts to provide reparation to victims.[165] It held the law to contravene the obligation to respect and ensure the rights of victims in terms of article 1, the right to a fair trial in terms of article 8 and the right to judicial protection in terms of article 25 of the American Convention on Human Rights.[166] While giving recognition to the government's efforts to acknowledge the rights of the victims, it held the truth commission process an inadequate substitute to judicial proceedings.[167] In particular, the investigations were not 'without any legal recourse or other type of compensation'. Since a process of reparations was in place for the benefit of most victims, the Commission was here apparently requiring a specific link between the investigations and the reparations. It was also noted that the Commission was not a judicial body and its mandate was restricted to identifying the victims of the right to life. It could not name or suggest the punishment of the perpetrators.

Latin America has, therefore, made a significant contribution to the development and scrutiny of the practice of amnesty. Transitions in Africa have made their own mark on the debate with new nuances, as demonstrated most clearly in the South African example. In the global and temporal context, one can perceive that while amnesty in the form of laws of general application remains unusual, there is a growing and developing practice of intriguing proportions.

4. *Other Examples of National Amnesty Laws*

For the purposes of building a constructive picture of national trends with respect to amnesty laws it is unnecessary to present an exhaustive global survey of such laws. However, the prominent ones have been discussed and there are a few other examples of amnesty laws from notorious transitions to democracy worthy of a mention.

In 1993 President Jean-Bertrand Aristide of Haiti issued a decree that amnesty would be granted for crimes against the state committed during the 1991 coup led by General Raoul Cédras, but excluding human rights crimes. This was done pursuant to the Governors Island

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[165] See *Juan Meneses et al v. Chile* Cases 11.228, 11.229, 11.182, Report No. 34/96 of 15 October 1996 (1999) 6 IHRR 89.

[166] Ibid., at paras. 49-71.

[167] Ibid., at paras. 73-4.

Accord, which called for the issuing of an amnesty in accordance with the Haitian Constitution, and pressure from General Cedras and the United States for amnesty of a broader nature.[168] The unique feature here was that the rebels had obtained *de facto* control of Haiti. Later, in 1995, an accord was reached by virtue of which Parliament would pass a general amnesty.[169]

In the former Yugoslavia, while the Hague tribunal prosecutes leading figures in the atrocities of the region, both Croatia[170] and the Serbian Republic[171] have passed amnesty laws with a view to nurturing and maintaining peace. Croatia first passed two amnesty acts in 1992,[172] which were subsequently repealed by the Law on General Amnesty of 20 September 1996.[173] The latter expressly excluded offenders responsible for 'flagrant violations of humanitarian law having the character of war crimes'.[174] The government of Croatia issued a list of individuals covered by the law, while the courts issued lists of those not covered by the law. The minister of justice and Croatian judicial officials have made conflicting statements relating to such lists, and in the circumstances the amnesty has done little to comfort the inhabitants of the region.[175]

The Republika Srpska National Assembly (parliament of the Serbian Republic) passed an amnesty law on 24 December 1998. It

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[168] See *Human Rights Watch World Report* 1994, at 107.

[169] See *Human Rights Watch World Report* 1995, at 101.

[170] See *Report of the Secretary-General on the United Nations Police Support Group*: S/1998/500 of 11 June 1998, at para. 29.

[171] See *Report by the High Representative for the Implementation of the Peace Agreement to the Secretary-General of the United Nations* (covering the period October to December 1998), pursuant to Security Council Resolution 1031 of 15 December 1995, at para. 24.

[172] 1992 Amnesty Act Applicable to the Perpetrators of Criminal Acts Committed in the Armed Conflicts and War against the Republic of Croatia, *Narodne Novine*, No. 58, 1992; 1996 Amnesty Act Applicable to the Perpetrators of Criminal Acts Committed in the Temporarily Occupied Areas of Vukovar-Sirmium and Osijek-Baranja, *Narodne Novine*, No. 43, 1996 (both cited by Human Rights Watch in its 1997 report: 'War Crimes Suspects and the Application of the Amnesty', note 40).

[173] See *Human Rights Watch Report*, 1997: 'War Crimes Suspects and the Application of the Amnesty', at 1.

[174] Article 3: *idem*.

[175] See note 170 *supra*.

covers the period right up until the conflict ended *de facto* and, unlike a previous amnesty, also covers deserters and draft-dodgers.[176]

Finally, one should allude to at least one of the few instances of amnesty laws enacted to deal with offences committed during the communist era. In 1990, Romania granted a general amnesty for political offences committed between 30 December 1947 and 22 December 1989.[177] A second law was passed in the same year that extended beyond political offences and was described as a pardon. The interesting aspect of these laws was that they excluded murder, severe bodily injury, rape, theft and prison escape; and also abuse of power contrary to the public interest, bribery, intercession, illegal arrest and abusive investigation, ill-treatment and unfair repression.[178] The second amnesty and pardon also excluded human rights violations and crimes against peace and humanity committed by agents of the state.[179] This respect for the imperative of the international community to maintain the rule of international law, in particular in relation to crimes against international law, is distinctly absent from other national amnesties.

5. *Understanding Transitional Justice: From Amnesty to Legal Liability*

All transitional societies that have suffered atrocities have one thing in common – a need to heal the wounds of the past.[180] The mechanism or approach that they choose will depend not only on perceptions of what is best for the society, but also on the balance of power between the society and its former offenders. This is illustrated by the amnesty laws discussed in this chapter, and indeed by the amnesties discussed in Chapter 1. The amnesty option has rarely been chosen just on the basis of grand notions of forgiveness or reconciliation. The beneficiaries have usually retained some ability to forestall the society's peaceful transition. Likewise, societies have often opted for prosecution when they have completely extinguished the threat of former offenders. The

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[176] See note 171 *supra*.

[177] See Edwin Rekosh, 'Romania: A Persistent Culture of Impunity', in Roht Arriaza, *Impunity and Human Rights in International Law and Practice*, *supra*, 129 at 134-5.

[178] *Idem*.

[179] *Idem*.

[180] See Neil J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights' (1996) 59 *Law and Contemporary Problems* 127.

amnesty laws discussed above, including that of South Africa, have also included fairly modest limitations.

It would be difficult to say that any of these laws were the result of considered and objective analysis of what was best for the society, and also having regard to its responsibility to the entire international community. International principles of law have the advantage that they can be formulated in a freer environment and in a less impulsive manner. They also enable the negotiators of national laws to set their limits on the basis of international obligations rather than power politics. Whereas it is desirable for negotiators to refer to international law, its perceived lack of clarity has meant that it has only been properly considered judicially after the event. National forums are constrained by national priorities as already laid down in the amnesty laws themselves. International tribunals are judging a *faite accomplis*. This work aims to contribute towards the derivation of clear international principles that may be referred to at the appropriate time.

It is in this light that the amnesty option, and its rationale, should be objectively compared with the alternative of legal liability and its rationale. This might provide a more balanced picture of priorities than can be expected at the national level. This will ultimately inform the debate over international legal limitations, in terms of where amnesty falls in the overall objective of the international community of promoting peace and human rights. The rationale of legal liability in its basic forms of criminal and civil liability is therefore addressed in the chapter following. However, in order to obtain a full picture of the dynamics of transitional justice this is insufficient. The national perspective needs to be placed within the global framework of transitional justice. While there is a developing practice of amnesty on a national level, there is also a developing practice of prosecution on a global level, and a developing practice of extradition on the inter-state level. Chapter 4 will examine this multidimensional facet of transitional justice.

CHAPTER 4

THE RATIONALE OF LEGAL LIABILITY AND AMNESTY

1. *Introduction*

My brief analysis of amnesty laws has revealed that there is a noticeable practice among states of opting for amnesty rather than prosecution of past offences. Yet, in looking holistically to the recent global practice of 190-odd states, past violators of human rights do not normally benefit from a formal amnesty. Even where there has been a change of government or the conclusion of a war, amnesty is not common in cases where the new government has gained power through the use of force or the victor in war has felt secure in its victory.

In the absence of amnesty, national and international laws have taken their normal course. Amnesty must be understood in the light of the basic alternative of legal liability. Laws for the imposition of liability for wrongs committed, both national and international, criminal and civil, form the basic framework within which amnesty finds its slot as an exception to the normal process of law. Ultimately, amnesty laws must be viewed within the context of, and reconciled with, the rationale of legal liability. This will inform the examination of the proper limits of amnesty laws undertaken in the chapters that will follow.[1]

The term liability is used because it is the antithesis of amnesty, which renders a person immune from one or both of these forms of liability. Where there is no amnesty, liability persists. So, technically speaking, it is the rationale of liability that needs to be measured against the rationale of amnesty.

The rationale of liability is treated here as covering the justification for each of the processes involved to rendering a person accountable for their actions. The fact that a person is liable does not necessarily mean

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[1] See chapters 6-12, *infra*.

that he will be prosecuted or sued, or that if he is, that punishment or an order for damages will follow. However, the law would provide that he has committed a crime or wrong that merits punishment or the requirement to compensate. Thus, he is liable or, to put it another way, open to criminal or civil proceedings that may culminate in some form of punishment or adverse order. It follows that the rationale of criminal liability is the same as the basic rationale of prosecution and punishment of an individual before a national criminal court. Likewise, the rationale of civil liability is the same as the basic rationale for the pursuit of a private civil claim against the perpetrator or his principal, and the subsequent damages or other order. Other factors may come into play at the various stages of the proceedings, but for our purposes it is the basic rationale with which we are concerned. The very notion of legal liability rests on the premise that it may culminate in punishment or some other order adverse to the person who is legally liable. If a person who would normally be liable fails to qualify for amnesty, then he remains liable. Since amnesty is meant to obviate the ultimate sanction, one can assume for the purposes of the present inquiry that the law will take its normal course. Therefore, the rationales of criminal and civil liability may be treated, for present purposes, as synonymous with the purpose of prosecution or punishment and of civil action or damages respectively.

Furthermore, the term legal liability is used here to cover both criminal and civil liability. The examination of impunity as a phenomenon frequently focuses exclusively on the criminal process of prosecution and punishment. While most amnesties operate solely within the criminal arena, which therefore deserves special attention, an amnesty law may indemnify an individual not only against criminal prosecution and punishment, but also against civil actions. So the question of civil liability needs some attention. Those amnesty laws that include immunity from civil liability must also be looked at in the context of, and reconciled with, the rationale of civil liability. Accordingly, while the next chapter, which moves into the broader global framework, will focus on criminal prosecution, this chapter includes the issue of civil liability. The rationale of civil liability has received very little scholarly attention – philosophers and sociologists, in particular, have rather become subsumed in debates over the rationale of the punishment of criminals.

There is not much to add to the general academic terrain concerning the purpose of punishment of criminals but amnesty does give the issue a new life and dimension. Here we are concerned with offences

committed in a political context.[2] The concept of a political offence will be given more detailed treatment in Chapter 11.[3] For present purposes, it suffices to say that a criminal offence is usually committed for private gain, but where there is a political motive for the offence, different considerations may apply to questions of punishment. The traditional examination of the justifications of punishment are meant to apply generally to crimes, but it is worth examining whether these theories require any refinement when applied to the political context. The justifications for amnesty themselves constitute a form of refinement of the understanding of punishment. Nevertheless, one should go further in analysing whether the actual justifications of punishment should be viewed with any degree of peculiarity when applied to political offences independently and in the light of the considerations that underlie amnesty.

International crimes form an important component of the category of political offences. Those who have explained punishment have addressed the question within the framework of national criminal justice and have not paid any particular regard to the international crime. This is partly because municipal legal systems have been the natural home for criminal justice and partly because international criminal law and its enforcement at an international level are relatively recent developments. Hitherto, when classical writers addressed their minds to criminal justice, international crimes were few – essentially they incorporated war crimes, the crime of piracy and perhaps at a later stage slavery. International criminal tribunals were present more in the imagination of jurists than in reality. The rapid development of the international dimension to criminal justice requires a reappraisal of the theories of the classical writers.

Modern writers have not taken into account these modern developments but have continued the debate embraced within the 18th and 19th century philosophies of great minds such as Kant, Hegel, Bentham and Durkheim. It is true that philosophers in particular have expressed themselves as if their propositions were of universal application, but that very premise needs to be tested against developments that could not have been prominent in their understanding of criminal law.

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[2] The concept of the political offence will be examined in detail in Chapter 9, *infra*.

[3] See Chapter 11 *infra*, at 301-7.

2. *The Rationale of Criminal Liability Culminating in Punishment*

Punishment can be a broad concept. The civil sanction of damages is in one sense a form of punishment and elements of the theories expounded on the subject can also be applied to civil damages. Nonetheless, the term is used here to mean the chastisement of an individual pursuant to a sentence delivered by a criminal court or tribunal.

Philosophers and sociologists have made various attempts at explaining the rationale of punishment. Yet legislators rarely consider why punishment should exist at all, let alone question whether one needs to justify punishment.[4] The institution of crime and punishment is so ingrained in the anatomy of society that the essential justification of the correlation between the two is hardly ever questioned except in deciding what type of punishment should be imposed.[5] The debate over rationale exists more prominently in the conscious and sub-conscious workings of the mind and speech of those disadvantaged by crime, the society and the victims than in the studies of the legislatures.

It is the resurrection of amnesty as a component of legislation that may force the lawmakers to give some consideration to the justifications of punishment per se. Theories on the justifications of punishment are well known and need not be extensively traversed in this work. They include those classified in terms of retribution,[6] deterrence,[7] reform,[8] denunciation[9] or a combination of two or more of

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[4] In relation to which see Ted Honderich, *Punishment: The Supposed Justifications*, 3rd ed., 1989, at 11-14.

[5] See e.g. the United Kingdom's *Royal Commission on Capital Punishment 1949-53 Report*, at paras. 50 et. seq., 618-24, 790(3).

[6] See Immanuel Kant, *The Metaphysics of Morals, Part I: The Metaphysical Elements of Justice*, 1797 (John Ladd transation, 1965), especially at 100; Hegel, *Grundlinien der Philosophie des Rechts*, 1821, especially at 93, reproduced as *Hegel's Philosophy of Righ*, 1942 (translation by Knox, at 67).

[7] See Jeremy Bentham, *Principles of Penal Law*, especially at 383, reproduced in John Bowring (ed.), *The Works of Jeremy Bentham*, vol. VI., 1985; *An Introduction to the Principles of Morals and Legislation* (edited by J. H. Burns and H. L. A. Hart, printed in 1780, but first published in 1970), chap. xiii. Barbara Wootton, *Crime and Criminal Law*, 1963.

[8] See Ewing, *The Morality of Punishment*, 1929, 1970 republication, especially at 83; Karl Menninger, *The Crime of Punishment*, 1969.

[9] See James Fitzjames Stevens, *History of the Criminal Law of England*, 1883, vol. II. See also *Minutes of Evidence taken before the Royal Commission on*

these.[10] In addressing their minds to these varied and complex theories, the legislators of national amnesty laws and those concerned with their international acceptability would need to consider how they apply to the political offence, a matter that has been given little attention in the classical writings on the subject.

Earlier, the concept of the political offence was broadly defined for present purposes as an offence committed not for personal gain but for political reasons.[11] From the moral perspective what distinguishes it from the ordinary offence is that it is never committed for the purely self-serving ends of the offender, but always in the belief that it is necessary for the good of a community. Could this constant altruistic dimension attributed to the political offence have any impact on theories of punishment? A common thread running through theories on punishment is that the crime is a wrong or an evil. This is why a particular act or omission has been classified as a crime.

With respect to the retributive theories of punishment, the crime is classified as such in order that it should be punished, so that the reason for classifying a particular act or omission as a crime should be the same as for the punishment itself. The concern is that a wrong should be avenged. The perpetrator of the political offence does not believe himself to be committing a wrong but may believe in fact that he is acting pursuant to some higher law, be it natural, international or otherwise. For instance, a liberation movement may act in the justified belief that it is acting pursuant to the right to self-determination of a

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Capital Punishment, Ninth Day (1950) (Lord Denning addressing the Royal Commission on Capital Punishment in the United Kingdom); see further *R. v. Llewellyn-Jones* (1965) 51 Cr. App. R. 204 (English Court of Appeal) and *R. v. Seargeant* (1974) 60 Cr. App. R. 74 (Court of Appeal). For an explanation of denunciation as an affirmation of a relationship of power, see Friedrich Engels, 'Wilhelm Wolff', (1876) *Die Neue Welt*, reprinted in *Die Schlesische Milliarde*, 1886.

[10] See Locke, *Second Treatise of Government*, at Section 12, quoted by Brian Calvert, 'Locke on Punishment and the Death Penalty' (1993) 68 *Philosophy* 211, at 216; Emile Durkheim, *The Division of Labour in Society*, 1893 (1933 translation by George Simpson), especially at 108; H. L. A. Hart, *The Concept of Law*, 1961, especially at 27; *Law, Liberty and Morality*, 1962 (Hart distinguishes between conduct subject to punishment and the question of severity); *Punishment and Responsibility*, 1968; Micheal Lessnoff, 'Two Justifications of Punishment' (1971) 21 *Philosophical Quarterly* 141.

[11] See further Chapter 11 *infra*, at 301-7; W. A. Miller, 'A Theory of Punishment' (1970) 45 *Philosophy* 307.

people when it bombs an oil refinery. In the sense that this is not a wrong, one might assert that the act should not be avenged and the retributive theory as outlined by the classical writers is inapplicable.

However, there are serious difficulties with any theory which would assert that punishment as a form of retribution is not justified for political offences but is so justified for other offences. First, one must determine what measure is used to determine whether an act or omission is right or wrong and therefore criminal or not. There is no supreme arbiter of any higher law except God and in a multi-religious society no one can claim to be the supreme authority on the content of God's will. There are circumstances where the perpetrator of an ordinary offence can claim that his act was not wrong although technically a crime – Robin Hood committed robbery in the belief that his acts were necessary in order to redistribute wealth among the poor. Within the sovereign territory of a state only the state itself can be the arbiter of its own laws. It may be that through its consent it has become bound by international laws but those laws apply in the international arena and only the state can bring its own laws into line with these external obligations. It follows that once a state has classified an act or omission as a crime then it must be deemed to be a wrong or evil, which in terms of one theory of retribution needs to be avenged to actualize the authority of the law.[12]

Second, not every political offence can be justified on the basis of some higher law. Even if the perpetrator had a political purpose it does not follow that his means can be justified in terms of such law.[13]

For similar reasons, the theories of deterrence or motivation are equally applicable to the political offence. Since in terms of the law of the state, from the moment that an act or omission is classified as a crime, it must be assumed that it is in the interests of the state to ensure or encourage its non-commission in the future. The theories certainly have a diminished validity with respect to such offences in so far as the political offender would in most cases not commit the offence if it were not for the political motivation. Further, the political offender possesses a certain amount of courage in confronting the government that he perceives as unjust or incorrect and is less likely to bend to the fear of punishment than an offender without such motives.

The theory of reformation is inappropriate for political offences since it is unlikely that punishment would change strongly held political

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[12] See Hegel, note 6 *supra*, at 220; translation at 141.

[13] Cf. Principle of proportionality discussed in chapter 11 *supra*, at 301-7.

convictions, which may even be reinforced as a result of the actions of the perceived oppressor. These convictions are also likely to be entrenched in others who see the prisoner as a hero of the struggle, as for instance in the case of Nelson Mandela's imprisonment.

In so far as denunciation constitutes the reason or part of the reason for punishment its application to political offences is presumably greater than to ordinary offences since political offences, if directed against the punishing state, threaten its stability. Miller's theory of influence in an educational manner,[14] while having little impact on the criminal's behaviour, may have greater relevance to others. Certain types of behaviour can be prescribed, through punishment, as unacceptable in all circumstances.[15]

There is one category of political offence that requires special consideration. This is the crime against international law. These offences have a character that is unique as compared to the ordinary criminal laws of the state. It is not a crime against the state but against the international community of states. It is also a crime that in most cases is not only attributable to an individual but also to a state.[16]

Municipal criminal law is designed to protect the interests and express the outrage of a society of individuals, which are by their human nature capable of subjective feelings of revenge. What place does retribution have in a system designed to protect the interests and express the outrage of a society of states, which are by their nature abstract entities incapable of personal human emotion? The common feature is that in both systems crimes are acts or omissions that are universally condemned by the members of the society. Durkheim observed that, with some apparent exceptions, the only feature common to all crimes was that 'they comprise acts universally condemned by the members of each society'.[17] Hegel's theory of retribution is quite consistent with such a system since subjective emotions are transformed into the reconciliation of the right with itself. They therefore do not form the basis of punishment, which lies rather in the

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[14] See W. A. Miller, 'A Theory of Punishment', note 11 *supra*.

[15] However, denunciation can also be somehow preserved in an amnesty as illustrated by the requirement of full disclosure in terms of the South African amnesty law: see 45 *supra*.

[16] See article 19 of Draft Articles on State Responsibility discussed at 80 *infra*.

[17] Émile Durkheim, *De la Division du travail social*, W. D. Hall's translation reproduced in Steven Lukes and Andrew Scull, *Durkheim and the Law*, 1983, at 42.

restoring of the right and the maintenance of the authority of the law. As he says:

> Objectively, this is the reconciliation of the law with itself; by the annulment of the crime, the law is restored and its authority is thereby actualized.[18]

Even the subjective reactions of a society of individuals remain the source of the state's need to avenge the crime, as the interests of the state within a society of states only reflect the subjective human desires of its population. So whereas municipal criminal law is administered by the state on behalf of its people, the international community, on behalf of states, administers international criminal law, which derives its outrage from moral values and the subjective human reactions of their respective peoples.

This relationship between the subjective reactions of individual societies, the behaviour of states applying international law and the place of retribution in the reality of the application of international criminal law is well illustrated by the treatment of Nazi war criminals. Many of these war criminals were pursued for more than forty years after the unconditional surrender of the Third Reich to the Allies. These later trials were national trials applying international law and could hardly be distinguished from a retributive application of municipal norms. Yet, it is but a small step from this to a Nuremberg-type tribunal where a number of states share the common need to avenge arising from the vengeful reactions of their peoples. The subjective reality of the Nazi war trials does not justify a theory of retribution in the application of international criminal law. However, it does show how the dynamics are essentially no different from those of municipal criminal legal application for the purpose of considering the validity of the theories of philosophers like Kant and Hegel.[19] In terms of whether crimes should be punished by virtue of their wrongfulness, the reality of retribution confirms that Hegel's noted conversion of the subjective revenge into objective punishment to restore the right is equally valid.

Hegel's retribution theory is arguably even more germane to the international criminal process by its emphasis on ensuring the authority of the law. The maintenance of the rule of law is a particularly acute problem in the international arena. This is especially so with

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[18] Hegel, *Grundlinien der Philosophie des Rechts*, 1821, note 6 *supra*, at 93.

[19] See note 6 *supra*.

international criminal law where the individual, unlike the state, has no personal interest in complying with it. It also has to deal with a number of relatively new crimes such as torture, genocide, apartheid and other crimes against humanity committed in times of peace. New crimes need time to sink into the collective consciousness and can easily become pointless if their validity is not reaffirmed on violation.

The second notable difference between the municipal crime and the crime under international law lies in the responsibility of states. Article 19 of the International Law Commission's Draft Articles on State Responsibility (1976)[20] confirm that under certain circumstances a violation of an international obligation can amount to a crime. One could legitimately ask why states rather than individuals should not be the subject of sanctions. The controversial nature of article 19 derives mainly from the difficulties associated with applying the notion of the crime to the conduct of a state. The Nuremberg tribunal had recognized the essential link between the crime and the individual. It pointed out that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[21] International conflicts have clearly shown how leaders and other agents of the state can act oblivious to the interests of the international community of states and, by extension, even the interests of their own state. Retribution against the state could seem like no retribution at all. This would be evidently so where the immediate victims of the crime were the individuals of the state sanctioned in circumstances where the perpetrators were no longer in power. This is closely related to the previous point that the validity of international criminal law depends on the affirmation of its authority through punishment.

Punishment certainly has the potential to deter the commission of crimes against international law but, again, the political nature of the offences means that deterrence is likely to have less of a role in this context than in the context of ordinary offences. On the other hand crimes against international law are in the main of a particularly unsavoury nature and are more often than not disproportionate to any political objective.[22] As such, with respect to international crimes,

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[20] *Report of the International Law Commission*, 28th Session, *UNGAOR*, 31st Session, Supp. No 10, A/31/10 (1976).

[21] (1947) 41 *AJIL* 172, at 221.

[22] As to the question of proportionality and the political offence, see Chapter 11 *infra*, at 301-7.

deterrence potentially plays an important role in terms of at least confining the commission of crimes to those other than international crimes. Prosecution followed by punishment might have a deterrent effect on some individuals party to a continuing conflict. Slobodan Milosevic did not seem to have been deterred from committing crimes against international law with respect to the people of Kosovo, despite the establishment of the International Tribunal for the Former Yugoslavia after the civil war that followed the collapse of communism in 1991. However, the ethnic cleansing on the scale of the former atrocities was not repeated. The recent determination to prosecute crimes against international law may have some deterrent effect on future conflicts.

Reformation probably has a very limited role in the context of international crimes. These crimes are usually one-off and committed in the context of a particular conflict. Ewing's proposition[23] might have some limited application in terms of reforming the individual for that individual's own good in terms of recognizing his own sins. However, in most cases the individual concerned would in any event be unlikely to re-offend against international norms after the relevant political situation forming the background to the crimes had subsided.

The Security Council resolutions establishing the international tribunals for the former Yugoslavia[24] and Rwanda[25] introduce a new justification for punishment in the international context – that of making a contribution to inducing the termination of hostilities and the maintenance of international peace and security. In one sense this is inextricably linked to deterrence in that, by deterring atrocities and other international crimes, one is putting a cap on a major source of continuing conflict. However, there is a sense in which the termination of hostilities is a reason for punishment possessing an independent existence from the traditional justifications of punishment. In the absence of deterrence and reformation, punishing the perpetrators of atrocities diminishes the need for reprisals or vengeance from the other parties to the conflict. These victimized parties can rely on the

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[23] See Note 20 *supra*.

[24] Security Council Resolution 827 (1993) on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (1993) 32 *ILM* 1203.

[25] Security Council Resolution 955 establishing the International Tribunal for Rwanda, (1994) 33 *ILM* 1598.

international community's determination to punish the offenders as a reasonable alternative to seeking vengeance and perpetuating the conflict.

3. *Weighing the Justifications of Punishment and Amnesty*

The essential context for the adoption of the contrasting approaches of punishment or amnesty is a society or societies in the midst of a past or persisting political struggle.[26] The offenders may come from either side of the conflict. The conflict may be between two or more states or between a state and rebels. In both cases if the conflict has ceased, this may have been reached through the victory of one side or a political settlement. In the latter case and in the domestic context, the rebels may be the new government, while the agents of the state are a prior regime.[27] Alternatively, the government may not have changed and the rebellion may have ceased, or may still be reactive.[28] The respective justifications for amnesty – transition, peace, reconciliation, forgiveness and truth[29] – may have varying degrees of potency in these different scenarios, and this also depends on the particular factual context.

In broad terms, one may summarize the various justifications for punishment as retribution, denunciation, deterrence and reform. In the case of a particular offender punishment and amnesty cannot apply simultaneously. Therefore, one must choose between them and from the moment that one chooses amnesty over punishment, the objectives which may have been achieved by punishment will no longer be achieved by that means. On the premise that the listed objectives are indeed achieved by punishment, for amnesty to be a viable option, the need for retribution, denunciation, deterrence and reform must be outweighed by the need for transition, peace, reconciliation, forgiveness or truth. Otherwise, amnesty or some other method must contribute to the ends that would otherwise have been achieved by punishment. Additionally, amnesty must be necessary in order to be capable of contributing towards any of its objectives in a sufficiently pronounced

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[26] See generally Chapter 3 *supra*.

[27] As in the case of Argentina, El Salvador, South Africa and Uruguay: see Chapter 2 *supra*.

[28] As occurred in the cases of Chile and Uganda. In one case, the amnesty was for the government officials. In the other case, the amnesty was for the rebels. See Chapter 2 *supra*.

[29] See Chapter 1 *supra*.

way. Balancing these various factors is far from easy and is surely not an exact science.

Addressing the first element of the inquiry, that of balancing needs, the society or societies must themselves determine their priorities. Peaceful co-existence will usually be the paramount consideration for any society. If a choice has to be made between peace on the one hand and retribution, denunciation, deterrence and reform on the other, peace will be the natural choice of a society seeking advancement. In a domestic context, transition may also be a paramount consideration, especially in the contemporary world if transition means transition to democracy. The other justifications of amnesty are corollaries to these two primordial objectives. A society seeking peace and democracy will therefore have no difficulties disposing of the first element of the inquiry. The need for peace and democracy will prevail.

It is the second limb of the inquiry, that is the necessity and capacity of amnesty to fulfil these objectives, which is the most difficult nettle to grasp. There are two significant obstacles to achieving clarity on this issue. Let us consider these obstacles in the domestic context of transition to democracy. In the first place, the actual effects of amnesty are not as clear as its objectives. While arguments can be raised on how amnesty contributes towards peaceful transition to democracy, counter-arguments can also be raised on how it can threaten peace and democracy. Secondly, while the choice between peaceful transition to democracy, on the one hand, and retribution, denunciation, deterrence and reform, on the other, may be simple enough, these latter processes are themselves part of the former broader objective. Arguably these compete with amnesty as the appropriate means of achieving a peaceful and stable democracy.

The justifications of amnesty were explained in the previous chapter. The potentially counter-productive nature of amnesty derives from the negative effects of impunity. Thus it is argued that when criminal law is not enforced its authority is compromised and it loses its power to deter future crimes.[30] Can this perceived authority of the law be sacrificed in favour of peace and stability? Where widespread disrespect for the criminal law has characterised the previous conflict, perpetuating an atmosphere of impunity may disrupt peace and stability by undermining the perceived validity of democratic institutions. In one

[30] See Diane Orentlicher, 'Settling Accounts: Duty to Prosecute Human Rights Violations of a Prior Regime' 100 *Yale LJ* 2537, at 2542.

sense there is an undermining of the rule of law that may have a general effect on respect for the law. Packer notes that,

> ... respect for law generally is likely to suffer if it is widely known that certain types of conduct, although nominally criminal, can be practised with relative impunity[31]

However, in a society in a state of transition, this general impact on the rule of law is minimized by public knowledge of the limited nature of the digression from the rule of law. In particular, it would be known that there is a distinction between the political crime and the ordinary crime, and it would normally be clearly announced that amnesty is an exceptional measure for dealing with the conflicts of the past. A more apparent danger exists in the maintenance of this distinction, not only in the minds of the members of the society but also in the minds of members of other societies. Rationalised impunity may be identified as weakness in fragile democratic structures and confirmation of enduring power in the hands of former protagonists who may be tempted to re-ignite or persist in the conflict with the reassurance that future punishment can be negotiated away. So, amnesty can facilitate the breakdown of democracy and peace that it and punishment, it is argued,[32] is designed to prevent.

The antitheses of this negative impact of amnesty are that punishment serves to strengthen democratic institutions in their infant stages[33] and promote peace through a respect for the authority of the law. The latter proposition is particularly important with respect to international criminal law, which will establish and maintain its authority globally by ensuring that it cannot be ousted domestically. It was earlier outlined how atrocities can initiate and perpetuate conflict. International criminal law applies especially to the category of crimes regarded as atrocities.

It may be argued that political trials and punishment can similarly perpetuate the antagonisms forming the source of conflict and provoke

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[31] Packer, *The Limits of the Criminal Sanction*, 1968, at 287 (quoted by Orentlicher, *supra*, at footnote 12)

[32] Garro and Dahl, 'Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward' (1987) 8 *Hum Rts LJ* 283, at 243; Malamud-Gotti, 'Transitional Governments in the Breach: Why Punish State Criminals?' (1990) 12 *HRQ* 1, at 12; Orentlicher, *supra*, at 2540.

[33] *Idem.*

hostilities destabilizing the fragile fledgling democracy.[34] This could certainly occur in the appropriate political context as is illustrated by the rebellions against the Argentine government of President Alfonsin, partly triggered by frustration over prosecutions of the military.[35] Ultimately, there is no precise answer as to which option, amnesty or punishment, gives greater security of stability, and ultimately political judgement needs to be exercised in making the choice. However, it would seem inappropriate to opt for amnesty except in the context of a particularly fragile democracy in circumstances where there is cogent evidence that punishment of political offenders may destabilize the newly attained freedom.

Amnesty may also be necessary where it is the price for peace or transition. If one of the parties to the conflict insists on it and is in a position to deprive the society of peace and democracy, the question of necessity arises in a genuine manner.[36]

These arguments of necessity relate of course to the stability within a nation. It is in principle highly undesirable that the commission of crimes against the international community should be subject to impunity since the effects of such impunity go beyond the borders of the state. The credibility of international criminal law needs to be retained with a view to the prevention of such conduct in conflicts in other states or between other states. The stability with one nation is not the sole consideration. International crimes can be excluded from the ambit of negotiations for peace if international law itself invalidates amnesty for international crimes.[37] Then, neither can a party to the conflict insist on something that the other party cannot offer, nor can that other party argue necessity in relation to such crimes. Where it is the fragility of a newly attained peace and democracy that is the concern, national prosecutions may very well be a risky endeavour. This does not prevent international law from retaining an insistence on prosecution in other states not involved in the conflict or in an international tribunal. In such cases the international community would be undertaking the responsibility of prosecution and this should not affect the stability of a newly formed peace or democracy since an

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[34] See Orentlicher, *supra.*, at 2544-6; see also Chapter 3 *supra.*
[35] Ibid. 2545.
[36] See Chapter 3 *supra.*
[37] See Chapters 11-12 *infra.*

initiative to prosecute would not be that of one of the parties to the conflict.[38]

Where the attainment or preservation of peace does not require amnesty as a necessary safeguard, then the balance becomes one between the justifications for punishment and arguments based on notions of forgiveness, reconciliation and truth. These types of arguments would naturally flow from the principal concern of securing lasting peace, but it is also clear that they are developing an independent existence as justifications for amnesty. Arguments in favour of amnesty are sometimes couched in terms of a choice between vengeance and forgiveness or retaliation and reconciliation.[39] For instance, the post-amble to the South African interim Constitution talks not only of peace but also of national unity and the wellbeing of all South African citizens as requiring reconciliation. It provides that past divisions,

> ... can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.[40]

Here, the society has a real choice to make. Amnesty can, through creating conditions of unity, serve a similar purpose to deterrence and reform. However, forgiveness in the sense employed for amnesty cannot be reconciled with the element of retribution in punishment. Retribution, on the other hand, cannot contribute towards reconciliation and, perhaps in that respect, amnesty is preferable.

The situation is, however, different with respect to international crimes. This is because, while national unity may prevent future atrocities, national amnesty may encourage future atrocities in other unstable areas of the world. This is because it provides a precedent and acts as a banner advertising impunity for political offences to the peoples of other countries. When this impunity relates to international crimes, international law is shown to be completely ineffective in the face of powerful elements within a state.

From a purely rational perspective, therefore, the balance between amnesty and punishment is a difficult one and depends on the facts, but

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[38] Ibid. and see annex 1 *infra*.

[39] See e.g. Desmond Tutu, *No Future Without Forgiveness*, 1999.

[40] See Constitution of the Republic of South Africa, Act No. 200 of 1993.

a distinction will usually need to be made between crimes under domestic law and crimes in the international arena.[41]

4. *The Rationale of Civil Actions*

Amnesty laws can immunize an offender not only from criminal liability but also from civil liability.[42] By civil liability I mean responsibility to the victim enforced by a court of law. The justifications for civil liability have received very little attention when compared to the fairly extensive debates over punishment. This can probably be explained by the fact that suffering is an integral element of punishment and therefore the need is felt to justify it. Civil actions are focused on repairing the damage to the aggrieved party rather than inflicting suffering on the person who caused the loss, although this may be incidental to the compensatory process. This appears to create less of a moral dilemma than is the case with punishment. As with punishment, the civil action is so well ingrained in the nature of modern societies that the lawmakers rarely question its basic justification as a concept. Again, while debates on justification of punishment in the law-making process are generally limited to the type and degree of punishment, the debates on the justifications of civil liability focus on the nature and extent of compensation awards.

While punishment focuses on the wrong of the offender, civil liability focuses on the loss of the victim of a wrong. Its basic aim is to correct this wrong and put the person who has suffered the loss in the position he or she would have been in, had the loss not been suffered.[43] The objective is the compensation of the victim. Hegel's theory of retribution[44] looked at punishment but it can be adapted to civil liability. If one imagines a society without laws, a wronged individual might carry out an act of vengeance against the wrongdoer. This act of vengeance would be aimed at restoring the right of the wronged

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[41] This delicate balance is integrated into the legal reality in an effort to reconcile the two in Chapter 11 *infra*. Chapter 12 sets out limitations to national amnesty in the light of this attempted reconciliation.

[42] For an examination of the legal dimensions of amnesty from civil liability see Chapter 10 *infra*.

[43] Neethling, Potgieter and Visser define the object of damages for the injured person in the domestic context to be that 'of eliminating as fully as possible his past as well as future damage': see Neethling, Potgieter and Visser, *Law of Delict*, 2nd ed., 1994, at 223.

[44] See *supra*.

individual. In so far as this act of retribution caused suffering to the wrongdoer it would be a form of punishment privately administered. In so far as the wronged individual obtained some form of benefit to recuperate his or her losses, it would be a form of civil liability privately administered. In both cases the act of retribution would be coercion to nullify, in Hegel's words, the initial coercion of the wrongdoer. It would be the reconciliation of the right with itself. In a society based on laws this reconciliation of the right with itself would, in compensating the victim of the wrong, actualize the authority of the law.[45]

This explains the compensatory process but the question remains as to why the law should fulfil this function of compensating the victim of a wrong through civil liability. In other words, why does the law need to take over the process of coercion to restore the right? Here again, Hegel's point in relation to punishment that the act of coercion ceases to be a subjective and contingent retribution of revenge remains valid for civil actions. Gaston Richard explained that in primitive societies arbitration served the important purpose of preventing conflicts from degenerating into open warfare.[46] The parties to a dispute are induced into referring the matter to an arbiter. What the law achieves is that it provides a guarantee of this arbitration to the victim. So, whereas arbitration is a purely voluntary process undertaken with the consent of the parties, a court of law is a compulsory form of adjudication. One can therefore assert that the right of access to court in civil matters[47] serves the purpose of avoiding acts of private and unmeasured retribution that may lead to protracted conflict. It also ensures that the ability to recuperate one's losses depends less on personal power. It is true that this still plays a role in terms of the financial ability to undertake litigation, but in modern societies legal aid has contributed significantly to levelling the playing fields with respect to financial capacity.

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[45] See *supra*.

[46] Gaston Richard, 'Essai sur l'Origine de l'idee de Droit', (1893) 35 *Revue Philosophique* 290-6.

[47] As to which see Chapter 10 *infra*.

5. *Weighing the Justifications of Amnesty and Civil Liability*

Amnesty is generally directed at criminal liability and the incorporation of immunity from civil liability is simply an extension of immunity from punishment. Assuming that the justifications for amnesty outweigh those of punishment the relevant question becomes why it should be necessary to include immunity from civil liability.

De Vattel explained amnesty as including immunity from civil actions:

> All the injuries caused by the war are likewise forgotten: and no action can lie on account of those for which the treaty does not stipulate that satisfaction shall be made: they are considered as never having happened.[48]

As is already hinted in this passage, this is based on the traditional notion that amnesty is the complete forgetting of past events.[49] In a sense this can only be achieved through amnesty covering all forms of liability. Civil liability, according to one theory, is an organized form of retribution in the sense of the restoration of the victim's rights, in order to prevent uncontrolled acts of individual vengeance. Seen in this context, officially endorsed oblivion needs to be accompanied by forgetfulness on the part of the individual victims and their families. Otherwise, the oblivion in the consciousness of the state will not be accompanied by oblivion in the consciousness of individuals and organised retribution may be replaced by uncontrolled individual acts of retribution. This can either be achieved forcefully, as with the Athenian amnesty following the reign of the 'Thirty Tyrants',[50] or it can be induced. The former will not achieve genuine forgetfulness while the latter is difficult in most circumstances and impossible in some.

Modern amnesty policies have moved away from a desire for oblivion to a need to remember and reconcile. The justifications for the extension of immunity to civil liability were discussed in the decision of the South African Constitutional Court in *AZAPO v. the President of the Republic of South Africa*.[51] Section 22 of the South African interim

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[48] See E. De Vattel. *The Law of Nations on Principles of Natural Law Applied to the Conduct and Affairs of Nations and of Sovereigns*. 1758. vol. III (Translation by Charles G. Fenwick). at 351.

[49] See Chapter 2 *supra*.

[50] See Chapter 2 *supra*. at 5-6.

[51] 1996 (4) SA 671; and see Chapter 10 *infra*. at 287-92.

Constitution provided for the right of individuals to bring justiciable disputes before a court of law. The applicants argued that the National Unity and Reconciliation Act, which provided for amnesty from civil liability, was inconsistent with this constitutional provision. In deciding whether other provisions of the Constitution justified this incompatibility with section 22, the Constitutional Court considered whether this extension to civil liability was justifiable.

Mahomed J considered it central to the justification of amnesty from criminal liability that the truth about past events could not be effectively revealed by the wrongdoers if they are prosecuted and felt that this equally applied to civil liability:

> That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might indirectly be against his or her material or proprietary interests. [52]

A wrongdoer may still be prepared to apply for amnesty even when faced with the prospect of civil proceedings arising out of his disclosures. This is because the wrongdoer will generally be in greater fear of imprisonment than of financial loss. Amnesty need not be granted unless there has been full disclosure of the facts. Nonetheless, it remains true to say that there will be a disincentive to come forward or at least an incentive to attempt to conceal some of the truth in the hope of giving the impression that there has been full disclosure.

There are possible means of safeguarding against this to a large extent. One method would be to require all civil claims arising out of the events of the past to be filed within a prescribed period. Amnesty applications would then not be considered until after all civil proceedings based on the same facts were brought to a conclusion. There are two difficulties with this approach. One is that some causes of action only arise once the injury has been discovered. Consider, for instance, the situation of a person who finds out in five years to come that he has a disease resulting from biological experiments carried out by the government. The second difficulty is that it may be important for the healing of the nation that the investigations into the past are brought to a conclusion fairly quickly so that the people can close the book on the past and look to the future. Limitation periods in civil actions are

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[52] Ibid., at 693, D-F.

often short (three years in a number of common-law jurisdictions) and the prescribed period could be even shorter. Yet the civil action itself could be stretched out for years, wound up in interlocutory applications and appeals.

Another possible solution to the dilemma of the fear of civil liability discouraging the disclosure of the truth would be to render the evidence in amnesty applications inadmissible before civil courts. This solution would mean that amnesty would not provide the potential plaintiff with the necessary evidence. It would not, however, deal with the problem of the information initiating the prospect of civil proceedings in the mind of the potential plaintiff or providing the clues as to where the evidence may be obtained. The disincentive to come forward and tell the whole truth could therefore remain in some circumstances.

Combining these two ideas would seem to present the most plausible alternative to a comprehensive amnesty covering civil as well as criminal liability. Potential plaintiffs could be given say one year in which to file and plead civil claims related to the conflicts of the past. Simultaneously, amnesty applications could be received but would remain secret pending the closure of pleadings in civil proceedings. After the conclusion of that period, no more civil actions could be brought and no civil judgments would have validity based on facts for which amnesty has been granted, but where proceedings have been filed and pleaded within the prescribed period civil judgments would be unaffected by amnesties. Evidence tendered in amnesty proceedings would be inadmissible before civil courts and civil proceedings would be confined to the facts pleaded. A cost penalty would apply to litigants who lost civil proceedings.[53] This would discourage the filing of civil claims just in case a cause of action exists and can be proved at a later stage. In this way applicants would be discouraged from giving full disclosure only to a very minimal extent if at all in most cases. Moreover, persons who have suffered injuries would be able to obtain proper compensation from the courts in accordance with their right to have judicial disputes settled by a court of law. Persons suffering from latent injuries would still lose the right to civil action but this need not prevent others from retaining their normal rights with minor modifications.

Parallel civil proceedings under these conditions would have the added advantage that the evidence in the civil proceedings could be

[53] This is, in any event, the normal rule in a number of states.

admitted in the amnesty proceedings and serve as a basis for testing whether the amnesty applicant has given full disclosure. It is important to note that there are other reasons than the fear of legal proceedings why a person might be conservative with the truth, including fear of acts of vengeance and fear of reduced standing in the community. In a sense, parallel legal proceedings discourage applicants from being economic with the truth for other reasons. The more rigorous rules on procedure and evidence also provide a better forum for testing the truth although not necessarily a better forum for eliciting it.

Given the existence of an admittedly imperfect but plausible alternative, the absolute extension of amnesty to civil liability on the basis of a desire for the truth is a less than satisfactory justification. On balance it would seem better to preserve a long-established safeguard against uncontrolled individual acts of vengeance and provide the best possible alternative for encouraging amnesty applicants to offer the whole truth. However, even assuming the feasibility of this suggestion, the state will legally have a margin of discretion in the implementation of its transitional measures, and it may still in the particular circumstances be able to justify the simpler solution of embracing civil liability within the scope of the amnesty.[54]

Different considerations apply to amnesty extending to the state's civil liability. Here it cannot be argued persuasively that the liability of the state would significantly discourage the applicant for amnesty from disclosing the truth. Mahomed J. focused on the limited resources of the state and the fact that these resources would be better applied to housing and other needs of the community.[55] This argument is unconvincing. These needs are constant and exist in tandem with the needs of justice and the maintenance of the rule of law for all, including the state. The argument also lacked a certain sense of realism in the South African context. South Africa is not a particularly litigious society and many of those affected by the past would in fact not litigate even with the limited existence of legal aid. Furthermore, most of the wrongs of the past would already have been prescribed by the limitation period, usually of three years. This would have left a very limited number of claims against the state. Mahomed J. noted that:

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[54] See Chapter 10 *infra*. at 286-92.

[55] See *AZAPO & Others v. President of the Republic of South Africa*: note 51 *supra*, at 694J-696C

> They [the negotiators and Parliament] could have chosen to direct that the potential liability of the State be limited in respect of any civil claims by differentiating between those against whom prescription could have been advanced as a defence and those whose claims were of such recent origin that a defence of prescription would have failed. They were entitled to reject such a choice as irrational.[56]

This differentiation exists in the normal course of the law and the inability of some to pursue their normal rights should not necessarily prevent those who can to do so. There is nothing irrational about that. What is irrational is to prevent a person from exercising his ordinary and fundamental right merely because another has been prevented from exercising it. The state can more forcefully make this point in relation to the stronger inter-related point that so many have suffered and that the state should therefore restrict private civil actions *in favour of* taking on the responsibility to provide reparations to all the victims.[57]

Didcott J. preferred to justify the extension to civil liability on the need to close the book on the past. If this is to be done effectively the grievances of the past must be addressed. This is partly achieved through obtaining a picture of the past but it is also achieved by allowing individuals to express their grievances through an organized and legal process rather than through private acts of vengeance.

6. *Conclusion*

When there remains much controversy over both the rationale of punishment and the rationale of amnesty, it is no mean task to decide where the proper balance lies. Even given the certain existence of a retributive element to the objective of punishment, amnesty can probably, with exceptions, be justified on a philosophical level. There is room for concluding that crimes against international law are suitable candidates for exception, based on the necessity of maintaining the international rule of law over the internal politics of any individual state.

The foregoing analysis gives us a background that enables a constructive examination of a developing area of law. The justifications of amnesty and legal liability loosely permeate the national debates on amnesty and national priorities. Understanding them is crucial to any

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[56] Ibid., at 695D-E.

[57] See Chapter 10 *infra*, at 288-9.

attempt to reconcile what is going on at a national level with the developments in international criminal and human rights law.

It is important to understand the multi-dimensional framework within which choices to prosecute or amnesty operate. This framework is created by the interaction of many national legal systems with an international legal order. Both amnesty and prosecution may operate on the national and/or international level. The choices for states and the international community in terms of dealing with past offenders have to be viewed within this context. This is the purpose of the chapter that follows.

CHAPTER 5

OPTING FOR PROSECUTION OR AMNESTY IN A SYSTEM OF GENERAL RELATIVITY

1. *Introduction*

In 1989, François Rigaux gave a series of lectures at The Hague in which he sought to expound a general theory of private international law employing the methods of the science of law. An early proponent of utilising the methods of science in law was Hans Kelsen, who distinguished positive law, as the technical regulation of life in society, from the science of law, which attempts to reduce the operation of positive legal systems to certain fundamental principles. As Rigaux aptly points out, the object of science is to conceive of a model that takes into account the totality of phenomena observed.[1] A theory on amnesty will fail to meet the requirements of the science of law if it gives a restrictive view of the interactions between various legal systems.

In the previous chapter I tried to analyse the rationales of punishment and amnesty making reference to theories essentially localised in the context of the legal system of a state. In recognition of the potential application of amnesty to international crimes we then considered the application of traditional theories of punishment and amnesty in relation to international crime. If one wishes to fully understand why punishment or amnesty is opted for, and what relationship pertains between punishment and amnesty, it is insufficient to confine the analysis to the application of concepts to the different classes of law applied within a single legal system. One also needs to recognise and consider the plurality of legal systems, as well as the general relativity, Rigaux observes, of the interactions between them.

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[1] François Rigaux, 'Cours général de droit international privé', 203 *Recueil des cours* (1989, I).

This work focuses on amnesty laws within a municipal legal system rather than amnesties organised at the inter-state level. However, developing an understanding of the international limitations on the municipal amnesty process, and the limitations which ought to apply to such a process, requires a contextual inquiry. One needs to refer to the reasons for prosecution and its consequential relationship with amnesty, not only in national courts but also in international forums. In addition, in a system of general relativity, the reasons for prosecuting in one type of forum or another or in one legal system or another intertwine and inter-react with the reasons for prosecuting or indemnifying the commission of an offence. The development of principles on the limitations of amnesty laws can only be constructively pursued with an appreciation of all the major elements of transitional justice.

Political transition may be accompanied by amnesties, prosecution in national courts, prosecution in international tribunals or a combination of these. Each has its benefits and its drawbacks and no doubt the future understanding of transitional justice will involve an appreciation of the need for all of these, sometimes in combination, depending on the particular context. Here I shall consider the alternatives to amnesty in order to ascertain how amnesty laws dovetail with them or contradict them.

2. *Prosecution before National Courts*

The municipal courts of a state are the most natural places for the prosecution of crimes. Individuals are primarily subject to the national organs of a state. Elaborate rules of procedure and evidence are established features of municipal criminal justice. States also possess effective law-enforcement agencies and centres for imprisonment and rehabilitation. Criminal jurisdiction has been described as 'one of the most sacred areas of state sovereignty'.[2] It is hardly surprising that states guard jealously their right either to prosecute or not to prosecute, or to indemnify alleged criminals falling under their jurisdiction.

The political crimes tried before national jurisdictions may be conveniently classified into two contrasting categories. There are those political crimes that are crimes against the state itself and are defined by the municipal law of the state. So-called terrorist acts and treason are

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[2] Antonio Cassese, 'On the Current trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *EJIL* 2, at 11.

the most prominent examples of such offences. Then there are those offences that are crimes against the international community as a whole and are defined by international law. Certain offences may of course fall under both categories. The state is particularly enthusiastic to pursue the prosecution of the first category of offences since they offend the interests of the state. This is illustrated by the United Kingdom's determined prosecution of suspected IRA terrorists, Turkey's prosecution of Kurd separatists, Spain's prosecution of Basque separatists and Israel's prosecution of Palestinian terrorists, to name but a few examples.

The state is less concerned to ensure the prosecution of crimes against international law that are not also crimes against the state, since these crimes offend the international community as a whole more than the state. Notwithstanding universal jurisdiction with respect to a number of international crimes, examples of moves for national prosecution of international crimes not directly affecting the interests of the state have been rare. Since one even finds a reluctance to prosecute international crimes in which the state has an interest, there are clearly other considerations at play. Professor Dugard identifies a number of possible factors, including the rule against retrospective legislation, the problem of legal certainty, the possible belief on the part of domestic courts that statutes of limitation apply to crimes against humanity, amnesty, immunity, uncertainty over the concept of universal jurisdiction and foreign relations interests.[3] He emphasizes that the absence of domestic implementing legislation presents the main obstable to the domestic prosecution of international offences.[4]

Those prosecutions that have taken place have generally involved the vested interests of the prosecuting state, particularly when it comes to the prosecution of war criminals. A recent example was the sentencing of Dinko Sakic, the former Croatian commander of the Jasenovac concentration camp, by a Croatian court, following his extradition from Argentina.[5] The former major allies – that is the Soviet Union, France, the United States and Britain – and others have also

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[3] See John Dugard. 'Universal Jurisdiction for Crimes against Humanity' *Africa Legal Aid Quarterly*. April-June 2000. Seminar: Universal Jurisdiction for Crimes against Humanity. at 7-9.

[4] Ibid., at 8.

[5] See *New York Times*. Tuesday 5 October 1999: 'Croat Convicted of Crimes at the World War II Camp'.

played a leading role in bringing Nazi war criminals to justice.[6] But other states have shown a reluctance to extradite Nazis although there are exceptions – Canada, for example, which, in 1983, agreed to extradite Helmut Rauca to the Federal Republic of Germany.[7] Moreover, in an isolated – but increasing – number of cases states have taken the initiative to prosecute international crimes in which they have no direct interest.[8]

For the prosecution of national crimes there is no alternative forum to the municipal criminal courts and little need for such a forum. For international crimes there is such a choice and the apparent reluctance of states to enforce international criminal law invites an investigation into the problems and advantages associated with prosecuting international crimes before national courts. What relationship develops between amnesty and prosecution may depend on the choice of forum for prosecution. Problems associated with prosecution before a particular forum may result from, or give rise to, the desirability of amnesty from the perspective of national authorities.

There are a number of problems associated with the prosecution of international crimes before national courts:

1. The law of a state can be a significant hurdle to effective prosecution of international crimes in national courts. In some states international law, whether customary or treaty based, is automatically integrated into the law of the state.[9] In other states one or both sources of international law require legislative enactment. In the *Pinochet* case, the House of Lords in England held in its second full judgment that Pinochet could only be extradited to Spain on the condition that he be tried solely for

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[6] See Norman E. Tutorow (ed.), *War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book*, 1986, at 4-8.

[7] See Matthew Lippman, 'The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems' (1998) 29 *Cal West International Law J* 1.

[8] See Cassese note 2 *supra*, at 6; in *Director of Public Prosecutions v T*, Danish authorities arrested a Croatian national and a Danish court convicted and sentenced him for grievous assault of non-Danish nationals in the Croatian POW camp Dretelj in Bosnia: E High Ct, 3d Div Den, Nov 22, 1994 (Danish Ministry of Foreign Affairs Legal Service, unofficial translation), referred to by Mary Ellen O'Connell 'New International Legal Process' (1999) 93 *AJIL* 334, at 341.

[9] This is the case for example in Libya and Russia.

offences of torture committed after 1988.[10] This was because before that date torture committed abroad was not an offence in the United Kingdom. The rules of criminal procedure can also be an obstacle. It was a desire to prevent time limits kicking in on the prosecution of international crimes which led to the adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes of 1968 and the European Convention on the Non-Applicability of Statutory Limitations to War Crimes of 1973.

2. There may be political constraints to national prosecution of international crimes. Amnesty is a case in point. One can imagine that states other than the state affording amnesty may not wish to prosecute the perpetrator of the crime subject to an amnesty so as not to offend the state that issued the amnesty. The United Kingdom's failure to prosecute Nazi war criminals after 1950 can be partly explained by a wish not to prejudice relations with West Germany.[11] Such political constraints resulting from national interest are avoided by prosecution before an international forum. Political constraints, however, play an important role in hindering the establishment of such a tribunal.

3. Similarly, there may be political constraints to extraditing alleged international criminals to other states. The United Kingdom refused extradition to the Soviet Union of alleged Nazi war criminals on a number of occasions on the basis that it perceived the Soviet Union as merely wishing to fuel its propaganda war.[12] A state that has afforded amnesty to an individual may find it politically impossible to extradite that individual to another state, even notwithstanding an international obligation to do so under an extradition treaty. Other states might find it difficult to extradite the individual without prejudicing their relations with the state affording amnesty. An international tribunal might face similar problems but organs such as the Security Council of the United Nations can assist in ensuring the co-operation of states.

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[10] See *R. v. Evans and others, ex p Pinochet Ugarte; R. v. Bartle and others, ex p Pinochet Ugarte (Amnesty International and others intervening) (No 3)* (1999) 6 BHRC 24; (1999) 38 ILM 581.

[11] See note 7 *supra*, at 15.

[12] Ibid.

4. In choosing between amnesty and prosecution before its own courts, a state may be swayed by financial constraints towards the amnesty option. This might be particularly true where the state is going through transition or a change in government. Limited resources may have to be carefully managed to meet various needs. Political trials have proved to be long and expensive. Their results may also be less than certain in terms of securing a conviction and obtaining the truth. The long trial and subsequent acquittal of Magnus Malan, the Minister of Defence in South Africa before 1994, illustrates the point.[13] International tribunals can obtain funds from various sources globally, both government and non-governmental, and these funds need not compete with the national resources of a state in transition.

5. The partiality or perceived bias of judges of a national court in a political trial can be a significant problem.[14] This may serve to intensify feelings of animosity against the state by rebel movements and their sympathisers. This problem is evident in the Turkish trial of the Kurd separatist leader. A state that seeks peace and reconciliation may be dissuaded by the potential consequences of a highly charged political trial. The use of international tribunals can cure this defect in the process by the appointment of judges from neutral states. The credibility of the Nuremberg judgment suffered because of the appointment of judges solely from the victorious allies.

6. Local public perceptions and opinion can be an obstacle to effective international criminal justice within a state. The public may be disturbed by the apparent extravagant costs of political trials. The public may not support the trial of an individual who has committed a crime in a conflict elsewhere in the world or concluded long ago. After 1950, the British people had apparently lost enthusiasm for the pursuit and trial of Nazi war criminals and wanted to look to the future.[15]

7. Since a crime under international law is a crime against the international community as a whole denunciation of the crime should be that of the international community rather than a single

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[13] See Chapter 2 *supra*, at 41.

[14] See Neil Kritz, 'The Dilemmas of Transitional Justice', in Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, xix at xxv-xxvi.

[15] See note 7 *supra*.

state. Although this is partly achieved by virtue of the existence of an international law, denunciation by the international community of specific crimes committed in the context of specific conflicts is better achieved through an international tribunal that can be identified with the interests of the world. Apart from reflecting the attitude of the world community this also assists in the reconciliation of the nation in conflict by detaching the expressions of disgust from the state wishing to reconcile with its people. This removes much of the rationale for impunity.

8. One of the major objectives of punishment, that of deterrence, loses much of its force when a crime against international law is tried in a national court. This is because the behaviour of one state in the context of a particular conflict does not necessarily reflect the behaviour of another state in the context of a different conflict. The fact that a Serbian war criminal is tried in Denmark does not imply that a Hutu war criminal will be tried in France. The fact that the military junta is tried in Argentina after transition to civilian government does not imply that the military junta in El Salvador will face the same fate.

9. In circumstances where an individual is tried in the courts of a state other than that which was the site of the commission of the crime, there may be substantial difficulties in obtaining evidence and witnesses. This would be particularly so when the state where the crime was committed has granted amnesty to the alleged perpetrator. Similar difficulties exist with respect to a trial before an international tribunal. However, it may be easier for such a tribunal to obtain the co-operation of other states and to secure the enforcement of such co-operation through international methods in the form, for instance, of directions from the Security Council of the United Nations.

There are therefore a number of problems with employing municipal jurisdictions for the enforcement of international criminal law which either militate against prosecution as a viable alternative to amnesty or lead to the failure of this option owing to the existence of amnesty laws. International tribunals overcome some of these difficulties[16] but there

[16] Cassese outlines some of the general merits of international criminal prosecution before an international tribunal: see note 2 *supra*.

remain a number of possible advantages to the national process, which ought to be outlined:

> 1. While difficulties exist with respect to the incorporation of international crimes into the municipal legal system, once this hurdle is overcome municipal courts offer advantages in terms of sophistication and certainty of principles of criminal law and procedure. The ad hoc tribunals have adopted elaborate rules on procedure and evidence but ultimately need to place some reliance on general principles of law. One can see in the *Blaskic* case[17] before the Yugoslav tribunal how procedural problems can arise which have not been clearly provided for in the Statute of the tribunal or the rules of procedure and evidence. In that case the Yugoslav tribunal was faced with the question of whether it could issue subpoenas to states and the agents of states. Similarly, while general principles of criminal law are well defined in national jurisprudence, where a principle is not provided for in the Statute or rules of an international tribunal recourse may need to be had to the uneasily ascertained rules of customary law. This occurred in the *Erdemovic* case[18] decided before The Hague tribunal, where the possible existence of a customary rule on duress was considered. The establishment and running of a tribunal can also face obstacles relating to different conceptions of criminal justice in different states which in some way need to be reconciled. States based on the civil law tradition have quite different conceptions on evidence, the guilty plea and the burden and standard of proof than states following common law tradition.[19]
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> 2. Political constraints also exist with respect to the establishment of an international forum for prosecution and with obtaining the bona fide assistance of states for these tribunals. The state's concern over sovereignty has constituted an obstacle to the establishment of systems of international adjudication as is illustrated by the initial reluctance of the United States to accept the compromise with Libya of trying the Lockerbie suspects

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[17] *Prosecutor v Blaskic*, IT-95-14 (AC) Decision of 29 October 1997.

[18] *Prosecutor v Drazen Erdemovic*, IT-96-23A (AC) Judgment of 7 October 1997.

[19] See *supra*.

before an international tribunal or in a neutral state.[20] Sovereignty can also constitute a barrier to the effective functioning of an international tribunal, shown for instance by the unwillingness of a state to accept that it must comply with a subpoena in the *Blaskic* case.[21] States that grant amnesty to international criminals consider themselves to be in the best position to judge how the perpetrators of past wrongs in internal conflicts should be dealt with. They may be most reluctant to comply with the orders or requests of international tribunals on a matter that they consider a precious exercise of their sovereignty.[22]

3. The state where the crime was committed may experience fewer difficulties in obtaining the extradition at least of its own nationals than an international tribunal. Access to evidence and witnesses that are already on the territory is also a significant advantage.

4. The national tribunal has a financial advantage in terms of having a pre-existing system of courts, judges and lawyers. Both the Rwanda and Yugoslav tribunals have experienced serious funding problems.

5. National prosecution has the obvious advantage of an established law enforcement agency and prison system. International tribunals rely heavily on the co-operation of states in this regard.

6. Finally, if all international criminals were to be tried before an international tribunal it is doubtful that the system could cope. National courts play an important role in sharing the burden of prosecutions of these crimes. The Rwanda tribunal would simply not be able to cope with the masses of accused that are being tried in the national courts of Rwanda.

Ultimately, the pros and cons of both avenues have led to the rejection of the idea that an international criminal court could replace national prosecutions. In the debates about establishing a permanent international criminal court the principle of 'complementarity' was

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[20] See Dugard, 'Obstacles to the Establishment of a Permanent International Criminal Court' *Cam LJ* 329. Subsequently Libya agreed to a trial in a Scottish court established in The Netherlands.

[21] See note 17 *supra*.

[22] See Chapter 11 *infra*, at 310-11.

developed, according to which the international tribunal will not replace but complement national courts for the prosecution of international crimes. However, it seems clear that where states are considering – or have granted – amnesty to the perpetrators of international crimes, the international tribunal has important advantages as an option. It has the potential to remove the effectiveness of an amnesty decision on the international plane and operates outside the political constraints of the state granting amnesty and other states who fear offending that state.[23]

3. *The Nuremberg and Tokyo International Military Tribunals*

The Nuremberg and Tokyo Military Tribunals were established specifically to try the perpetrators of crimes against international law before 1945. The predecessors to the Nuremberg and Tokyo Tribunals were likewise temporary solutions to specific crises. The earliest known example would seem to be an international military tribunal established by the Holy Roman Empire in 1474 in Breisach, Germany, to try Peter von Hagenbach for crimes against 'the laws of God and man' consisting of raping, killing and pillaging the property of innocent civilians.[24] Between the two world wars there were a few unsuccessful attempts at setting up international criminal tribunals, including one to try Kaiser Wilhelm II and other alleged war criminals of the First World War,[25] one to try Turkish nationals for the massacres of Armenians[26] and one to try persons for acts of terrorism.[27]

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[23] This gives room for permitting the state to refrain from prosecuting itself while avoiding complete impunity for the offender; consider the solution adopted in Chapter 12 *infra*; see also Chapter 11 *infra*.

[24] See Bassiouni, 'The Prosecution of International Crimes and the Establishment of an International Criminal Court' in M. Cherif Bassiouni (ed.), *International Criminal Law*, 1986, vol. 3: *Enforcement*. Citing Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 1968, vol II: *The Law of Armed Conflict*, at 462-6.

[25] See articles 227, 228 and 229 of the Treaty of Versailles of 1919 (1919) *UKTS*. No 1. The Netherlands refused to extradite the Kaiser and other suspects.

[26] See the Treaty of Sevres of 1920 (1920) *UKTS* No 11, terminated by the Treaty of Lausanne of 1923, (1923) *UKTS* No 16, which granted a general amnesty.

[27] Convention for the Creation of an International Criminal Court, protocol to the League of Nations Convention for the Prevention and Punishment of

An international criminal court has evoked the imagination of jurists for more than half a century.[28] Before that the concept would have been distant in the minds of a legal fraternity that believed international law to be concerned solely with the relationship between states. As late as 1963, international law was being defined exclusively in those terms.[29] The debate over the status of individuals as subjects of international law is recorded in the most recent texts on the subject.[30] Even in the context of war, a doctrine grew in the 19th century to the effect that a war was 'a relation of a state to a state and not of an individual to an individual'.[31] In contrast, the earliest writers of international law such as Grotius, Pufendorf and Bynkershoek viewed the individual subjects of an enemy state as themselves enemies.[32]

The International Military Tribunal at Nuremberg confirmed international criminal responsibility of the individual when it exclaimed in its historic judgment that, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[33]

At its first session in 1946, the General Assembly of the United Nations adopted Resolution 95(1) affirming the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. In 1947, the General Assembly directed[34] the then newly established International Law Commission to work on a Draft Code of Crimes Against Peace and Security of

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Terrorism of 1937. The League of Nations was losing steam and neither treaty entered into force.

[28] See Cherif M. Bassiouni 'From Versailles to Rwanda in seventy-five years: the need to establish a permanent international criminal court' (1997) 10 *Harvard Journal of Human Rights* 11; Benjamin. B. Ferencz *An International Criminal Court. A Step Towards World Peace - A Documentary History and Analysis*, 1980; 'UN observer report: toward an International Criminal Court: an historical perspective' *American Society of International Law Newsletter* March-April (1998) 9.

[29] See Brierly *The Law of Nations*, 6 ed, 1963, at 1

[30] See Andreas O'Shea, *International Law and Organization, A Practical Analysis*, 1998, at 2; Malcolm N Shaw, *International Law*, 4 ed., 1997, at 182-4.

[31] See *Hall's International Law*, 8 ed., 1924, at 85.

[32] See ibid., at 86, footnote 1.

[33] (1947) 41 *AJIL* 172.

[34] By GA Resolution 177 (II) of 21 November 1947.

Mankind. The International Law Commission has produced three drafts[35] and continues with its work on this topic. The international military tribunals therefore had a profound impact on the subsequent development of international criminal law.

Since the trials of the criminals of the Second World War were instigated by the victors, political necessity would not require an amnesty in the same way as it may have done in a negotiated peace.[36] The horrors of the Second World War, as with the First, no doubt made the amnesty option most undesirable for the victors, who felt an irresistible need for retribution.[37] Yet, looked at in a broader context, there were other considerations, which militated against the desirability of amnesty. The punishment of war criminals by international tribunals after the Second World War must be seen in the context of the developments in international law during the 20th century. The termination of hostilities took place within a very different legal framework to that which existed in previous centuries. Before the advent of the development of international criminal law individuals would either be tried for crimes against the municipal laws of a state or as retribution for crimes not against law but against morality and the sanctity of nations. The parameters of justice were far less clear. Where punishment was not based on a pre-existing law of certain foundation a defeated party to a former conflict could quite easily feel that individuals belonging to the defeated group had been injured beyond their deserts, in the words of Gentili. Hence the evolution of the principle of justice which we call *nullum crimen sine lege*. They would not be restful and would desire revenge. Peace would be transient. The same feelings could persist with respect to the application of municipal

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[35] International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1954): (1954) *Yearbook of the International Law Commission* 151; International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1991): *Report of the International Law Commission* 43d Session UNGAOR 46th Session Supp No 10 A/46/10 (1991); International Law Commission Draft Code of Offences against the Peace and Security of Mankind (1996): *International Law Commission* 48th Session UN Doc A/CN.4/L.522 of 31 May 1996, as adopted with amendments on 5 July 1996.

[36] See Chapter 2 *supra*, at 19.

[37] There is, however, some limited reference to amnesties for Nazis otherwise subject to declassification regulations that would have excluded them from public office: see Norman E. Tutorow (ed.), *War Crimes, War Criminals, and War Crimes Trials, An Annotated Bibliography and Source Book*, 1986, at 8.

criminal laws where the individual was not a national of the state of criminal jurisdiction. He would never before have been subject to the criminal laws of that state. International criminal law, on the other hand, has a universal character and the individual, which violated its provisions, could fully expect punishment. It would be more difficult for him to assert that he had been punished beyond his just deserts.

The Nuremberg judgment brings this dimension to the surface in a masterful analysis. The defendants relied on the maxim *nullum crimen sine lege, nulla poena sine lege* in arguing that 'ex post facto punishment is abhorrent to the law of all civilized nations' and that 'no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed'.[38] The Tribunal states that:

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and in so far from it being unjust to punish him, it would be unjust if his wrong were to go unpunished.[39]

The tribunal went on to explain that the solemn renunciation of war by 65 nations in the Kellogg-Briand Pact of 1928 made war illegal and necessarily involved the proposition that those planning and waging war were committing a crime.[40] Although the Pact does not expressly create a crime, the Tribunal supported its finding with the custom and practice of states suggesting the criminal nature of aggression. It pointed out that the Hague Conventions did not specifically incorporate penal protection for its prohibitions but since 1907 violations of these have 'certainly been crimes'.[41]

There is a very pronounced difference between indemnifying acts which are wrongs in morality and municipal law, and indemnifying acts which violate an individual's duty not to his own or any other state but to the international community as a whole. An amnesty for acts in the latter category is questionable both in terms of what it contributes to the

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[38] Judgment of the International Military Tribunal at Nuremberg, 1 October 1946 (1947) 41 *AJIL* 172, at 217.

[39] *Idem*.

[40] Ibid., at 218.

[41] Ibid., at 218.

maintenance of peace and in terms of its legitimacy. In terms of its contribution to peace, the justice in punishing such acts is indisputable. In terms of its legitimacy, it conflicts with not merely a national or moral norm but a norm of global application. It is noteworthy that the judgment clarifies that the principle of international law pursuant to which the acts of government representatives are protected from the application of criminal law cannot be applied to acts contravening international criminal law. The Tribunal observes that:

> On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.[42]

Although the purposes of sovereign immunity and amnesty are quite different the principle that individuals should not be immune from criminal liability under international law should be a constant. The basic premise is that international duties are owed to the international community and not merely to any one state. Therefore, it is in a sense anomalous and inappropriate for one or two to grant immunity for breaches of obligations, which were not owed to them alone but to the international community as a whole.

The Nuremberg Tribunal therefore firmly established the inviolability of crimes against international law and, it is suggested unknowingly, provided a precedent which militates against the appropriateness of amnesty for such crimes. It is true that the particular context of Nuremberg differed significantly from other contexts where some amnesty laws have been passed, in that the Nuremberg judgment was delivered in an environment where there was a victor and a loser.[43] However, it is the general background in terms of the extent to which international law had developed at that time and the contribution of the tribunal to that development which is the pertinent consideration for present purposes. The Tribunal, in commenting on its Charter, indicated that it was 'the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international

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[42] Ibid., at 221.

[43] See Desmond Tutu, *No Future Without Forgiveness*, 1999, at 24-5.

law'.[44] That background highlights a new international legal framework in which individuals are to be held accountable to the international community as a whole rather than merely to the parties to former hostilities.

4. *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*

A. The basis for the establishment of ad hoc tribunals

By concluding international agreements on international crimes, the international community has given its full support to the Nuremberg axiom that those who commit crimes of international ramifications should be punished. Most states would probably agree that the international criminal law should be accompanied by mechanisms to ensure its effectiveness. However, jealous preservation of sovereignty has hitherto held back the process of intervention in the internal affairs of a state in turmoil. Even more particularly this has proved to be a barrier to political consensus for the creation of effective mechanisms for the punishment of international crimes.[45] This position was exacerbated by cold war and an under-developed commitment to the punishment of international criminals. The exact moment at which the political constraints of the cold war dissolved is not easy to determine, but perhaps one of the important final steps in the process of establishing a new era of co-operation was the introduction of domestic legislation in the United States to give effect to the new approach to foreign relations. On 17 December 1993 the United States government passed the Act for Reform in Emerging New Democracies and Support and Help for Improved Partnership with Russia, Ukraine and other new Independent States (the Friendship Act), that repealed all the cold war legislation and other impediments to normal relations with the former republics of the Soviet Union.[46]

As the cold war was brought to a definite closure, a more democratically mature and trusting group of powerful states have found it possible to give effect to these long-awaited aspirations. The conflicts in Yugoslavia and Rwanda, at least at the initial stages, both involved internal struggles. Yet, the international political environment was ripe

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[44] See note 38 *supra*, at 216.

[45] Dugard, note 20 *supra*.

[46] See Detler F. Vagts, 'Repealing the Cold War' [1994] *AJIL* 506.

for a more effective intervention in the name of humanity. The almost unprecedented scale of atrocities in these respective conflicts also served to push the international community into a new era of co-operation, which would ultimately result in the establishment of a permanent international criminal court.

In 1993 and 1994, the Security Council made novel use of its powers by establishing international tribunals for the prosecution of offenders in the Yugoslav and Rwandan conflicts. There were still obstacles remaining within the context of these conflicts. Notably, the conflicts had not yet ceased when the Security Council reached its decisions to establish criminal tribunals. In these circumstances, criminal liability of the leaders and chief negotiators was a potential obstacle to reaching peace settlements and a potential carrot for bargaining peace.[47] These people were the major culprits and could not be excluded from any criminal process directed at their subordinates without creating a sense of extreme injustice. Amnesty was in one sense a political means to achieving peace in the Balkans and Rwanda respectively and prosecution was in one sense an obstacle to the termination of hostilities.

It should be remembered that at the conclusion of the Second World War, Hitler had committed suicide,[48] a number of the Nazi leaders had already been captured and Germany had given its unconditional surrender.[49] The failure to prosecute the Emperor of Japan was an exception based on the policies of the Supreme Allied Commander.[50] Such a complete victory in conflicts involving obvious atrocities has not repeated itself since 1945 and apart from constraints on political consensus for the establishment of international tribunals, the participants in the conflicts of the latter half of the 20th century, unlike the Nazis, would have been very aware of the implications of Nuremberg for them and always had, if in some cases only residual, power to countenance or reject peace. The victory of the United Kingdom over Argentina in the Falklands War was not an appropriate context for an international tribunal because the Argentine troops did not commit widespread atrocities. One could cite the crime of aggression but this was ill-defined and the United Kingdom could not

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[47] See Anthony D'Amato, 'Peace vs. Accountability in Bosnia' [1994] *AJIL* 500.

[48] See Mark Arnold-Forster, *The World at War*, 1981, at 365.

[49] *The World at War*: BBC2 documentary series, 6 September 1994.

[50] See Chapter 2 *supra*, at 19.

effectively capture perpetrators of this crime without extending its war to Argentinean territory, which would have amounted to an act of aggression. The Gulf War after Iraq's invasion of Kuwait was perhaps the nearest to a victory after a war of atrocities, although there was no unconditional surrender or seizure of the power of the state. The establishment of an international criminal tribunal was debated but at this stage what caused the abandonment of the idea is indecipherable. The reasons could include the perceived usefulness of Saddam Hussein's role in keeping Iran in check, a potentially greater threat to peace in the Middle East, and, although this is less likely in my view, the wish to underplay the horrors of possible breaches of the Geneva Conventions by the allied forces in relation to the civilian population of Iraq.[51] On the other hand, formal amnesty for officials of the Iraq regime was an option that was never considered.

A useful starting point to understanding the determination of the international community to prosecute perpetrators of international crimes in the Yugoslav and Rwanda conflicts is an examination of the Security Council resolutions establishing the ad hoc tribunals. Both Security Council resolution 827 establishing the Yugoslav tribunal and resolution 955 establishing the Rwanda tribunal state that the Security Council is,

> Determined to put an end to such crimes [widespread and flagrant violations of international humanitarian law] and to take effective measures to bring to justice the persons who are responsible for them.

and that it is,

> Convinced that in the particular circumstances of [the former Yugoslavia and Rwanda, respectively] [...] the prosecution of persons responsible for the serious violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.

The two major elements in the decisions of the Security Council were therefore halting the violations and justice. It was the particular circumstances of these conflicts that persuaded the Security Council

[51] I still remember very vividly the extensive and clear BBC television coverage of the bombing and the resulting destruction, although it seems that the allies aimed for exclusively military targets.

that prosecution by an international tribunal would achieve these results. It is convenient to deal with the circumstances of each of these conflicts in turn.

Before 1991, the Socialist Federal Republic of Yugoslavia was made up of the six republics of Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia, together with the two autonomous regions of Kosovo and Vojvodina. The population consisted of a number of ethnic minorities, the largest of which was the Serbs making up just over one third. The next largest group was the Croats consisting of just over one sixth of the total population.[52] The various groups could be distinguished ethnically and religiously. The main religious division was between Christians and Muslims. Historical tensions and identity struggles had subsisted between the groups, which explains the choice of a federation as the appropriate form of government.

The government was headed by the Presidential Council, which was chaired by the heads of the republics and autonomous regions on a rotating basis. It was the domination of Serbs in the federal structure that exacerbated growing tensions within the Federation. In the latter part of 1990 developments took place which would herald the onset of the subsequent conflict. Both Croatia and Slovenia took steps towards breaking away from the federation. The parliaments of both republics subjugated federal legislation. The Slovenian parliament declared that it would no longer be applied, while Croatia declared that it would be subordinate to its own legislation. On 23 December 1990, Slovenia held a referendum on independence for which the 88.5 percent of its electorate voted in favour.

Negotiations on the reform of the federation failed and the Serbian leadership, which favoured a more centralised form of government, declared martial law. When Serbia, Montenegro and the two autonomous republics vetoed the election of a Croat for the federal presidency, Croatia and Slovenia consolidated plans for independence and declared independence on 25 June 1991. The Serbian leadership then executed its threat to use all available means to stop the secession of the republics by employing the armed forces. There began the initial stages of what proved to be one of the bloodiest conflicts since the Second World War involving the seizure of territory, spates of genocidal acts and forced population transfer which came to be known as 'ethnic cleansing'.

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[52] See *Whitaker's Almanac* 1992, at 877-8 (1991).

The circumstances surrounding the conflict in Rwanda, which predominantly consists of two groups known as the Hutus and the Tutsis, date back to the First World War. The Tutsis were the minority but ruled Rwanda as a Tutsi kingdom. Initially a German colony, after the First World War it became a Belgian mandate in terms of article 119 of the Treaty of Versailles of 1919. While the Tutsis and Hutus were ethnically distinct, the differences petered out through inter-marriage. The Belgian government fuelled the distinction by requiring possession of identity cards stating the ethnic category of the holder. Belgium facilitated the formation of a Hutu-dominated government in preparation for independence while the Hutu government launched a series of propaganda campaigns against the Tutsis that led to their regular massacre.[53]

The circumstances of these conflicts militate against amnesty as an option. On the surface there were factors that lent themselves to the consideration of amnesty. Clearly both conflicts engulfed the majority of the populations of the respective territories and in that respect reconciliation was a desirable objective in securing lasting peace. It was also questionable whether there were the available resources to prosecute the large number of perpetrators, particularly in Rwanda. In both conflicts the attainment of peace could not be achieved by force and the co-operation of the warring parties was essential.

However, there were also important differences between these situations and the ones pertaining in the Americas and South Africa. Perhaps the most significant lies in the attitude and positions of strength of the parties to the conflicts. In Latin-America and South Africa amnesty was a domestic initiative employed in the context of a common burning desire for peace and a realisation on the part of the former governments whose reppressive rule could not continue. At the time that the Security Council addressed the setting up of tribunals, the conflicts were persisting and the protagonists had no common wish to reconcile as well as the ability to continue their causes. It is doubtful whether a peace settlement was even close or whether one incorporating amnesty would have lasted. A peace settlement incorporating amnesty needed a firm commitment to peace from all sides.

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[53] See Mariann Meier Wong, 'The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Inquest' (1995-96) 27 *Col Hum Rts LR* 177, at 179-80.

In one sense impunity might have worsened the situation in that the conflicts could have quickly re-ignited with even greater fervour to destroy the enemy by any means. In Rwanda a history of impunity and lack of respect for the rule of law was even perhaps a major contributing factor to the scale of the atrocities.

Another difficulty with amnesty as an option lay in the nature and seriousness of the crimes in question. Genocide constitutes one of the most extreme violations of human dignity. In legal terms, the prohibition on genocide has been elevated to the status of *jus cogens*, a norm of international law from which there can be no derogation except by virtue of a norm of similar status.[54] Justice and the maintenance of the rule of law could rarely if ever countenance impunity for the commission of such crimes. When crimes reach this level of seriousness the concern to halt violations goes beyond the violations in the subsisting conflict. One must also give careful consideration to the implications of impunity for future conflicts. The paramount necessity of deterring the repetition of such acts in future conflicts outweighs considerations of the contribution to reconciliation and the attainment of peace, which might be achieved by impunity in the subsisting conflict. This must be particularly so when such impunity may in fact have the opposite effect of prolonging the conflict.

In Latin America and South Africa the commission of serious crimes did occur. Genocide was not endemic to these conflicts, although there may have been elements of it in Chile in particular. Nonetheless, very serious crimes were committed in these conflicts and it may be that amnesty for such crimes is questionable, despite the underlying rationale for amnesty in those states.[55]

An interesting facet of the reasoning of the Security Council in its resolutions is its assertion that the setting up of a tribunal and prosecution of the perpetrators can lead to the termination of the violations of international humanitarian law. It is an unusual but not illogical rationale for punishment that the pursuit of such punishment may suppress the continuation of the acts that are the very subject of the proceedings. In the premises, this proved to be wrong, although it may have deterred some. President Slobodan Milosevic (who has subsequently been deposed) appears to have been oblivious to international developments with respect to the criminal tribunals and

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[54] See O'Shea, *International Law and Organization, A Practical Analysis*, 1998, at 23-4.

[55] With respect to which consider the chapters that follow.

the prosecution of heads of state in his conduct towards the ethnic Albanians of Kosovo. This may be partly due to the fact that he was not indicted for earlier crimes, possibly pursuant to a secret or implied assurance.

Although crimes under international law can be prosecuted in the municipal courts of a state, there are impediments to the effectiveness of the national process, which may require prosecution before an international tribunal. First, it may be impractical and undesirable to have trials within the state while the hostilities have not yet ceased. In the former Yugoslavia hostilities were still fierce at the time of the setting up of the international tribunal, and even six years after the establishment of the tribunal hostilities were persisting that had ignited in Kosovo a year earlier with the same political context as in the original conflict of discrimination and the assertion of the right to self-determination from Serb-dominated rule. In Rwanda, at the time of the establishment of the international tribunal, although the government of National Unity had taken control, the conflict continued in areas where the government had not secured total control. National trials were begun but in an atmosphere of conflict. Arrests were made not on the basis of proper evidential inquiries but on the basis of prejudiced suspicion veiled in feelings of vengeance.

Secondly, it may be difficult to expect the government to select with impartiality, or at all, those persons to be prosecuted and judges to impose punishments. It would be difficult to conceive of the Serb government prosecuting Serbs in the prevailing climate. Some of those indicted in the international tribunal are in fact high-ranking officials in the ruling governments of the political structure of the former Yugoslavia. Similarly, in Rwanda, the new government was set up through the victory of the Tutsis and it is far from clear that impartiality exists or can be expected in the process.

B. *The jurisdiction of the tribunals*

The jurisdiction of the tribunals is established by the resolutions of the Security Council as a measure for the maintenance of international peace and security. The jurisdictional competence of the Tribunal for the Former Yugoslavia is prescribed by its Statute and extends to persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia since 1991.[56] The

[56] Article 1.

jurisdictional competence of the tribunal for Rwanda is prescribed by its statute and extends to persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and to Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.

The international tribunals were not intended to replace but to complement the jurisdiction of national courts. The tribunals lack the necessary resources to deal with every violation of international humanitarian law and any move to bar the long-established jurisdiction of municipal courts with respect to international crimes would be a regressive and foolish approach. There may be arguments to assert the undesirability of national prosecution in the territory in which the underlying conflict persists. However, the availability of evidence and witnesses on the territory of the state is an important consideration in retaining the jurisdiction of those courts. It should also be remembered that a number of international crimes are subject to universal jurisdiction and can therefore be tried in the national courts of another state. Given the difficulties in securing the presence of accused, witnesses and evidence, it is desirable that international criminal justice should rely on all available means of ensuring its effective enforcement.

The tribunals appropriately do not rely on exclusive jurisdiction over crimes but complement national prosecution. The principle of 'complementarity' was retained and refined in the Statute of the International Criminal Court.[57] In the statutes of the ad hoc tribunals concurrent jurisdiction is provided for[58] but the international tribunals retain primacy of jurisdiction over that of national courts. The tribunals may, at any stage, request national courts to defer to their jurisdictional competence.[59]

The statutes of the tribunals, however, preserve the principles of *autre fois acquis* and *autre fois convict*.[60] A person tried for an international crime before a national court may not be retried before the international tribunal unless 'the national court proceedings were not impartial or independent, were designed to shield the accused from

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[57] *infra*.

[58] Article 9 of the Statute of the International Tribunal for the Former Yugoslavia. *supra*. and article 8 of the Statute of the International Tribunal for Rwanda. *supra*.

[59] Article 9 (2) of the Yugoslav Statute and article 8 (2) of the Rwanda Statute.

[60] Expressed jointly in the Latin maxim *non-bis-in-idem*.

international criminal responsibility, or the case was not diligently prosecuted'.

No provision is made for lack of jurisdiction or the inadmissibility of proceedings in the event that a person has been granted amnesty or pardon under the municipal law of a state.[61] It follows that a person may be prosecuted before a tribunal in so far as genuine criminal proceedings have not been brought to a close. Where a person has been properly tried and convicted before a national court and has subsequently been granted immunity for the same crime, then the jurisdiction of the international tribunals would appear to be excluded. This results from the fact that the statutes only require the national court proceedings to have been conducted in good faith. This was an oversight on the part of the negotiators of the statutes. In practice, this only really has potential consequences for the jurisdiction of the Tribunal for the Former Yugoslavia, which has jurisdiction over events still taking place where there is a genuine risk of national measures been taken to ensure the immunity of perpetrators of international crimes.

C. *Crimes within the purview of the jurisdiction of the tribunals*

The nature of the conflicts in the former Yugoslavia and Rwanda have pre-determined the scope of crimes covered by the statutes of the tribunals. These were armed conflicts and as such the crimes envisaged are those committed in the context of armed conflict. Neither statute incorporates the crime of aggression.[62] This can be partly explained by the fact that neither conflict began as a conflict between recognised independent sovereign states. The crime of aggression is closely related to the prohibition on the use of force in the settlement of international disputes and therefore involves an aggression by one state against another. The omission can also be explained by the fact that the crime of aggression has not reached a state of development of clear definition in the practice of states and there is a degree of political reluctance to

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[61] See Chapter 11 *infra*, at 314-5.

[62] Contrast the conditional inclusion of the crime of aggression in the Rome Statute on the Establishent of an International Criminal Court: see O'Shea. note 92 *infra*, at 253-4.

enshrine a principle that could conceivably find application in some of the actions of the super-powers.[63]

The conflict in Rwanda differed from that in the former Yugoslavia in that the former was a purely internal conflict whereas the latter developed into an international conflict as the former republics successively declared themselves independent and duly received international recognition. These characteristics are reflected in the two statutes. Whereas the Statute of the International Tribunal for the Former Yugoslavia refers to grave breaches of the Geneva Conventions of 1949[64] and violations of the laws and customs of war,[65] the Statute of the International Tribunal for Rwanda refers to violations of article 3 common to the Geneva Conventions and of Additional Protocol II.[66] Both tribunals are competent to try persons for the commission of the crime of genocide[67] and crimes against humanity.[68]

D. *International co-operation and judicial assistance*

Both statutes of the tribunals incorporate the general principle of co-operation by states in the investigation and prosecution of perpetrators of crimes within the jurisdiction of the tribunals. States must comply with requests for assistance from the relevant tribunal and this may include, inter alia, assistance in the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons and the surrender or the transfer of accused to the tribunal.[69]

It follows from the fact that these tribunals were established by Security Council resolutions that an enforceable obligation to co-operate also derives from article 25 of the UN Charter which obliges member states to comply with the decisions of the Security Council.

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[63] Consider the debate over the inclusion of a crime of aggression in the Statute of the International Criminal Court, *infra*.

[64] Article 2 of the Statute.

[65] Article 3 of the Statute.

[66] Article 4 of the Statute.

[67] Article 4 of the Statute for the Former Yugoslavia and Article 2 of the Rwanda Statute.

[68] Article 5 of the Statute for the Former Yugoslavia and Article 3 of the Rwanda Statute. For analysis of the distinction between genocide and extermination as a crime against humanity see *infra*.

[69] Article 29 of the Statute for the Former Yugoslavia and Article 51 of the Rwanda Statute.

There is no provision made for the refusal of assistance in the case of an accused benefiting from amnesty under the municipal law of a state.[70] It is trite law that a state may not rely on its own municipal law as an excuse for not complying with its international obligations. It follows that an amnesty will not trump the initiation of proceedings before the ad hoc international tribunals for the prosecution of an international crime covered by the amnesty.

E. *The power of the tribunals to give effect to a national amnesty law*

It is possible for the tribunals to give effect to a national amnesty law having found the accused guilty of the commission of a crime within their jurisdiction. It would seem to follow from the fact that no provision is made for the halting of proceedings simply on the basis that the accused has amnesty under the law of a state, that the recognition of such amnesty should not follow as a matter of course. The relevant provisions of the Statutes provide that where the applicable law of the state in which the convicted person is imprisoned makes him or her eligible for pardon or commutation of sentence, the state concerned shall notify the tribunal. The president of the tribunal may then, in consultation with the other judges, allow the pardon or commutation of sentence to have effect if he so decides on the basis of the interests of justice and the general principles of law.

The relevant articles refer to pardon rather than amnesty but it is possible to interpret the word pardon to include amnesty. The objections to amnesty for an international crime would presumably apply equally to pardon. However, the decision to give effect to a national pardon will follow the sentence of the tribunal, and the state in which the person is imprisoned will not necessarily be the same state which affords that individual amnesty. Where this is the case the amnesty cannot be implemented. It may be that the interests of justice would militate against the implementation of amnesties where some perpetrators within the context of a conflict are imprisoned in one state not affording amnesty but who are eligible for amnesty in terms of another state where other perpetrators within the context of the same conflict are imprisoned, and who are also eligible for amnesty under the law of that state.

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[70] See also Chapter 11, *infra*, at 309-10.

There would also in all probability need to be something more than the political nature of the offence to justify the endorsement of an amnesty since to accept impunity simply based on the political nature of the offence would be incompatible with the premise on which the tribunal is based – namely that a serious violation of humanitarian law should be punished. These violations would satisfy the criterion of political association in most cases.

It would therefore seem that, although an amnesty could theoretically be endorsed by one of the tribunals, there is in fact little scope for such *complementarity* between the criminal process of the tribunals and a national amnesty process.[71]

F. *Future ad hoc tribunals*

The International Criminal Tribunals for the Former Yugoslavia and Rwanda have set a firm precedent for the establishment of criminal tribunals for particular conflicts. The developments with respect to the International Criminal Court[72] will not extinguish the relevance of ad hoc criminal tribunals. It may be some years before the Court is established and even once established the ad hoc tribunal will retain importance for conflicts on the territory of non-parties and for crimes not covered by the jurisdiction of the Court.

Most recently, Sierra Leone approached the United Nations with a view to the establishment of an international criminal court.[73] The Security Council requested the Secretary-General of the United Nations to negotiate an agreement with the government of Sierra Leone for the establishment of an independent special court.[74] An agreement was negotiated between 12 and 14 September 2000 on the establishment of a 'Special Court' for Sierra Leone.[75] This ad hoc tribunal will differ from its predecessors in that it will have jurisdiction over international and national crimes in terms of Sierra Leonean law.

There are signs that the Court's legal framework will adopt a more defined and refined approach to amnesty than its predecessors. The

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[71] See further Chapter 11 *infra*.

[72] See *supra*.

[73] See further Chapter 11, *infra*, at 315.

[74] See Security Council resolution 1315 (2000) of 14 August 2000, UN Doc.

[75] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone: Annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915.

Lome Peace Agreement of 7 July 1999 granted amnesty to rebels from the Revolutionary United Front (RUF) and established the National Truth and Reconciliation Commission. However, the civil war resumed. The Statute of the Special Court for Sierra Leone[76] expressly stipulates in article 10 that amnesty shall 'not be a bar to prosecution' for crimes against humanity,[77] violations of article 3 common to the Geneva Conventions and of Additional Protocol II,[78] and other serious violations of international humanitarian law.[79] It is nevertheless envisaged that the National Truth and Reconciliation Commission might be used as an alternative to prosecution in other cases.[80] The Security Council suggested in its response to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone[81] that juvenile offenders should be brought before the Commission.[82] Logistical negotiations continue at the time of writing.

6. *The International Criminal Court*

On 17 July 1998, in Rome,[83] the international community delivered a historic blow to impunity, when it adopted[84] a text of agreement for the establishment of a permanent international criminal court (hereinafter referred to as the Rome Statute).[85] The principal obstacles to political consensus on such an ambitious endeavour were finally defeated.[86]

There remain two further stages in the process before the Court can begin to operate. First, states must reach consensus on the rules of

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[76] Enclosure to the Report of the Secretary-General, ibid.

[77] Defined in article 2.

[78] As defined in article 3.

[79] As defined in article 4.

[80] See Report of the Secretary-General, note 75 *supra*, at para 8.

[81] See note 75 *supra*.

[82] See *UN newservice*, 28 December 2000 (*www.un.org/News/dh/latest/page2.html*).

[83] The plenipotentiaries met between 15 June and 17 July at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

[84] By 120 votes in favour, 7 against and 21 abstentions.

[85] The Statute of the International Criminal Court A/CONF. 183/9 (1998) 37 *ILM* 999.

[86] With respect to these obstacles see Dugard, note 20 *supra*.

procedure and evidence. A Preparatory Commission was established[87] to, inter alia, produce draft rules on procedure and evidence before 30 June 2000.[88] These draft rules were accordingly formulated.

States now need to ratify the Rome Statute.[89] The national authorities of states will have an opportunity to review the implications of the treaty before instruments of ratification are submitted. The time taken for a treaty to enter into force varies. The International Covenant on Civil and Political Rights of 1966 took nine and half years before it attained the required twenty-five ratifications to enter into force.[90] On the other hand, the Convention on the Rights of the Child of 1989 took nine months to receive the required twenty ratifications to enter into force.[91] The Rome Statute requires at least sixty ratifications before it can enter into force.

It is not within the scope of this work to give an appraisal of the court.[92] Nonetheless, the agreement for its establishment is a recent and significant development in international criminal law that has important implications for amnesties. Accordingly, it is worth giving it some attention in an attempt to take into account the totality of the phenomena observed.

A. *The legal basis of the Court's jurisdiction and amnesty*

One way in which the Court may acquire jurisdiction is if a situation is referred to it by the Security Council acting under chapter VII of the Charter of the United Nations.[93] Here, the consent of no individual state is required. So, whatever a state's position on its amnesty law may be,

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[87] Resolution F para 1 of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court A/CONF.183/10.

[88] See Resolution F para 6 of the Final Act: ibid.

[89] As at 18 December 2000, the Statute had received 25 ratifications.

[90] See article 49 (1); the Covenant entered into force on 23 May 1976.

[91] The Convention on the Rights of the Child entered into force on 2 September 1990.

[92] For this see: Andreas O'Shea, 'The Statute of the International Criminal Court' (1999) *SALJ* 243.

[93] Article 13 (b).

as long as it is not a permanent member of the Security Council,[94] it cannot block the Court's jurisdiction.

In acting pursuant to chapter VII, the Security Council must deem that it is taking a measure necessary to maintain and restore international peace and security. The state that has passed an amnesty law may already have judged that it is necessary for restoring and maintaining peace. The Security Council will not be bound by that judgment and may decide that prosecution is more likely to restore and maintain peace than impunity. In most cases the state's law will have been introduced as a bargaining chip and therefore the Security Council's action can be reconciled with that of the state on one level, although an inconsistent approach to justice is in principle undesirable.

The Court also has jurisdiction if a situation is referred to the Prosecutor by a state party to the Statute or if the Prosecutor has initiated an investigation on the basis of information on crimes within the jurisdiction of the court.[95] In these two situations the Court may only exercise jurisdiction in circumstances where the crime was committed on the territory of a state or by a national of that state and that state is a state party to the Statute[96] or has otherwise accepted the jurisdiction of the Court. It follows that while a state party cannot object to the jurisdiction of the court on the basis of its amnesty law, the non-state party is under no obligation to consent to the court's jurisdiction. This requirement of consent leads to the anomalous result, in the relevant circumstances, that crimes subject to universal jurisdiction in terms of customary international law may be tried by any state in the world, but not by the International Criminal Court.[97]

The situation referred to the Prosecutor may be one in which one or more crimes appear to have been committed.[98] So, a general situation may be referred, in which many individuals have committed many

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[94] In terms of article 27 of the Charter of the United Nations, votes on non-procedural matters require the concurring votes of all five permanent members. It is likely that this would be treated as a non-procedural matter.

[95] Articles 13 (a) and (c).

[96] States party to the statute ipso facto accept the jurisdiction of the Court: article 12 (1). However, a party may declare that the Court shall have no jurisdiction over war crimes committed by its nationals or on its territory for a period of seven years after the Statute's entry into force: article 124.

[97] See O'Shea, 'The Statute of the International Criminal Court', note 92 *supra*, at 247-8.

[98] See article 13 (a) & (b).

crimes, some of which are covered by national amnesties and some of which are not.[99] This will not affect the question of jurisdiction.

The Prosecutor can initiate an investigation on the basis of any source of information. This means that other UN organs, international organizations and non-governmental organizations can play an active role.[100] States are generally reluctant to petition other states before international tribunals for violations of human rights treaties.[101] States guard jealously their national jurisdiction and try to refrain from 'doing unto others what they would not wish done unto themselves'. After all, no state's human rights record is untarnished and such a state can expect a reprisal in kind. Equally, a state would not wish to interfere with the national process of reconciliation of another state by referring to an international criminal tribunal offences covered by that other state's amnesty law. The Security Council may be also swayed by political considerations. Non-governmental organizations, on the other hand, are often keen to confront impunity for gross human rights violations, as is illustrated by Amnesty International's active participation in the Pinochet proceedings and its continued appeal to states such as South Africa to avoid the culture of impunity created by general amnesties,[102] and respect their international obligations under human rights treaties.[103]

A debatable aspect of the Security Council's control over the jurisdiction of the Court is the proviso contained in article 16 of the Statute. This allows the Security Council, again acting under chapter VII, to forestall a prosecution for a renewable period of twelve months. Such a resolution would of course require nine affirmative votes from the fifteen members, including the concurring votes of the permanent

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[99] The Lawyers Committee for Human Rights expressed the view that the Statute should clearly specify that the Security Council may refer matters but not individual cases before the Court: Lawyers Committee for Human Rights, *Establishing an International Criminal Court, Major Unresolved Issues in the Draft Statute*. A Position Paper of the Lawyers Committee for Human Rights (unpublished).

[100] Cf. articles 21 and 25 of the Draft Statute: Report of the International Law Commission 46th Session UNGAOR 49th Session Supp No 10 UN Doc A/49/10 (1994).

[101] See Dugard, note 20 *supra*, at 338.

[102] See Amnesty International, 'South Africa: No impunity for perpetrators of human rights abuses', *Amnesty News*, 30 July 1999.

[103] See Amnesty International, 'South Africa: Mengistu -- failure to respect international human rights obligations', *Amnesty News*, 8 December 1999.

members.[104] The veto of the permanent members could only be used to prevent such a resolution from being passed. Therefore, the major powers could not stop a prosecution without support from the non-permanent members.

It is in the context of amnesty that the power of the Security Council could have practical implications and even some use. The Prosecutor may legitimately pursue the prosecution of individuals that have hitherto received amnesty from their home state. The domestic situation could still be volatile with those having been granted amnesty retaining the power to de-stabilise the transition process. Having won their amnesty, the prospect of it being taken away may force them to arms. In these circumstances, delaying the prosecutions may be the only wise course of action, albeit that the dynamics may turn out similar to a hostage-type situation.[105]

The relationship between the Court and national criminal courts is governed by the principle of 'complementarity'.[106] This principle is referred to in the preamble and article 1 so that it is deemed relevant to the interpretation of the Statute as a whole.[107] The controversial nature of the obligation to prosecute or extradite (*aut dedere aut judicare*) is evident from the discussion in the chapters that follow. It is unfortunate that the plenipotentiaries did not bolster the stated principle of 'complementarity' by including another principle, that of *aut dedere aut judicare* in the substantive provisions of the Statute.[108]

The preamble to the ILC Draft Statute stated that the Court was 'intended to be complementary to national justice systems in cases where such trial procedures may not be available or may be

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[104] Article 27 (3) of the Charter of the United Nations. The referral of a matter to the Court must be a non-procedural matter in line with the practice of treating a request for an advisory opinion from the International Court of Justice as a non-procedural matter: see Simma et. al, *The Charter of the United Nations, A Commentary*, 1994, at 438.

[105] See Chapter 11 *infra*, at 310-1.

[106] A term introduced by the Ad Hoc Committee on the International Criminal Court: see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court UNGAOR 50th Session supp No 22 UN Doc A/50/22.

[107] See article 31 of the Vienna Convention on the Law of Treaties of 1969.

[108] As suggested by South Africa: see Report of the Preparatory Committee: Report 7 *supra*, at para 26.

ineffective'.[109] There was widespread agreement that this test was unclear.[110] It has been pointed out that the Court may be rendered powerless where national authorities refuse to prosecute, grant amnesty or tolerate a friendly prosecution.[111] Such results can be interpreted as consistent with a requirement that trial procedures be available and effective. The Rome Statute adopts a preferable formula in classifying a case as inadmissible where it is being or has been investigated or prosecuted by a state having jurisdiction, unless the state is unwilling or unable genuinely to investigate or prosecute.[112] The effect of this, taken together with the criteria that follow, is that a refusal to prosecute following upon investigation by a state will only be accompanied by the Court reaching a finding of inadmissibility where the decision was based on a lack of evidence as to the commission of the crime. A refusal to prosecute based on a decision to grant amnesty to the accused would not affect the jurisdiction of the Court.[113] An investigation must be interpreted as an investigation with a view to prosecution in the light of article 17 (2) (b) and (c) which provide as criteria, in the determination of unwillingness, 'unjustified delay' and 'the proceedings being conducted in a manner' which is *'inconsistent with an intent to bring the person concerned to justice'*. A failure to prosecute based on amnesty would also amount to an inability to prosecute owing to the unavailability of the state's national judicial system.[114]

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[109] See Draft Statute for an International Criminal Court. Report of the International Law Commission, 46th Session, *UNGAOR*, 49th Session. Supp.No.10, UN Doc.A/49/10 (1994).

[110] See Report of the Ad Hoc Committee, *supra*, at para. 41.

[111] See Dugard note 20 *supra*, at 336.

[112] Article 17 (1) (a) & (b).

[113] For an examination of how this can be reconciled with the growing practice of amnesty, see chapter 11 *infra*, at 316 *et seq.*

[114] See article 17 (3) which provides that, 'In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or *unavailability of its national judicial system*, the State is unable to obtain the accused or the necessary evidence and testimony or *otherwise unable to carry out its proceedings*' [emphasis added].

B. *The co-operation of a state in relation to an amnestied accused*

The Court's jurisdiction over an offence is virtually meaningless without the accompanying ability to obtain evidence and secure the attendance of the accused and witnesses. It will not have the resources or the legal right to pursue evidence in the sovereign territory of states without their consent. It therefore requires the co-operation of states. A state that has granted amnesty to an accused will find itself in an embarrassing predicament if it receives an extradition request and will be most reluctant to comply with the request. Its internal law may require extradition proceedings that may be covered by the amnesty.[115] The extradition law may also contain a condition to the effect that the accused has not been granted amnesty.

It is clear that a state may not rely on the provisions of its own domestic law as a justification for not fulfilling its international obligations. In terms of the Rome Statute, states must adapt their laws to enable them to co-operate with the Court. A general obligation for state parties to co-operate with the Court is contained in article 86 of the Rome Statute. The articles, which follow then set out the rules and procedures for such co-operation. In the case of the *Prosecutor v Blaskic*.[116] the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia confirmed the powers of that tribunal to issue binding orders to states.[117]

The tribunals for the former Yugoslavia and Rwanda were created by Security Council resolutions.[118] So, the obligation to co-operate was an obligation of all member states of the United Nations.[119] The Court, on the other hand, is established by international agreement. The obligation under this agreement only exists for the parties to it. However, this does not prevent a non-party from accepting this obligation in writing.[120]

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[115] See Chapter 11, *infra*, at 308.

[116] See note 17 *supra*. See O'Shea, 'The Statute of the International Criminal Court', note 92 *supra*, at 257.

[117] See article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Security Council resolution 827 (1993), para. 4.

[118] Security Council resolutions 827 (1993) and 955 (1994) respectively.

[119] See *Prosecutor v Blaskic* note 17 *supra*, at para 116.

[120] See article 35 of the Vienna Convention on the Law of Treaties of 1969.

It is intended that the Court will be brought into relationship with the United Nations through an international agreement.[121] Since the Court's function is to promote universal respect for human rights it may be classified as specialised agency within the meaning of articles 57 and 63 of the United Nations Charter. The Charter's obligation to co-operate with the United Nations in the promotion of human rights may therefore also be a basis for a loose obligation for non-party states to co-operate with the Court.

C. *Crimes under the Court's jurisdiction*

To harmonize the international criminal justice system with national approaches to transitional justice, principles on the limits of amnesty laws must have due regard to the scope of the jurisdiction of the International Criminal Court. Given the potential conflict of interest, those crimes covered by the jurisdiction of the Court should be prime candidates for exemption from the legitimate parameters of an amnesty law.

The crimes over which the court has jurisdiction are set out in article 5 of the Rome Statute. They include genocide, crimes against humanity, war crimes and the crime of aggression. The jurisdiction of the Court over the crime of aggression[122] is deferred until agreement is reached over the definition of the crime.[123] The jurisdiction of the Court is also limited to the most serious crimes of concern to the international community as a whole. This statement might seem superfluous since these categories are, by their very nature, the most serious crimes of concern to the international community as a whole. The crime of genocide and crimes against humanity are necessarily among the most serious crimes. However, with respect to war crimes, an act may be an infringement of the laws and customs of war without necessarily reaching the required level of seriousness. Likewise, acts of aggression may technically contravene the non-use of force but a genuine belief in the lawfulness of the act or a meticulous respect for the laws of war might bring it outside the scope of 'atrocities'.

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[121] Article 2.

[122] See Hogan-Doran and von Ginkel, 'Aggression as a crime under international law and the prosecution of individuals by the proposed International Criminal Court', (1996) 43 *Netherlands Int'l Law R* 321

[123] Article 5 (2) in conjunction with articles 121 and 123.

The Draft Statute envisaged jurisdiction over a list of treaty crimes relative to terrorism, drug offences and offences against internationally protected persons.[124] This is not so much because the international community does not see these crimes as serious, but is more related to the personal interest that states have in these crimes and their paranoid faith in their own legal systems to deal with them.[125]

Genocide refers to the same crime as that contained in the Genocide Convention.[126] Both crimes against humanity and war crimes have been far more extensively defined than in the Nuremberg,[127] Yugoslav[128] or Rwanda[129] Statutes. It is therefore worth shedding some light on this definition so as to give some idea as to the parameters of these broadly phrased crimes. Crimes against humanity in terms of the Rome Statute require 'acts committed as part of a widespread or systematic attack directed against a civilian population'.[130] Such acts include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other act of sexual violence of comparable gravity, enforced disappearance of persons or the crime of apartheid'.[131] Such acts also include 'persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender..., or other grounds that are universally recognized as impermissible under international law, in connection with any [of the mentioned acts] ... or any crime within the jurisdiction of the Court'.[132]

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[124] See article 20 (e) of the ILC Draft Statute on an International Criminal Court.

[125] Consider Dugard's illustration of the US refusal to submit the Lockerbie affair to an international tribunal: see note 20 *supra*, at 334.

[126] For the distinction between genocide and extermination as a crime against humanity: see O'Shea. 'The Statute of the International Criminal Court'. note 92 *supra*, at 254-5.

[127] See article 6 (c) of the Charter of the Military Tribunal at Nuremberg (1945) 39 *AJIL* Supp 258.

[128] See article 5 of the Statute of the International Tribunal for the Former Yugoslavia (1993) 32 *ILM* 1192.

[129] See article 3 of the Statute of the International Tribunal for Rwanda (1994) 33 *ILM* 1598.

[130] Article 7 (1).

[131] ibid.

[132] Article 7 (1) (h).

Finally, they also include 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.[133] Many of these respective acts are then individually defined.[134]

War crimes are exhaustively defined. The jurisdiction of the Court extends to four categories of war crimes. The first category is grave breaches of the Geneva Conventions of 1949.[135] The second category is other serious breaches of the laws and customs applicable to international armed conflicts.[136] The third category is serious violations of article 3 common to the four Geneva Conventions, which provides for minimum standards in armed conflicts not of an international character.[137] The question of an obligation to prosecute grave breaches of article 3 is considered in the next chapter.[138] The Statute's confirmation that such violations constitute crimes under international law lends support to the proposition that they do, although those who argue the contrary might rely on the use of the word 'serious' instead of 'grave'. The fourth category is serious violations of the laws and customs applicable in armed conflicts not of an international character.[139] The Statute therefore confirms the application of international criminal law to conflicts within the territory of one state. The Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor v Dusko Tadic*[140] had already taken this stance, which, in the light of recent state practice, should now be accepted as correct.

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[133] Article 7 (1) (k).
[134] Article 7 (2).
[135] Article 8 (2) (a).
[136] Article 8 (2) (b).
[137] Article 8 (2) (c).
[138] See also O'Shea, 'Should Amnesty be Granted to Individuals Who Are Guilty of Grave Breaches of Humanitarian Law? A Reflection on the Constitutional Court's Approach' (1997) 1 *Human Rights and Constitutional Law Journal of Southern Africa* 24.
[139] Article 8 (2) (e). See also Meindersama C 'Violations of Common Article 3 of the Geneva Conventions as violations of the laws and customs of war under article 3 of the International Criminal Tribunal for the Former Yugoslavia' (1995) 42 *Netherlands Int'l Law R* 375.
[140] (1996) 35 *ILM* 32; see also Geoffrey R. Watson 'The humanitarian law of the Yugoslavia War Crimes Tribunal: jurisdiction in Prosecutor v Tadic' (1996) 36 *Va JIL* 687.

6. Conclusion

For an emerging democracy, as in a society in transition from conflict, the choice between amnesty and punishment for past human rights violations is not an easy one. Viewing the situation as it does, the choice of a generous unrestrained amnesty may appear to be the only realistic option, having regard to all the relevant circumstances. However, it is a choice that is frequently made having regard only to the repercussions within the state. The insular examination of the question by the government of a society in transition, using Rigaux's scientific method of law, is comparable to the ancient Aristotelian conception of the universe as a world at the centre of which lies a stationary planet known as Earth.

An international legislature must examine the issue having regard not only to the dynamics within an individual state, but to the interactions within the whole international system. Applying Rigaux's conception of the science of law to this task requires this legislature to consider the totality of phenomena observed within the international system. Einstein's theory of general relativity would have provided a complete mathematical model for the universe that would describe all the phenomena observed. In this model, every planet and every star could move constantly in a relative space and time. The holistic method of science would also change the face of engineering when thermodynamics would move away from looking at the engine as a simple closed system of mechanical parts to seeing it as an open system surrounded by an atmosphere and through which energy can flow. The science of law requires the observer to examine transitional justice in a manner that goes beyond a domestic choice between liability and amnesty having regard to the circumstances pertaining within that state. The observer needs to incorporate within the model for understanding transitional justice a developing international legal criminal justice system and its interaction with a number national legal systems.

In the former chapter, the justifications for amnesty and liability and its consequences were described and balanced. These rationalising philosophies offer a deceptive simplicity when viewed within the closed system of a state. I have attempted to refine them for the purpose of their application to the political offence and then the international crime, as a specific category of political offence. In doing so, we concluded that there is both a philosophical basis for permitting

amnesties and for limiting them in relation to the crime against the international legal order.

In this chapter, I have put transitional justice within the context of national legal systems interacting with a developing international criminal justice system. I could not hope to succeed in describing the totality of the phenomena to be observed in the global dynamics of transitional justice. Einstein took many years to develop the theory of general relativity and never finished it; but he nevertheless advanced physics in the attempt. It is not so much my success in describing a complete theory of transitional justice that matters, but rather the holistic method that I have employed.

In employing this method, I have brought to light certain truths about amnesty laws. What have we learnt? Amnesty laws have geographical and juridical limits. Their juridical effects lie principally within the legal system within which they were passed. The international legal order has its own agenda, and individuals who received amnesty under the law of one state may be prosecuted in another state or in an international tribunal. The choice of forum for prosecution will also determine its viability as an option and amnesty may play a role in that decision. Thus, there is a relative interaction between the choices made in the international arena of states and international bodies and those made within the emerging democracy.

The laws of nature harmonize the actions and reactions within the universe into an interwoven chaos of beauty. Likewise, the laws of man created within interacting legal systems should be harmonized into a coherent legal cosmology for the mutual benefit of mankind. International and national laws on transitional justice are currently swirling in undefined and sometimes opposing directions. For the international legal order it means a breakdown in the respect for the international rule of law as treaties preach prosecution, while states successfully preach impunity under the veil of forgiveness and reconciliation. For the individual state it means potential embarrassment and confusion over the actual status and effects of its amnesty law within the global context.

Accordingly, the principles developed on the limits for amnesty laws should have regard to the very clear priorities of the international community for the punishment of international atrocities. These priorities are expressed in treaties, but especially in the agreement to establish an international criminal court. Likewise, any further developments in international criminal law should take into account the benefits of well-defined national amnesty laws. The parameters of the

jurisdiction of the future international criminal court are limited to the most serious affronts to the dignity of mankind. Here, natural and marginal limits are imposed on the proper scope of a national law. These natural limits ought to be legally formalized, both to protect the interests served by the future court and to reconcile the apparent differences of approach to transitional justice in international and national law. In the chapters that follow I shall examine the formal legal limits that actually exist in terms of humanitarian law, human rights treaties and customary international law, in that order.

CHAPTER 6

PROSECUTION PERSUANT TO INTERNATIONAL HUMANITARIAN LAW TREATIES

1. *The Origin and Scope of the Right to Prosecute for Violations of the Law of Armed Conflict*

In the field of humanitarian law, one should clearly distinguish between the obligation to prosecute violations of the law of armed conflict and the right to prosecute such violations. Historically, the latter precedes the former and the existence of a right to prosecute does not necessarily imply an obligation to do so. The obligation to prosecute grave breaches as defined in the Geneva Conventions of 1949 is clearly narrower than the pre-existing right to prosecute violations of the laws and customs of war, although the exact scope of that right is less than clear. With respect to customary law the formation of a rule affording a state the right to prosecute derives from state practice, accompanied by the *opinio juris* that these states are acting pursuant to a legal right. On the other hand, a rule obliging a state to prosecute derives from state practice, accompanied by the *opinio juris* that these states are acting pursuant to a legal obligation to do so. [1]

The significance to the present inquiry of an obligation to prosecute is that such an obligation would entail a violation of international law by a state that granted amnesty for an act covered by such an obligation. This would amount to a legal limitation to the municipal amnesty process. A right to prosecute could form the basis of an argument that amnesty ought to be limited to the extent that it should not apply to war crimes as the subject of that right, but it would not amount to a legal limitation except and in so far as a conventional rule had been created to that effect.

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[1] The question of whether there is a customary obligation to prosecute international crimes will be addressed in chapter 9.

Since the criminal law of a state is a matter essentially within the domestic jurisdiction of that state, the state has an inherent right to penalise any behaviour subject to its jurisdiction that it deems fit, subject only to international human rights norms and international rules on the treatment of aliens The importance of the right to prosecute war crimes lies in the ability of the state to punish a crime under international law in the absence of a corresponding domestic crime;[2] and also in terms of confirming the jurisdiction to punish such crimes committed by the enemy even where committed outside its territory by non-nationals. Existing records of the regulation of armed conflict trace its origins much further back in time than existing records of the *right to prosecute* breaches of such regulations. Yet, confirming penal jurisdiction over at least the worst excesses of such breaches seems an almost necessary corollary to the regulations, in order to ensure their enforcement.

Before the advent of the Kellogg-Briand Pact of 1928 (the Pact of Paris), resort to war was not in itself unlawful, but the regulation of armed conflict has been a feature of societies for thousands of years, and may even be almost as old as war itself. The ancient Egyptians are said to have incorporated clauses in their treaties regulating the initiation and conduct of war.[3] The ancient Greeks similarly devised rules on the treatment of the wounded, the treatment of prisoners and sanctuary.[4] The histories of the Chinese,[5] the Japanese, the Mayas[6] and the Hindus[7] are also characterized by the regulation of the conduct of war. It is difficult to imagine how such rules would have been enforced except through the personal liability of combatants.

Nonetheless, the first recorded prosecution for instigating an unjust war appears to have been that of Conradin von Hohenstafen in Naples in 1268, while the first recorded prosecution by an international tribunal is that of Peter von Hagenbach in Breisach, Germany, in 1474, tried by

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[2] Although there is usually in practice the necessity of domestic implementing legislation before national authorities are prepared to prosecute international crimes: see John Dugard, 'Universal Jurisdiction for Crimes against Humanity' *Africa Legal Aid Quarterly*, April-June 2000, Seminar: Universal Jurisdiction for Crimes against Humanity, 7-9, at 8.

[3] M. Cherif Bassiouni, 'International Law and the Holocaust' (1979) 9 *Cal West Int'l LJ* 202, at 203.

[4] A. Aymard and J. Auboyer, *L'Orient et La Grece Antique*, 1953, at 293-99.

[5] See Sun Tzu, *The Art of War* (L. Giles trans. 1944).

[6] See Bassiouni, note 3 *supra*, at 203.

[7] 7 *Commentaries: The Laws of Manu* (G. Buhler trans. 1967)

a tribunal composed of judges from the states of the Holy Roman Empire for offences 'against the law of God and man'. The principle, if not the practice, of the prosecution of violators of the laws of war has been given written expression on occasion. The Oxford Manual of 1880[8] and the Lieber Instructions of 1863[9] provide coherent examples. In terms of jurisdiction to try such offences, it became a well-established principle of the laws of war that it was the right of the belligerent in war to punish the perpetrators of war crimes who were members of the armed forces of the enemy and fell into its hands.[10] The Nuremberg Tribunal gave expression to this right when it indicated that it was only doing what each of the allies could have done individually.[11]

This customary right of the belligerent relates to international armed conflicts. The right of states other than belligerents to prosecute war crimes committed in international and non-international armed conflicts, where they have no connection to the conflict, depends on whether war crimes are subject to universal jurisdiction. There is some support for this proposition. The United Nations War Crimes Commission stated:

> ... the right to punish war crimes ... is possessed by any independent State whatsoever, just as is the right to punish the offence of piracy.[12]

Similarly, the British Manual of Military Law states that war crimes "are crimes ex jure gentium and thus triable by the courts of all States". In the *Eichmann* case[13] the District Court of Jerusalem claimed jurisdiction over the former Head of the Jewish Office of the German Gestapo partly on the basis of universal jurisdiction. It stated in this regard,

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[8] See Schindler and Toman, *The Laws of Armed Conflicts*, 1981, at 35.

[9] "Instructions for the Government of the Armies of the United States in the Field": see Schindler and Toman, ibid., at 3.

[10] See Lauterpacht, 'The Law of Nations and the Punishment of War Criminals' (1944) 21 *BYIL* 61.

[11] See Judgment of the International Military Tribunal at Nuremberg, 1 October 1946 (1947) 41 *AJIL* 172, at 216.

[12] (1949) 15 *War Crimes Reports* 26.

[13] *Attorney-General of the Government of Israel v. Eichmann* (1961) 36 ILR 5.

> The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (delicta juris gentium). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.[14]

A lack of clarity exists on the question relating to whether all violations of the laws and customs of war or only serious violations constitute international crimes. A number of statements of the principle seem to suggest that any violation of the laws and customs of war constitutes a war crime. Article 228 of the Treaty of Versailles provided that:

> The German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed *acts in violation of the laws and customs of war* [my emphasis]

In the *Llandovery Castle* the German Supreme Court stated that:

> Any violation of the law of nations in warfare is ... a punishable offence.[15]

The Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armies in the Field[16] provides that:

> the Governments of the High Contracting Parties shall propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in war of *any act contrary to the provisions of the present Convention,* [my emphasis].

The United Nations War Crimes Commission, established in 1943 to report on war crimes committed during the second World War, indicated that:

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[14] Ibid., at para. 12.
[15] 2 *Ann Dig* 437, at 437-8.
[16] Article 29: 118 *LNTS* 343.

> The UN Commission should proceed upon the footing that a war crime is a violation of the laws and customs of war ....[17]

The British *Manual of Military Law* (1929) stipulated that war crimes included:

> Violations of the recognized rules of warfare by members of the armed forces[18]

Some writers have also framed the principle in these wide terms. One of the earliest examples is Johann Jakob Moser, who asserted that:

> Enemy combatants *who act contrary to international law* need not, when they fall into the hands of the belligerent, be treated as prisoners of war, but may be treated as robbers, murderers and so on, [my emphasis].[19]

Other writers have restricted the right to punish war crimes to certain categories of violations of the laws and customs of war. Hall stated the right to punish "so long as the belligerent confines himself to punishing breaches of universally acknowledged laws"[20] Yet, a rule may be universally acknowledged but of insufficient import to justify its classification as a crime. Lauterpacht warns us that:

> It must be a matter for serious consideration to what extent an attempt to penalise by criminal prosecution at the hand of the victorious belligerent all and sundry breaches of the law of war may tend to blur the emphasis which must be placed on the punishment of war crimes proper in the limited sense of the term[21]

Draper notes that 'it is manifest that not every infraction of the laws of war is a war crime. Some are too minimal to support the appellation of "crime"'. Consider for example the situation where the person

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[17] *The History of the UN War Crimes Commission*, 1948, at 171.

[18] Cited in Lauterpact, note 10 *supra*, at 78.

[19] *Grundsatze des Volkerrechtes in Kriegszeiten*, 1752, para. 18 (quoted in Lauterpacht, note 10 *supra*.)

[20] *International Law*, 3rd ed., 1883, s. 135. To similar effect see Balladore Pallieri, *La Guerra*, 1935, at 385 (Cited by Lauterpacht, note 10 *supra*, at 79).

[21] See note 10 *supra*, at 78-9.

responsible for recording the particulars of a wounded soldier fails to record his first name in accordance with article 16 (d) of the First Geneva Convention of 1949 or where a postal carrier fails to securely seal a sack containing prisoner of war mail in contravention of article 71 of the Third Geneva Convention of 1949. Lauterpacht admits that:

> The task of defining ... the scope of violations of the laws of war which ought to fall within the purview of punishment is one of considerable difficulty.[22]

Since 1944, when Lauterpacht made this remark, developments have taken place which form the basis for a preliminary appraisal of the definition of an international crime. At the time of the negotiations preceding the conclusion of the four Geneva Conventions, there were initially suggestions to the effect that the Conventions should provide for the repression and punishment as 'war crimes' of acts in contravention of the provisions of the Conventions.[23] However, this view was ultimately rejected on the basis that it would be premature to give any meaning to war crimes in the light of the work of the newly established International Law Commission on this subject.[24] Accordingly, any reference to war crimes in the Conventions was meticulously avoided.

According to article 19 (2) of the International Law Commission's Draft Articles on State Responsibility,[25]

> An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.[26]

Article 19 (2) is not binding on states for the full range of international obligations within its scope. It is beyond the scope of this work to

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[22] See note 10 *supra*, at 79.

[23] See *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions* (Geneva, 1947), at 93.

[24] See Guggenheim, 'The Geneva Conventions of 1949' (1949) XXVI *BYIL* 294, at 305.

[25] *Report of the International Law Commission*, 28th Session, UNGAOR, 31st Session, Supp. No. 10, A/31/10 (1976).

[26] See also *infra*, chapter 8 at 206-7.

analyse state practice in order to determine the range of acts or omissions that are covered by the customary right to prosecute members of opposing armed forces for war crimes. Nevertheless, in so far as violations of the laws and customs of war are concerned, article 19 (2) probably broadly reflects state practice in terms of the nature of violations attracting the exercise of that right. It is at least clear that there is no consistent state practice of the assertion of the right to prosecute very minor violations of the laws and customs of war. The fundamental interests of the international community obviously cover those interests protected by rules of *jus cogens*, but it is suggested that the concept extends further than that and should be understood as the interests of the international community defined by reference to those basic broadly defined principles which govern the peaceful co-existence of states. What obligations are so essential for the protection of these fundamental interests that their violation constitutes a crime is a matter of degree and would be subject to the opinion of the international community as expressed through state practice.

The requirement of recognition is of practical importance since in the absence of an universal legislature and judiciary, no coherent and reliable test can be devised that would not be coloured by the subjective interpretation of states in particular situations. Admittedly, even then variability of interpretation of what is a recognized crime is inevitable, but as state practice develops a degree of clarity and consistency can be achieved. Although article 19 is not yet binding and notwithstanding the customary position, it is submitted that it provides a useful test for international criminality. It is also directed at the obligations of states but, again, it is suggested that it is equally useful as a basis for determining the criminality of violations of the international obligations.

Some progress has already been made in the international community's recognition of the parameters of international crimes. This is evident from the three existing statutes of the international criminal tribunals. Notwithstanding the fact that these statutes are intended to define the subject-matter jurisdiction of the respective tribunals, it may be reasonably assumed that it was intended that their jurisdiction should cover all acts or omissions properly classified as crimes, which were otherwise within the jurisdiction of the respective tribunals. The extent to which violations of the laws and customs of armed conflict are recognized as crimes is given the clearest exposition in the Statute of the International Criminal Court. The Statute of the International Tribunal for the Former Yugoslavia is of limited assistance in this

regard. It confirms that grave breaches of the Geneva Conventions of 1949 come within the category of crimes.[27] With respect to violations of the laws or customs of war, the latter statute gives a list of some of the more serious violations as being included in that definition. In that sense it impliedly emphasises seriousness as an element in determining the criminality of violations. However, it also provides that the power to prosecute is not limited to the listed violations and gives no further guidance. The Statute of the International Tribunal for Rwanda does not mention the laws and customs of war as such, but confines the power to prosecute violations of article 3 common to the Geneva Conventions and of Additional Protocol II to serious violations. The Statute of the International Criminal Court definition of war crimes includes grave breaches of the Geneva Conventions of 1949,[28] other serious breaches of the laws and customs applicable in international armed conflicts,[29] serious violations of article 3 common to the Geneva Conventions of 1949[30] and other serious violations of the laws and customs applicable in armed conflicts not of an international character.[31]

The existence of a right to prosecute serious violations of the laws and customs of armed conflict does not legally prevent a state from granting amnesty to the perpetrator of such a crime except in so far as that right has matured into an obligation. However, it creates a practical limitation in that an individual granted amnesty by one state may be prosecuted by another. It would seem desirable in the interests of consistency and effectiveness that states voluntarily refrain from granting amnesty for serious violations of the laws and customs of armed conflict. The extent to which there is an obligation to do so, remains to be examined.

2. *An Obligation to Ensure the Prosecution of Violations of the Laws of Armed Conflict*

The importance of an obligation to prosecute or facilitate the prosecution of violations of the laws of armed conflict, in order to reinforce the right, is evident from the frequent failure to exercise the right owing to legal uncertainties and political constraints. After World

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[27] Article 2.
[28] Article 8 (2) (a).
[29] Article 8 (2) (b).
[30] Article 8 (2) (c).
[31] Article 8 (2) (d).

War I, the Treaty of Versailles envisaged the prosecution of Kaiser Wilhelm II for 'a supreme offence against international morality and the sanctity of treaties'.[32] It also provided for 'the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war'. In the event, the Netherlands refused to extradite the former Kaiser and only 12 out of 896 named alleged war criminals were tried. Even where national tribunals have prosecuted war criminals they have generally avoided relying on international crimes and have applied the ordinary criminal law.[33]

Prior to 1929, there does not appear to have been any attempt to impose a duty to penalise violations of the laws and customs of war. In particular, the Geneva Conventions of 1864 and the Hague Conventions of 1899 and 1907 make no mention of any such obligation. Such an obligation was introduced into the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 27 July 1929, which provides in article 29:

> The Governments of the High Contracting Parties shall propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention.

This was a general provision that made no express distinction between serious or other violations. The four Geneva Conventions are all dated 12 August 1949 and consist of the first Geneva Convention for the Amelioration of the Condition of Wounded in the Field,[34] the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea,[35] the third Geneva Convention Relative to the Treatment of Prisoners of War[36] and, finally, the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[37] The four Geneva Conventions of 1949 each contained identical provisions, but in differently enumerated

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[32] Article 227 of the Treaty of Versailles of 1919 112 Brit. For. St. Pap. 1; (1919) 13 *AJIL* (Supp.).

[33] See Mary Ellen O'Connell, 'New International Legal Process' (1999) 93 *AJIL* 334, at 340.

[34] (1950) 75 *UNTS* 31-83.

[35] (1950) 75 *UNTS* 85-133.

[36] (1950) 75 *UNTS* 135-285.

[37] (1950) 75 *UNTS* 287-417.

articles, establishing universal jurisdiction and an obligation to penalize grave breaches of the respective conventions. In articles 49, 50, 129 and 146 respectively it is provided that:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

There is therefore an unequivocal obligation on states to prosecute or extradite the perpetrators of grave breaches of the Conventions. There follows a paragraph in the same article requiring the taking of such measures as are necessary for the suppression of breaches other than grave breaches. Penal sanctions are not expressly mentioned in relation to such other breaches, but are clearly envisaged, at least in part, having regard to the sentence that follows, which states that '[i]n all circumstances the accused shall benefit from the safeguards of proper trial and defence ...'; also having regard to the fact that the entire article is entitled 'penal sanctions'. Even according to a minimalist interpretation of the clause penal sanctions are required for breaches that cannot be effectively suppressed without them. The obligation to introduce effective measures of suppression, whether penal or otherwise, is further supported by common article one which requires states to 'respect and to *ensure respect* for the present Convention in all circumstances' [my emphasis].

3. *The Obligation to Prosecute in Non-international Armed Conflicts*

National amnesty laws are most likely to exist in the context of a civil, as opposed to international, conflicts. The majority of scholars support the proposition that the obligation to prosecute or extradite persons who have committed 'grave breaches', within the meaning of the Geneva Conventions, only applies to international conflicts and not to civil

wars.[38] A minority of commentators argue that the 'grave breaches' regime applies equally to non-international armed conflicts.[39]

When addressing this problem exclusively on the basis of the text of the 1949 Conventions one can find oneself lost in an intellectual whirlpool. The text is almost like a prism through which the light creates a different effect every time you look at it. It has been aptly noted that '[o]ne cannot but deplore the high level of confusion about the meaning of the "grave breaches" provisions of the Geneva Conventions'[40]. While these provisions fail to explicitly confine their effect to crimes committed in international conflicts, the provision on internal conflicts fails to expressly mention the applicability of the 'grave breaches' regime to such scenarios. It is surprising that the negotiating parties should have left such a matter open to doubt.

Those who argue that the 'grave breaches' regime is confined to 'crimes of a truly international character'[41] rely principally on article 2 common to all four Geneva Conventions, which provides that:

> the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise *between two or more of the High Contracting Parties* .... [my emphasis]

It follows from specific reliance on this provision that the argument would confine the 'grave breaches' regime to international conflicts in the sense of conflicts between states. It is argued that the application of the regime to internal conflicts is irreconcilable with this article. This is presumably because the obligation of *aut dedere aut judicare* applies to 'grave breaches of the present Convention as defined in article [x]' and article x forms part of the general provisions of the convention, which is said, in article 2, to apply to conflicts between states.

Common article 3 to the Geneva Conventions provides for minimum standards of treatment of the parties to internal armed conflicts. This is viewed as an exceptional provision falling outside the

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[38] See *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, (1996) 35 ILM 32, at para. 79; see also e.g. Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *AJIL* 302, at 311.

[39] See *Prosecutor v. Tadic*, note 38 *supra*; separate opinion of Judge Abi-Saab.

[40] See Simma and Paulus, note 38 *supra*, at 310.

[41] A phrase used by Simma and Paulus: note 38 *supra*, at 311.

general regime of protection of the Conventions. Since article 3 makes no reference to penal sanctions, it is argued, then none apply and the 'grave breaches' regime must be confined to crimes committed in conflicts between states.

The argument is supported by reference to Protocol II of 1977 to the Geneva Conventions of 1949, which extends the regime of protection in non-international armed conflicts, but makes no provision in relation to penal sanctions.

The articles of the Conventions that provide for an obligation to search for and punish the perpetrators of grave breaches of those Conventions do not specify or exclude any particular provisions of the Conventions. Article 3 itself does not exclude the obligation to prosecute in relation to a grave breach of its provisions. One sentence might form the basis for an argument to the effect that the obligation to prosecute does not apply to article 3. Paragraph (2) states:

> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

This provision was designed to ensure that article 3 would not be used as a basis for an argument that rebels were subject to the same belligerents' rights and obligations as states, implying that the laws for the conduct of war would apply in their entirety in the relations between rebels and states.[42] For example, the status of a rebel is not elevated to that of a protected person or privileged combatant for the purposes of the Geneva Conventions. This is not just a legal effect but a question of legal status. Before the Geneva Conventions came into force, 'recognition of belligerency' was the method of elevating the legal status of rebels so as to apply the *jus in bello* in its entirety to the relations between the rebels and the recognising state. The provision also ensures that the legal status of the state and in particular its sovereignty over its territory and right to govern its own internal affairs remains unaffected by article 3.

It does not follow that no legal effects flow from article 3. Minimum standards of treatment are as much in need of enforcement as the higher standards applied to conflicts between states. An obligation to prosecute an individual who is guilty of a grave breach of the contents of article 3 is an important legal effect but it does not in any

[42] See Georges Abi-Saab. 'Non-International Armed Conflicts' in Abi-Saab (ed.), *International Dimensions of Humanitarian Law*, 1988, 217 at 223.

way change the legal status of the parties to the conflict. Since the Nuremberg judgment it was clear that individuals had sufficient legal personality under international law to be subject to prosecution for crimes against international law.

In any event, individuals are not as such the parties to the conflict. Certainly, one cannot refer to a soldier employed by the state party to the conflict, and who is guilty of grave acts of torture, as himself being a party to the conflict. He would not therefore be a party to the conflict whose legal status cannot be changed within the meaning of article 3.

Moreover, while the application of the other articles of the Convention to rebels would be inconsistent with the very notion of article 3 setting down minimum standards of treatment, the same cannot be said for the provisions on prosecution. These dovetail comfortably with all the Convention standards as their means of enforcement.

One is therefore left with a text that does not expressly confirm or exclude the application of the grave breaches regime to non-international armed conflicts. Notwithstanding the arguments for its non applicability outlined earlier, the text remains consistent with an interpretation that would apply the grave breaches regime to non-international conflicts. The relevant articles are identical in the four conventions, but differently numbered. Let us, for convenience, examine the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War by way of example. Article 146 refers to:

> ... any of the grave breaches *of the present Convention* defined in the following Article [my emphasis].

The words 'of the present Convention' are of great significance. If the drafters had intended to define grave breaches exclusively in terms of the 'following Article', one might have expected a phrase such as 'grave breaches set out in the following Article' or 'grave breaches of the following Article'. Yet, there is a clear reference to the Convention as a whole. Article 3 may fall outside the general application of the Convention as defined in article 2, but it clearly forms part of 'the present Convention'. It is therefore drawn into the application of article 146 by the words of that article itself.

Article 147 then confirms that it is defining the nature of breaches of the other articles of the Convention, covered by the 'grave breaches' regime, rather than giving a complete definition of the norms that might be breached. This is confirmed by the opening words of the article:

> Grave breaches to which the preceding Article relates shall be *those involving* any of the following acts. ... [my emphasis].

The use of the word 'those' refers to breaches of other articles of the Convention, whichever articles they might be. The use of the word 'involving' indicates that the purpose of the article is to confine liability to certain types of breaches of other articles. It is also strange that if article 147 should be the normative basis of the breaches that it should itself use the word 'breaches' in defining its content.

This is one possible interpretation of the Conventions and it is submitted that it is confirmed by the context, as well as object and purpose of the Convention[43] as derived from the *travaux preparatoires* and subsequent practice. The context of the conclusion of the Geneva Conventions included the recent conclusion of the Second World War and the subsequent judgment of the Nuremberg Tribunal. The tribunal had made it plain that international law could only be effectively enforced with respect to the commission of crimes if men were punished for those crimes.[44] This is no less applicable to civil wars. Once it is accepted that international law applies, it must have been the intention of the drafters of the Conventions that it could be effectively enforced.

It is submitted that the *travaux preparatoires* also support the proposition that the grave breaches regime was intended to apply to breaches of the other provisions of the convention, and was not simply meant to operate as a self-contained regime. At the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, article 33 (new) was inserted into the text of the former 1929 Convention for the Relief of Wounded and Sick Armies in the Field, which provided:

> Any wilful *violation of the present Convention, leading to* the death of persons protected by its provisions, to grave ill-treatment of the said persons, or serious damage to hospital buildings and equipment, shall be considered as a war crime. The responsible persons shall be liable to appropriate penalties.

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[43] See article 31 of the Vienna Convention on the Law of Treaties of 1969.

[44] See *Judgment of the International Military Tribunal at Nuremberg* (1947) 41 *AJIL* 171, at 221.

> The High Contracting Parties undertake to insert in their penal and military legislation provisions for the punishment of *any infractions of the stipulations of the present Convention.*[45]

Here we have a hint as to the thinking behind the grave breaches regime. It seems to have been intended that where a breach of a provision of the Convention would lead to certain types of grave consequences, then it should be punishable. The grave consequences were therefore not so much the foundation of the breach, but rather the basis for the criminality of the breach. There is no evident intention to confine the penal regime to any particular provisions of the Convention.

In other words, it is not article 2 (on general applicability) that defines the applicability of article 147 (grave breaches regime), but article 147 that defines its own applicability to all the provisions of the convention. This is whether they fall within the international regime set up by article 2 in association with the other provisions or the internal regime set up by article 3 (minimum standards in internal conflict).

The Geneva Conventions must also be interpreted having regard to subsequent agreements and practice in their application.[46] In terms of the general development of international law, the grave breaches regime can be considered as being of relatively recent origin, arising essentially out of the circumstances of the Second World War and its aftermath. State practice on the meaning of these instruments and in particular the question of punishment can almost be said to have been held in abeyance for some forty years or so. The last ten years have seen a sudden re-emergence of the interest of states in the laws of war and their punishment.

The conflict in the former Yugoslavia had both internal and international dimensions.[47] The Statute of the International Tribunal for the Former Yugoslavia was clearly intended to set up a tribunal that would punish war crimes committed in internal as well as international conflicts.[48] Article 2, entitled 'Grave breaches of the Geneva Conventions of 1949', it is submitted, is drafted in such a way that

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[45] See *Report on the Work of the Government Experts for the Study of the Conventions for the Protection of War Victims*, 1947, at 63.

[46] See Vienna Convention on the Law of Treaties of 1969: article 31(3)(b).

[47] See *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for an Interlocutory Appeal (Appeal Chamber), 2 October 1995, note 38 *supra*, at para 72.

[48] See Report of the Secretary-General of the United Nations, UN Doc S/25704 (3 May 1993), at para 62.

supports its application to both internal and international conflicts. It describes 'grave breaches' as 'the following acts against persons or property *protected under the provisions* of the relevant Geneva Conventions' [my emphasis]. There is no accompanying provision specifically for violations of article 3 common to the four conventions, although it must have been intended that the atrocities committed in the Yugoslav conflict and covered by article 3 would be punishable. Until the *Tadic* decision,[49] there was a degree of doubt as to whether the laws and customs of war, also mentioned in the Statute, applied to internal conflicts or the extent to which they coincided with the provisions of article 3.

The Trial Chamber in the *Tadic* decision supported the view that article 2 of the Statute, on grave breaches of the Geneva Conventions, applied equally to internal conflicts. It said:

> [T]he requirement of international conflict does not appear on the face of article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spacial and temporal requirements of Article 1 are met.[50]

The majority in the Appeal Chamber disagreed with the Trial Chamber on the basis that it misunderstood the meaning of the grave breaches provisions of the Geneva Conventions. Judge Abi-Saab, in a separate opinion, supported the minority view on the meaning of those provisions as incorporating breaches of common article 3.[51] He came to this conclusion having regard to state practice subsequent to the conclusion of the Geneva Conventions. The difficulty with the view of the majority on this issue is highlighted by its own observation in relation to the remaining provisions of the Statute, which it is submitted applies equally to article 2 of the Statute, given the failure to expressly distinguish international and internal conflicts. The Tribunal said:

> Contrary to the drafters' apparent indifference to the nature of the underlying conflicts, such an interpretation would authorize the International Tribunal to prosecute and punish certain conduct in an

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[49] See note 38 *supra*.

[50] See *Prosecutor v Dusko Tadic*, Decision on the Defence Motion on Jurisdiction, 10 August 1995 (Trial Chamber II), at para 50.

[51] See note 38 *supra*.

> international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict.[52]

Avoiding the same result in relation to article 2 would require a finding that the scope and application of the laws and customs of war in internal armed conflicts (ostensibly article 3 of the Statute) were identical to the content of common article 3 to the Geneva Conventions, save with respect to the obligation to punish. Yet, such customary developments would inevitably have arisen out of the compliance of states with the provisions of the Geneva Conventions.

The Rwanda Statute was brought into effect in response to an internal conflict and refers to 'serious' violations of article 3 common to the Geneva Conventions. This confirms that the regime of universal punishment for war crimes is treated in the modern practice of states as equally applicable to serious violations of the protective norms applicable in internal armed conflicts.

This is again confirmed in the Rome Statute of the International Criminal Court, which speaks of and lists 'serious' violations of article 3 common to the four Geneva Conventions.[53] It could be said that by doing this as well as mentioning grave breaches of the Geneva Conventions, it is affirming the non-applicability of the grave breaches regime to internal conflicts. However, whereas the reference to article 3 specifically mentions 'armed conflict not of an international character', the reference to grave breaches does not specifically mention international conflicts. Indeed, grave breaches are said to include 'any of the following acts against persons or property protected under the provisions of the relevant Geneva Conventions'. The acts listed under serious violations of article 3 have a distinctly internal flavour and could be said to supplement, rather than complement, the earlier reference to grave breaches. In any event, whatever the technical position, the Rome Statute clearly intends to extend the regime of international punishment to internal conflicts. It is inconceivable that it would have been intended that some crimes could be committed with impunity in internal conflicts, but not in international conflicts, particularly when one has regard to the ambiguous nature of most modern conflicts.

Other strands of state practice and *opinio juris*, including the views of the United States *amicus curiae* before the tribunal in *Prosecutor v*

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[52] See *Prosecutor v Dusko Tadic*, note 38 *supra*, at 78.

[53] See article 8(2)(c).

Dusan Tadic,[54] the German Military Manual, the agreement of the parties in Bosnia-Herzegovina of 1 October 1992 and the Danish decision of *Prosecutor v Refik Sarik* support the application of the grave breaches regime to internal conflicts.[55] On the Appeal Tribunal's own admission in the *Tadic* decision, its conclusion on the grave breaches provisions 'may not appear to be consonant with recent trends of both State practice and the whole doctrine of human rights - which tend to blur in many respects the traditional dichotomy between international wars and civil strife'.[56]

Whatever the proper interpretation of the Geneva Conventions, it seems clear beyond doubt that all serious violations of the laws of war, whether committed in domestic or international conflicts, or conflicts of a hybrid nature, are subject to the international regime of punishment.[57] In that light, amnesty for such crimes in internal conflicts is prima facie incompatible with developments in international law.

With regard to the obligation to prosecute war crimes in internal conflicts, this is, as it has been submitted, derived from the Geneva Conventions. There is also an emerging if not emergent customary obligation to prosecute serious violations of the laws of war in internal conflict derived from recent state practice accompanied by *opinio juris*. The question of customary law will be given further consideration in chapters 8 and 9.

4. *The Treatment of Humanitarian Law by the South African Cape Provincial Division*

The Azanian People's Organisation (AZAPO) commenced proceedings before the Constitutional Court of South Africa to challenge the constitutionality of section 20 (7) of the South African amnesty legislation.[58] AZAPO, together with the relatives of political activists

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[54] Case No IT-94-1-T of 17 July 1995, at paras 35-6.

[55] See *Prosecutor v Dusko Tadic*, note 38 *supra*, at para. 83.

[56] *Idem*.

[57] See *Prosecutor v Dusko Tadic*, note 38 *supra*; the Statute of the International Criminal Court, *supra*.

[58] See *Azanian People's Organization (AZAPO) and others v. President of the Republic of South Africa and others* (1996) 1 BHRC 52. See chapter 3 *supra*, at 65-70; chapter 10 *infra*, at 371-372; Braude and Spitz, 'Memory and the Spectre of International Justice: A Comment on AZAPO (1997) 13 *SAJHR* 269; Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question.' (1997) 13 *SAJHR* 258;

killed, also applied to the Cape Provincial Division for an interdict against the Truth and Reconciliation Commission and the members of the Amnesty Committee in their individual capacity, to suspend the granting of amnesty pending a decision of the Constitutional Court.[59]

The applicants argued that the Act[60] was inconsistent with those provisions of the Constitution[61] relating to the function of the judiciary and the powers of the courts to deal with disputes.[62] Section 22 of the interim Constitution[63] is almost identical to section 34 of the Bill of Rights and provides as follows:

> 22. **Access to court**
> Every person shall have the right to have justiciable [sic] disputes settled by a court law or, where appropriate, another independent and impartial forum.

The court agreed that the Act curtails the right of access to the courts contained in section 22 of the interim Constitution but held that it was justified by the need for reconciliation and reconstruction as expressed in the post-amble.[64]

The applicants relied strongly on an article by Professor Ziyad Motala.[65] The judgment refers to two passages in particular. The author states that:

> in suspending and cancelling any civil action the victims of war crimes may bring against alleged offenders, the Act violates a

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Moellendorf, 'Amnesty, Truth and Justice : AZAPO' (1997) 13 *SAJHR* 283; O'Shea, 'Should Amnesty Be Granted to Individuals Who Are Guilty of Grave Breaches of Humanitarian Law? - A Reflection on the Constitutional Court's Approach' (1997) *HCLJSA* 27.

[59] See *Azanian People's Organization (AZAPO) and others v. Truth and Reconciliation Commission and Others* 1996 (4) SA 562.

[60] In particular s. 20 (7), s. 20 (8) and s. 20 (10).

[61] Interim Constitution: see *supra.*

[62] Sections 7 (4) (a), 22, 96 (1), 96 (3), 98 (2), 98 (3) and 101 (3) (b).

[63] The constitutionality of the Act or amnesty decisions would now be determined in terms of the provisions of the new Constitution. Section 34 contains the right of access to court.

[64] See *AZAPO v. Truth and Reconciliation Commission*, note 59 *supra*, at 570, paras E-F.

[65] See Motala, 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 *CILJSA* 338.

> peremptory norm of international law which provides rights to individual victims of war crimes regardless of the attitude of the State.[66]

He adds:

> the Act, to the extent that it grants amnesty to war crimes, violates a cardinal rule of international humanitarian law, namely that there can be no amnesty for war crimes.[67]

The rules on war crimes are contained principally in the four Geneva Conventions of 1949 as reflected in and supplemented by customary international law. Peremptory norms of international law are those which are of such a fundamental nature that they may not be derogated from except by virtue of a norm of similar status. They are known as rules of *jus cogens*. They therefore constitute the supreme international legal norms against which the validity of all other norms must be judged. Motala has extended the notion of *jus cogens* beyond its actual parameters. The provisions of the Geneva Conventions of 1949 have entered into the corpus of customary international law but the concept of *jus cogens* is much narrower.[68] The court appeared to accept the false premise of Motala's argument since it talks of 'the peremptory rule prohibiting an amnesty in relation to crimes against humanity'.[69] The court was therefore faced with a challenge from international law which did not reflect the true position and was thus cornered into a false understanding of international humanitarian law and a perceived prima facie conflict between international law and the Constitution which went well beyond reality. It therefore searched for an exception to this perceived rule which led to a distorted analysis of the issues and fell back into the classical stance of a national judge that national law must prevail.

The court correctly indicated that the Constitution provides that from the point of view of South African law, Acts of Parliament take

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[66] Ibid., at 339.

[67] Ibid.

[68] See Dugard, *International Law, A South African Perspective*, 1994, at 35; O'Shea, *International Law and Organization, A Practical Analysis*, 1998, at 23–4.

[69] See *AZAPO v. Truth and Reconciliation Commission*, note 59 *supra*, at 572, para D.

precedence over treaties[70] and customary international law.[71] Professor Dugard aptly notes that the obiter dictum that the 'interim Constitution would "enable Parliament to pass a law, even if such is contrary to the jus cogens" was both unnecessary (as the court itself conceded) and unwise as it seriously undermines the Constitution's clear intention of establishing harmony between international law and municipal law'.[72] Faced with such a perceived inconsistency, the court was given little latitude for considering how international humanitarian law might affect the proper interpretation of the Constitution. It was also not given the option of holding the amnesty process consistent with international law except in so far as it contravened rules of *jus cogens*, which are in fact quite limited in scope.

It found its exception in Protocol II to the Geneva Conventions relating to armed conflicts within the territory of one state. Article 6 (5) of the Protocol stipulates that,

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

This provision was never intended to justify the non-prosecution of individuals for grave breaches of humanitarian law but to encourage amnesty for ordinary criminal acts committed in a political context. If there was a rule of *jus cogens* prohibiting amnesty for crimes against humanity, a treaty provision of this nature could not create an exception to it but, on the contrary, would be invalid in the light of it. If there is a customary rule for the prosecution of grave breaches of humanitarian law, then the creation of a general exception would require a competing wide, uniform and constant practice accompanied by *opinio juris*. A single reference in a treaty which is not widely ratified could not serve this purpose. Article 6 (5) of Protocol II would not prove that there was no customary rule since, unlike *jus cogens* which invalidates a treaty provision to the contrary, parties to a treaty may agree to a provision between them which contravenes the customary rule for the purpose of

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[70] Section 231 (1).

[71] Section 231 (4).

[72] See Dugard, 'Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question', note 58 *supra*, at 264-5.

the relations between themselves. In this regard, South Africa was never a party to Protocol II during the apartheid era[73] and it cannot be applied retrospectively.

The court recognized the existence of a presumption that Parliament does not intend to act in breach of international law, but it found it unnecessary to consider further 'the applicability of *jus cogens*' to the interpretation of the Constitution because of this exception. This misguided analysis of international law therefore meant that the court failed to address the pertinent issues relating to the applicability of international humanitarian law to the proper interpretation of the Constitution.

The court held that the applicants had failed to establish either a clear right or a *prima facie* right open to some doubt, for the purposes of obtaining a temporary interdict.[74] This finding related both to the validity of the amnesty process and the submission to the effect that the word 'amnesty' in the epilogue only covered criminal liability and not civil liability.

5. *The Treatment of Humanitarian Law by the South African Constitutional Court*

In *AZAPO v. President of the Republic of South Africa et al.*[75] it was argued before the Constitutional Court that the state was obliged by international law to prosecute those responsible for gross violations of human rights and that the provisions of section 20(7), which authorized such amnesty for such offenders, was a violation of this obligation. Reference was also made to the four Geneva Conventions. The court unanimously decided against the applicants. Only Mahomed DP and Didcott J gave reasoned judgments[76] and only Mahomed DP addressed the question of international law.

The learned judge noted that international treaties only become part of South African municipal law when they have been incorporated into the law by legislative enactment. Section 231, subsections 1 and 4, and section 35(1) were relied on in terms of which international law is only

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[73] South Africa only acceded to the Protocols on 21 November 1995.

[74] Ibid. at 576; Friedman JP and Farlam J describe the requirements for obtaining a temporary interdict at 568-9.

[75] See *Azanian People's Organisation (AZAPO) and others v. President of the Republic of South Africa and others*: note 58 *supra*.

[76] Chaskalson P, Ackermann, Kriegler, Langa, Madala, Mokgoro, O'Regan and Sachs JJ concur in the judgment of Mahomed DP

applicable in South African courts in so far as it is not inconsistent with the Constitution or an Act of Parliament. His analysis of the Geneva Conventions and Protocols begins by discounting the application of these treaties without analysing their content:

> In the first place it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict to which I have referred.[77]

According to Baxter 'the first line of defense against international humanitarian law is to deny that it applies at all'.[78] At the time the court was criticized for adopting a chauvinist attitude towards international law similar to that which was adopted by the previous government.[79] This criticism was too harsh. Mahomed DP clearly recognized the duty to have regard to international law and did so, albeit in a somewhat cursory fashion. As I have indicated on a previous occasion, 'he would probably never have dreamed that his judgment might be compared to the previous government's attitude to international law'[80] and rightly so. Such an analogy must have been quite hurtful for a man who took a leading role in the defence of political activists during the era.[81]

The court alluded to the scope of humanitarian law in the following passage:

> Secondly, whatever be the proper ambit and technical meaning of these Conventions and Protocols, the international literature in any event clearly appreciates a distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien

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[77] See *AZAPO v President of the Republic of South Africa* note 58 *supra*, at para 29.

[78] Baxter 'Some Existing Problems of Humanitarian Law' in *The Concept of International Armed Conflict: Further Outlook 1* (Proceedings of the International Symposium on Humanitarian Law Brussels 1974)

[79] See Sargeant at the Bar 'Don't shut out the world (again)' *Mail & Guardian* 23-29 August 1996.

[80] See O'Shea. 'Should Amnesty be Granted to Individuals Who Are Guilty of Grave Breaches of Humanitarian Law ? - A Reflection on the Constitutional Court's Approach' note 58 *supra*, at 25.

[81] See *S v Ramgobin and Others* 1985 (4) SA 130; *StaatsPresident en Andere v United Democratic Front en 'n Ander* 1988 (4) SA 830.

> movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other. In respect of the latter category, there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. On the contrary, article 6(5) of Protocol II to the Geneva Conventions of 1949 provides that,
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> > [a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[82]

The Geneva Conventions of 1949[83] and Additional Protocols[84] codify humanitarian law which traditionally refers to the rules that limit the manner in which a war between states may be conducted and attempts to limit the unnecessary suffering resulting from war. The nature of war has gradually changed since the beginning of the Second World War. War has traditionally been perceived as conflicts between the armed forces of different states. The First and Second World War were marked by the persecution of minorities. The post-war period has been characterized by armed conflicts within the borders of one state. Rebels within a state have even become the proxies for enemy states.[85] This is reflected in article 3 of the four Geneva Conventions and the Additional Protocols I and II.

The Constitutional Court is correct in observing that a distinction is made between international armed conflicts and non-international

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[82] *AZAPO v President of the Republic of South Africa* note 58 *supra*, at para 29.

[83] See *supra*, at 189 et seq.

[84] 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1977 Geneva Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

[85] See the facts of the *Nicaragua* Case: *Nicaragua* v *United States (Merits)* [1986] ICJ Reports 14.

armed conflicts. Common article 2 of the four Geneva Conventions states that the Conventions apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977 (hereinafter referred to as Protocol I) extends the application of the Geneva Conventions, for parties to the Protocol, to armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations.

The court is also correct in observing that Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) applies to conflicts which take place in the territory of a sovereign state between its armed forces and dissident armed forces, that is to say, non-international armed conflicts.

The Geneva Conventions and Protocol I impose an obligation on High Contracting Parties to search for and prosecute persons alleged to have committed grave breaches of the Geneva Conventions. On the other hand, breaches of Protocol II do not carry with them this obligation.

The court's reasoning is inadequate because it does not venture beyond this point. It does not necessarily follow from the above that no obligation to search for and prosecute perpetrators of grave breaches exists in armed conflicts between the armed forces of a High Contracting Party and dissident armed forces.[86]

6. *Conclusion*

The obligation of states to penalize serious violations of the Geneva Conventions of 1949 committed in the context of armed conflicts between states is non-contentious. Amnesty for such acts is impermissible. Amnesty, however, is usually employed in the context of civil wars. It has been submitted that this obligation also extends to internal conflicts, although it is recognized that this is a far more

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[86] See *supra*. at 195-205.

debatable proposition. However, what is clear is that there is a definite move in this direction.

In that light it is desirable to reconcile this move with developments in transitional justice. The South African decisions illustrate how national courts can struggle with humanitarian law and there is surely a need for clarity on the international level. The present nature of war makes it virtually impossible to clearly classify some conflicts and there seems no reason in principle to distinguish the position of the criminal according to the nature of the conflict. International law is in equal need of compliance and enforcement in both cases. In so far as there should be international limitations on a municipal amnesty process, it would seem appropriate to declare and refine a principle that would exclude on the international level national amnesty for serious violations of humanitarian law, whatever the geographical nature of the conflict.[87]

[87] See articles 3 and 4 of the Draft Protocol, Appendix, *infra*.

CHAPTER 7

ADDRESSING IMPUNITY THROUGH HUMAN RIGHTS TREATIES AND RELATED INSTRUMENTS

1. *Introduction*

In the previous chapter we observed how international humanitarian law has traditionally accepted the notion that belligerents to international armed conflicts could punish enemy war criminals. In contrast, the punishment of human rights violations in time of peace was, from the outset, inhibited by the principle of non-interference in the domestic affairs of a state. The United Nations Charter, while inaugurating the development of human rights as a distinct branch of international law, also provided in article 2(7) that nothing in the Charter would authorize interference in matters that were essentially within the domestic jurisdiction of the state. There was a mutual reluctance on the part of states to interfere in matters between another state and its own citizens. These were viewed as purely domestic matters. This perception was easily reinforced by the vagueness of the Charter's human rights provisions.

Subsequent state practice has, however, confirmed an interpretation of the UN Charter that removes domestic human rights violations from the almost exclusive domestic jurisdiction of the state and makes them the collective concern of the international community. The concept of human rights was so substantially developed through the Universal Declaration on Human Rights of 1948 and later human rights treaties that there has been a progressive rejection of the exclusivity of the relations between a state and its citizens. For the purposes of article 2 (7), this becomes a matter of international concern once human rights are substantially violated. This is illustrated to some extent by the international community's persistent condemnation of apartheid in South Africa, notwithstanding South Africa's heavy reliance on article

2(7).[1] In that situation, however, justification for interference could also be found in the attacks on neighbouring states. More recently, the international community has been more clearly convinced on this point as is illustrated by its response to apparently essentially internal situations such as Saddam Hussein's treatment of the Kurds in Northern Iraq, Serbia's treatment of the ethnic Albanians in Kosovo and the genocide in Rwanda[2].

The United Nations Charter and other general human rights treaties do not introduce any express and specific obligation to punish human rights violations. They do, however, contain general obligations on state parties to secure respect for the rights protected under the relevant treaty. It is apposite to investigate the extent to which it is possible to derive an obligation to facilitate prosecution from these other protective obligations. In this way one can derive general limitations on municipal amnesty process from the global human rights imperative.

Otherwise, there is a whole group of treaties that deal with specific international offences and provide for an express and specific obligation to facilitate the punishment of such offences. A series of treaties introduces universal jurisdiction and an obligation to punish human rights violations such as genocide,[3] apartheid[4] and torture.[5] Another series of treaties establishes international regimes for the punishment of particular international offences committed in time of peace. Such offences include the unlawful seizure of aircraft,[6] unlawful acts against the safety of civil aviation,[7] the taking of hostages,[8] crimes

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[1] See John Dugard. *International Law: A South African Perspective*. 2000. at 237; and see the citations of Dugard in note 17. It should, however, be observed that arguments of domestic jurisdiction undoubtedly tempered the response of the international community.

[2] Each of these cases was essentially of an internal character, but still arguably retained international implications.

[3] Convention for the Prevention and Pun ishment of the Crime of Genocide of 1948. *UNTS*. vol 78. at 277.

[4] International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973. (1974) *ILM* 50.

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1984. (1984) *ILM* 1027. and amended in (1985) *ILM* 535.

[6] See Convention for the Suppression of Unlawful Seizure of Aircraft of 1970. (1971) *ILM* 133.

[7] See Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971. (1971) *ILM* 1151.

against internationally protected persons[9] and unlawful acts against the safety of maritime navigation.[10] These treaty crimes are not normally discussed within the purview of human rights, but do fall within the broad categorization of human rights violations in times of peace. An examination of these various treaties will also assist in defining the needs of the international community and the appropriate limitations on a national amnesty process.

2. *The Obligation to Promote Human Rights*

The promotion of human rights is included in the Charter as one of the purposes of the United Nations.[11] Article 56 of the Charter provides that 'all members pledge themselves[12] to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55'.[13] The extent to which these articles create a legal obligation taking human rights out of the exclusive jurisdiction of the state[14] proved to be controversial.[15] The reference to non-discrimination has been more easily accepted as a directly applicable legal obligation[16]

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[8] See International Convention against the Taking of Hostages of 1979, (1979) *ILM* 1456.

[9] See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents of 1973, (1974) *ILM* 41.

[10] See Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988, (1988) *ILM* 668.

[11] See the Preamble and articles 1 (3), 13 (1) (b), 55 (c), 62 (2) and 76 (c).

[12] The French text uses the expression 's'engage' which perhaps more clearly indicates a legal obligation.

[13] Article 55 (c) provides that the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

[14] Article 2 (7) of the Charter provides that, ' Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...'. South Africa relied on this clause extensively in its assertion that the United Nations was acting ultra vires in pronouncing on South Africa's policy of apartheid: see Lint, *The United Nations, The abhorrent misapplication of the Charter in respect of South Africa*, 1976.

[15] See e.g. de Visscher, *Theories et Realites en Droit International Public*, 1953, at 158; Kelsen, *The Law of the United Nations*, 1950, 29-32.

[16] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council*

and few would today dispute that article 56 'at least implies a negative obligation not so to act as to undermine human rights'.[17] Although the principle of good faith[18] cannot establish a legal obligation where there is none,[19] it requires that a treaty be interpreted not 'according to purely formal criteria, based on the letter of the law'[20] but having *proper* regard to its object and purpose. It is submitted that the member states have indeed accepted a legal obligation to assist the United Nations in good faith in the promotion of human rights.[21] The lack of definition does not reduce the legal validity of the obligation[22] since it was always intended that human rights would be defined in a future document and they are now much more clearly defined.

Resolution 276 (1970), 1971 ICJ Reports 16 at 57. See also Partsch in Simma (ed.), *The Charter of the United Nations: A Commentary*, 1995, at 780.

[17] Brierly *The Law of Nations*, 6th ed., 1963, at 293.

[18] Article 2 (2) of the Charter provides that members '... shall fulfil in good faith the obligations assumed by them in accordance with the Charter'. Article 26 of the Vienna Convention on the Law of Treaties of 1969 provides that, 'Every treaty in force is binding on the parties to it and must be performed by them in good faith'. Article 31 of the same treaty provides that, 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose'; see O'Connor, *Good Faith in International Law*, 1991; Zoller, *La bonne foi en droit international public*, 1977.

[19] See the *Border and Transborder Armed Actions* Case (Nicaragua v. Honduras), ICJ Reports, 1988, at 105.

[20] Muller in Simma et al, note 16 *supra*, at 91.

[21] In support of this view see Namibia Opinion, *supra*, per Judge Tanaka (dissenting): 'From the provisions of the Charter referring to human rights and fundamental freedoms it can be inferred that the legal obligation to respect human rights and fundamental freedoms is imposed on member States...' (it should be pointed out that the value of this statement is reduced by the fact that the case was actually concerned with discrimination). See also Lauterpacht, *International Law*, 47-9; Oppenheim, *International Law*, 1955, vol. 1, at 739-40; See Bouony in Simma et al, note 16 *supra*, at 888-9.

[22] Marie and Questiaux in Simma, note 16 *supra*, at 867: '... aussi vague, sommaire et isolee qu'elle soit, cette seule mention des droits de l'homme prend un charactere decisif: le Plan mis au point a Dumbarton Oaks prevoit expressement que la future Organisation aura l'obligation de promouvoir le respect des droits de l'homme et des libertes fondamentales'.

The question that needs to be addressed is what is involved in an obligation to promote universal respect for and observance of human rights. The notions of 'respect' and 'observance'[23] are used interchangeably in UN resolutions. However, they describe different processes.[24] 'Respect' for a person's rights involves recognition and consideration for those rights but does not necessarily imply an obligation to absolutely refrain from anything which might compromise those rights.[25] 'Observance' implies something stronger and directs the subject not to do anything that would infringe the rights in question.[26] A pledge to 'promote' the universal respect for and observance of human rights suggests a pledge to encourage others to respect and observe human rights.[27] In the context it must also involve a pledge to show respect for and observe human rights oneself. For a state to violate human rights is an act which produces the opposite effect to the promotion of the observance of human rights.

Might an amnesty law *discourage* others from respecting and observing human rights? If so, can the same amnesty law simultaneously have the greater effect of *encouraging* others to respect and observe human rights? Providing that the second question is answered in the affirmative, the amnesty law is *prima facie* consistent with a state's obligations under the UN Charter.

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[23] The French text refers to 'Le respect *universel et effectif* des droits de l'homme' [emphasis added].

[24] Partsch acknowledges that 'observance' is stronger than 'respect': see Simma, note 16 at 779. When the Charter was being negotiated the reference to 'observance' was extracted and then reinserted with the purpose of extending the scope of the obligation: see Russel and Muther, *A History of the United Nations Charter*, 1958, at 423-4.

[25] It is possible to envisage a broader meaning being attributed to this word in a treaty where it is not accompanied by another word as here.

[26] Marie and Questiaux, commenting on the French version of 'le respect universel et effectif' indicate that it was intended to emphasise that one was not simply concerned with a vague formal respect but a real observance of human rights: in Cot and Pellet, *La Charte des Nations Unies*, 1991, at 868.

[27] Article 1(3) states one of the purposes of the United Nations to be 'promoting and encouraging respect for human rights.....' To promote means to raise to another level, but promoting respect for human rights necessarily implies encouraging respect for human rights since the former cannot be achieved without the latter. Promotion and encouragement may have slightly different meanings but in the context of respect for rights they are two sides of the same coin.

The only remaining question is whether the introduction of the amnesty law in itself amounts to a failure to *observe* human rights by violating a specific human right to judicial protection or a remedy. This will be considered below. It will presumably indicate a *respect* for human rights if it has the overall effect of encouraging others to respect and observe human rights.

An amnesty law may discourage individuals from respecting and observing human rights. When a country next finds itself in a situation of political instability such individuals may not be deterred from violating international human rights norms, while holding the belief that at the appropriate time an amnesty law can form part of any subsequent political settlement.[28] From this point of view an amnesty law sets a dangerous precedent. Even if the country remains in a situation of political stability, an amnesty law may have the general effect of undermining the rule of law. Thus, the law could distract from the true horror of some human rights violations and create the feeling in the hearts of people that the law is ineffective or that human rights violations are not as serious as common crimes in the final analysis because of their political justification.[29]

On the other hand, an amnesty law may be part of an overall programme with the specific objective of promoting human rights. Providing this objective is *bona fide* and has a realistic prospect of being achieved, the amnesty law may have an effect of promoting a human rights culture which is ultimately more powerful than the simultaneous dampening of the deterrent effect. In such a case this would be consistent with an obligation to promote respect for and observance of human rights.

Whether an amnesty complies with the state's obligation to promote human rights needs to be judged against its purpose, scope and means of implementation. Let us consider, for instance, the South African amnesty law.[30] In the words of the Promotion of National Unity and

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[28] Such an argument has been applied in Rwanda to justify the harsh approach of the Rwandan courts to genocide in applying the death penalty. It is argued that the genocide in Rwanda was partly due to the fact that political crimes have for so long gone unpunished.

[29] The Promotion of National Unity and Reconciliation Act does not require remorse. so that the perpetrator can maintain the position that his actions were correct and moral. providing he gives full disclosure and can establish that his act was associated with a political objective.

[30] See generally *supra*, at 53-70.

Reconciliation Act, the South African Truth and Reconciliation Commission was established 'to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.[31] Although this is an objective which is distinct from the objective of creating a human rights culture, the latter objective is implicit in the former. The conflicts and divisions of the past are what created the necessary environment for a plethora of human rights violations. The South African law is limited to political offences, which are defined, inter alia, by reference to the principle of proportionality. Furthermore, the granting of amnesty is conditional on full disclosure on the part of the applicant.[32] The amnesty provisions serve the purpose of obtaining the fullest possible picture of the pattern of human rights violations during apartheid. The truth may be more difficult to obtain through criminal proceedings in the context of the policies of a previous government.[33] Properly implemented, the South African law is largely consistent with the obligation to promote human rights.

3. *The Obligation to Secure the Protection of Human Rights*

All the major human rights treaties dealing with civil and political rights contain a general provision requiring the state parties to secure the protection of the rights contained in other provisions of the treaty. The International Covenant on Civil and Political Rights of 1966 provides for an obligation to 'respect and to ensure' the rights recognized in the Covenant.[34] States further undertake to 'take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognized in the present Covenant'.[35] The American Convention on Human Rights of 1969 contains virtually identical undertakings to respect and ensure, which also include the adoption of legislative measures where necessary.[36]

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[31] Section 3.
[32] Section 20(1)(c).
[33] The defence in the trial of a former South African Minister of Defence, Magnus Malan, cost more than R12 million and the trial ended in an acquittal: see 41 *supra*.
[34] Article 2(1).
[35] Article 2(2).
[36] Articles 1 and 2.

The African Charter on Human and Peoples' Rights of 1981 requires state parties to 'recognize the rights, duties and freedoms enshrined in this Charter' and 'adopt legislative or other measures to give effect to them'.[37] The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that state parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention'.[38]

This type of obligation does not prescribe the methods by which rights ought to be secured, except to the extent that states undertake to adopt legislation. Nonetheless, the need to penalise serious violations of human rights is implicit in the notion of securing or ensuring their protection.[39] Generally, it is difficult to see how the rights could be genuinely secured without such measures.

The Human Rights Committee has on occasion indicated that the Covenant requires the investigation of acts and the punishment of perpetrators. In the case of *Muteba v. Zaire*,[40] the Committee held that Zaire had violated the right to be free from torture under article 7 of the Covenant. It was held to be under an obligation to inquire 'into the circumstances of torture, to punish those found guilty of torture and to take steps to ensure that similar violations do not occur in the future'. In the case of *Dermit v. Uruguay* the Committee held that where Uruguay had violated the right to life of a detainee under article 6, it was under an obligation to 'establish the facts of ... death' and 'bring to justice any persons found to be responsible for his death'. An obligation to bring perpetrators to justice was also stated to exist in the cases of *Quinteros v. Uruguay*,[41] *Bleier v. Uruguay*[42] and *Barbato v. Uruguay*.[43]

The protection of human rights cannot realistically be ensured if serious violations of human rights go unpunished. The current victims will feel unvindicated and potential perpetrators will not be sufficiently

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[37] Article 1.

[38] Article 1.

[39] See also Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1978) 78 *Cal Law Rev* 450, at 467-74; *Impunity and Human Rights in International Law and Practice*, 1995, at 29-32; Diane F. Orentlicher, 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' 100 *Yale LJ* 2537, at 2569-82.

[40] Doc. A/39/40.

[41] Doc. A/38/40.

[42] Doc. A/37/40, p. 130, pr. 15.

[43] Doc. A/38/40, p. 124, pr. 11.

deterred, knowing that the political nature of their offence can serve as a basis for negotiating away the prospect of punishment. The need to ensure deterrence against serious violations of human rights has also been emphasized by the European Court of Human Rights. In *A v United Kingdom*, the Court considered that:

> the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (...). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (...).[44]

In *X and Y v Netherlands*, a case involving a violation of the respect for private life in terms of article 8 of the European Convention, the Court remarked that:

> the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions; indeed, it is by such provisions that the matter is normally regulated.[45]

The Inter-American Court of Human Rights, in the famous *Velasquez Rodriguez*[46] and the *Goninez Cruz* cases,[47] also held that state parties to the American Convention on Human Rights have positive obligations. These include, in the case of disappearances followed by torture and death, the duty to carry out a serious investigation, identify those responsible and impose appropriate punishments.[48] Its statements cover,

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[44] See *A v the United Kingdom*, case 100/1997 of 23 September 1998, at para 22; see also *Stubbings v the United Kingdom*.

[45] See *X and Y v Netherlands*, 26 March 1985, Series A, no. 91.

[46] Series C, No. 4, para 170; (1989) 28 ILM. 291; see pp. 65-6 *supra*; see also Roht-Arriaza, *Impunity and Human Rights in International Law of Practice*, note 39 *supra*, at 30-2.

[47] Series C, No. 5, para 179; see also p. 65 *supra*.

[48] (1989) 28 ILM 291, at 324.

obiter, all human rights violations. These statements go further therefore than those of the European Court. However, in neither set of cases that we have cited here were the courts concerned with amnesty laws, which owing to their intended effect of national reconciliation, raise slightly different considerations.

The Human Rights Committee has on occasion held amnesty laws to be inconsistent with a state's obligations in terms of the Covenant. Commenting on Argentina, the Committee has indicated that 'pardons and general amnesties may promote an atmosphere of impunity and respect for human rights may be weakened by impunity for perpetrators of human rights violations'.[49] In its consideration of Peru's report submitted under article 40 of the Covenant, the Human Rights Committee noted,

> The Committee is deeply concerned that the amnesty granted by Decree Law 26,479 on 14 June 1995 absolves from criminal responsibility and, as a consequence, from all forms of accountability, all military, police and civilian agents of the State who are accused, investigated, charged, processed or convicted for common and military crimes for acts occasioned by the "war against terrorism" from May 1980 until June 1995 ... Such an amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations, and constitutes a very serious impediment to efforts undertaken to consolidate democracy and promote respect for human rights and is thus in violation of article 2 of the Covenant. In this connection, the Committee reiterates its view, as expressed in its General Comment 20 (44), that this type of amnesty is incompatible with the duty of States to investigate human rights violations, to guarantee freedom from such acts within their jurisdiction, and to ensure that they do not occur in the future.[50]

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[49] See *Concluding observations of the Human Rights Committee: Argentina*, *supra*, at note 164.

[50] *Human Rights Committee, Comments on Peru*, UN Doc CCPR/C/79/Add.67 (1996); see also *Human Rights Committee, Comments on Paraguay*, UN Doc CCPR/C/79/Add.48 (1995); *Human Rights Committee, Comments on Haiti*, UN Doc CCPR/C/79/Add.49 (1995); *Human Rights Committee, Comments on El Salvador*, UN Doc CCPR/C/79/Add.34 (1994)..

The need to punish the perpetrators of human rights violations in relation to the undesirability of amnesty was even more emphatically stated by the Human Rights Committee in its consideration of Senegal's report under article 40 to the Covenant. It said,

> The Committee considers that amnesty should not be used as a means to ensure the impunity of State officials responsible for violations of human rights and that all such violations, especially torture, extra-judicial executions and ill-treatment of detainees should be investigated and those responsible for them tried and punished.[51]

Similarly, the Inter-American Commission in its Annual Report 1992/3 considered Uruguay's amnesty law to be incompatible with the state's obligation to ensure and respect human rights in terms of the American Convention on Human Rights.[52] It reached a similar conclusion in *Consuelo et al. v Argentina* with respect to Argentina's 60-day deadline law and the Presidential Decree of Pardon,[53] and in *Masacre Las Hojas v El Salvador* in relation to El Salvador's amnesty law.[54]

A normative trend has been created of requiring criminal proceedings in cases of serious violations of human rights. However, states generally possess a margin of discretion in their application of the provisions of human rights treaties. In the *Mauritian Women* case[55] the Human Rights Committee stated that, 'the legal protection or measures a society or a State can afford to the family vary from country to country and depend on different social, economic, political and cultural conditions and traditions'. The Committee, while generally denouncing the atmosphere of impunity created by amnesty laws, has also in certain

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[51] Human Rights Committee, Comments on Senegal, UN Doc CCPR/C/79/Add.10 (1992); see also Human Rights Committee, Comments on Niger, UN Doc CCPR/C/79/Add.17 (1993).

[52] See Inter-American Commission on Human Rights, *Annual Report 1992-93*, Report No 29/92, Uruguay, 2 October 1992 (1993), at 154, as reproduced in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 1996; see 68-9 *supra*.

[53] Report No. 28/92, OEA/Ser. L/V/II.83 Doc. 14 at 41 (1993); see 71-3 *supra*.

[54] Report No. 26/92, OEA/Ser. L/V/II.83 Doc. 14 at 83 (1993); see 77-8 *supra*.

[55] *Aumeeruddy-Cziffra v. Mauritius*, Doc. A/36/40, p.134.

cases apparently loosely recognized their value in contributing to the laying of 'solid grounds for the development of a free and democratic society based on the rule of law'.[56] Whether a particular amnesty law violates the 'respect and ensure' provisions will therefore depend on the extent to which the law impinges upon the effective protection of the rights in question, and the contribution it makes to the establishment of a democracy in which human rights can be respected. The jurisprudence is at present insufficiently developed to derive more precise guidance from it as to where the line is to be drawn. The amnesty laws that the Human Rights Committee and the Inter-American Commission have condemned have been very broad in their effects. A more refined and limited amnesty law that contributed significantly to establishing democracy, excluded from its perview serious human rights violations and was accompanied by a thorough investigation of human rights violations, might be consistent with the provisions of international human rights instruments.

So far we have considered the obligation to prosecute as part and parcel of the obligation to ensure the protection of other rights. The 'respect and ensure' provisions could also be violated by a failure to prosecute a violation when the obligation to prosecute is a necessary component to one of the protected rights. Human rights treaties frequently include the right to an effective remedy. Arguably, a remedy for certain categories of violation can only be effective if accompanied by criminal proceedings. In such cases, the right would not be secured without the initiation of steps towards the prosecution of the perpetrator.

4. *The Right to an Effective Remedy*

Let us consider this link between the notion of an effective remedy and an obligation to prosecute human rights violations. The obligation to provide an effective remedy is again common to all the major human rights treaties on civil and political rights,[57] and is also one of the rights listed in the Universal Declaration of Human Rights of 1948.[58] The Human Rights Committee has expressed the view that Act 23, 521 (the

[56] Human Rights Committee, Comments on Bulgaria, UN Doc CCPR/C/79/Add.24 (1993); see also Human Rights Committee, Comments on Morocco; UN Doc CCPR/C/79/Add.44 (1994).

[57] See International Covenant on Civil and Political Rights of 1966: article 2(3)(a).

[58] Article 6.

due obedience law) and Act 23, 492 (the "full stop" law) in Argentina deny an effective remedy in violation of articles 2 (2) - (3) and 9 (5) of the Covenant.[59] In *Rodriguez v. Uruguay*[60] the Human Rights Committee held Uruguay's amnesty law to violate the right to an effective remedy under the Covenant by ultimately excluding in a number of cases the possibility of investigation into past human rights violations and thereby preventing the state from discharging its responsibility to provide effective remedies to the victims of those abuses.[61]

Having regard to the ordinary meaning of the words it is not immediately obvious why there should be a connection between the concept of an effective remedy and an obligation to prosecute. For the lawyer, the term 'remedy' is usually employed in a civil rather than a criminal context. The Concise Oxford Dictionary defines a remedy for present purposes as 'a means of counteracting or removing anything undesirable', or as 'redress; legal or other reparation'.[62] Punishment certainly counteracts the commission of a crime. In one sense, it also redresses the crime in that it serves as a form of retribution for the victim. If one interprets the phrase according to its ordinary meaning, it does not require *per se* that a remedy be in the form of a criminal sanction or even in the form of redress before the courts. The European Court of Human Rights has, on a number of occasions, stated that article 13 of the European Convention on Human Rights on the provision of effective remedies does not require any particular form of remedy.[63]

However, one should read the effective remedy provision in its context. In particular, looking at the provision requiring the securing of recognized rights, the reference to effective remedies can be taken as part of an overall attempt on the part of the drafters of human rights treaties to provide effective judicial protection for the victims of human

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[59] See *Concluding observations of the Human Rights Committee: Argentina*, 3/10/95. A/50/40, paras. 144-165.

[60] No. 322/1988.

[61] See also Niomi Roht-Arriaza. 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', note 39 *supra*., at 474-83; *Impunity and Human Rights in International Law and Practice*, at 32-5: note 39 *supra*.

[62] *The Concise Oxford Dictionary*, 8th ed., 1990.

[63] See e.g. *Boyle and Rice* judgment of 27 April 1988, Series A. no. 131, at para 52; *Vilvarajah and Others* judgment of 30 October 1991, Series A, no.215, at para 122.

rights abuses. In that light, the provision or non-provision of a criminal sanction should be relevant to the inquiry whether an effective remedy exists. Remedies for certain very serious categories of violations may be said not to be effective unless they include both a civil remedy and a thorough investigation of the offence capable of leading to a prosecution. Without a criminal investigation, the victim may not be able to effectively pursue a civil claim. The European Court of Human Rights has expressed these sentiments in a number of recent cases. In the *Selcuk and Asker* judgment, for instance, the Court considered that:

> the nature and gravity of the violations complained of in the instant case under Articles 3 and 8 of the Convention and Article 1 of the Protocol No. 1 have implications for Article 13. It recalls that where an individual has an arguable claim that his or her possessions have been purposely destroyed by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate and without prejudice to any other remedy available in the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure.[64]

This clearly indicates an obligation in appropriate cases to carry out a criminal investigation, which can ultimately facilitate an effective civil remedy. Does it go further in requiring, in appropriate cases, a prosecution in terms of article 13? Before this and other cases employed such language, it had been stated that, 'the European Court of Human Rights has also interpreted "the right to remedy" language of the European Convention to include the obligation to investigate and prosecute'.[65]

While the effective remedy provision of the European Convention has long been criticized for its vagueness, the language here adopted by the Court, and recently repeated on a number of occasions, fails to entirely clarify the issue of whether the notion of a remedy includes vindication through prosecution. It is submitted that it is open to two

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[64] See *Selcuk and Asker* judgment of 24 April 1998, case 12/1997; see also *Mentes* judgment, Case 58/1996 of 28 November 1997; *Kurt* judgment of 25 May 1998, case 15/1997.

[65] See Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, note 39 *supra*, at 34.

possible interpretations. One is that there is, in certain cases, an obligation to carry out a criminal investigation as a necessary condition to the pursuit of any civil remedy in order for it to be effective. The other is that in certain cases, for a remedy to be effective, it must include prosecution of the perpetrator. The language: 'capable of leading to' could be explained as merely constituting the recognition of the fact that a criminal investigation might not always be successful, but that where it is, prosecution must follow.

The cases where this language is used are based on facts where there was no thorough criminal investigation and the applicants argued that they could not successfully pursue a civil claim without the authorities first carrying out a thorough criminal investigation.[66] This lends support to the former interpretation of the words of the court. In the case of serious violations of human rights the experience and resources of the police may be crucial to the victim's ability to pursue a civil remedy. Thus, the Human Rights Committee, commenting on Peru's amnesty law, noted in its consideration of Peru's report pursuant to article 40:

> It also makes it practically impossible for victims of human rights violations to institute successful legal action for compensation.[67]

Whether a criminal investigation is a necessary part of an effective remedy will principally depend on the nature and seriousness of any particular violation of a recognized right, together with the measure of protection provided by non-criminal legal mechanisms. Again, if no - or no adequate - civil remedy is available, then the additional absence of punishment for the violation may lead to an infringement of the effective remedies provision. The distinction between civil and criminal proceedings is even somewhat blurred in the domestic legal systems of some states. So, if the state's margin of discretion in terms of organizing its domestic legal system is to be truly respected, then one cannot exclude the relevance of criminal proceedings in the determination of the question of whether existing remedies are effective.

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[66] See note 64 *supra*.

[67] See note 50 *supra*; see also Inter-American Commission on Human Rights, *Annual Report 1992-93*, Report No 29/92, Uruguay, 2 October 1992 (1993), at 154, para 53, note 52 *supra*.

The *travaux preparatoires* to the International Covenant on Civil and Political Rights indicate a deliberate omission in its effective remedy provision of any requirement that violations must be prosecuted. A proposal that 'violators shall swiftly be brought to the law, especially when they are public officials' was rejected.[68] They do not exclude that at least the initiation of criminal proceedings, and maybe more, might in fact be necessary for the remedy to be said to be effective in any particular case.

However, in *H.C.M.A. v. The Netherlands*[69], *S.E. v. Argentina*[70] and *Rodriquez v. Uruguay*[71] communications pursuant to the Optional Protocol to the International Covenant were declared inadmissible to the extent that a right to criminal prosecution was being asserted. In these cases the Human Rights Committee held that the Covenant does not provide for a right for an individual to require that the state party criminally prosecute another person.

These cases related to admissibility under the Optional Protocol which requires an individual's *right* to have been violated. This does not affect the existence of an *obligation* to prosecute under the Covenant in certain circumstances. As already outlined above, the obligation under article 2(1) to 'respect and to ensure' and under article 2 (2) 'to take the necessary steps' and 'adopt ... measures' to give effect to the rights recognized under the Covenant may require prosecution in cases of serious violations.[72] In *Rodriguez v. Uruguay*, while the Human Rights Committee held there to be no right to prosecution, it nonetheless expressed concern that, 'the State Party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations'.[73]

An individual can be said to have no right to require that the state prosecute a perpetrator of human rights violations in terms of the

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[68] Bossuyt. *Guide to the* 'Travaux Preparatoires' *of the International Covenant on Civil and Political Rights*, at 65.

[69] No. 213/1986.

[70] No. 275/1988.

[71] No. 322/1988.

[72] In *Santullo (Valcada) v. Uruguay*, Doc. A/35/40, p. 107, the Human Rights Committee suggested the existence of a positive obligation to ensure protection of the individual arising from article 2(1).

[73] See note 60 *supra*, at para. 12.4; see also *Human Rights Committee, Comments on Uruguay*, U.N. Doc. CCPR/C/79/Add.19 (1993) at para. 7. where the same wording is used and the following is added: 'This is especially distressing given the serious nature of the human rights abuses in question'.

Human Rights Committee's interpretation of the Covenant, or for that matter to insist on a particular form of remedy. That notwithstanding, there can be said to be an obligation on the state to provide effective judicial protection from human rights violations, such obligation deriving from the provision on ensuring the recognized rights in conjunction with the right to an effective remedy. The American Convention's equivalent provision to the effective remedy provision of other instruments is article 25, which speaks of 'the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights'.[74] This right is entitled the 'Right to Judicial Protection'. The Inter-American Commission on Human Rights has interpreted this provision in relation to the obligation to 'ensure and respect' in terms of article 1(1). In doing so, it held Uruguay's amnesty law to be incompatible with these provisions as a denial of justice, despite damages agreements that had been reached with certain victims.[75]

Impunity for serious human rights violations will normally lead to a breach of the obligation to judicial protection as derived from the 'ensure and respect' or 'secure' provision of a treaty read in conjunction with the effective remedy provision. Whether the failure to initiate a prosecution can lead to an independent violation of the right to an effective remedy will depend on the circumstances. One would have to be able to conclude that the failure to take steps towards prosecution was part of a general failure to provide judicial protection in an effective manner in relation to the recognized right that has been violated. Yet, the victim has no all-embracing right to require the state to opt for prosecution.

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[74] Article 25.

[75] See note 67 *supra*; see also Case 7821, Inter-Am. C.H.R. 86, OAE/ser. L/V/II/57, doc. 6, rev. 1 (1982), at 87; Case 6586, Inter-Am. C.H.R. 91, OEA/ser. L/V/II/61, doc. 22, rev. 1 (1983), at 93: cited as authority in Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, *supra*., at 34, note 72; and see *Consuelo et al. v. Argentina*, Report No. 28/92, OEA/Ser. L/V/II.83 Doc. 14, at 41 (1993), discussed at 66-7 *supra*; *Masacre Las Hojas v El Salvador*, Report No. 26/92, OEA/Ser. L/V/II.83 Doc. 14, at 83 (1993).

5. *Limitations on the Right to and Obligation of Judicial Protection*

Inevitably that the state that introduces an amnesty law will defend its actions on the basis of political necessity. One therefore needs to consider whether the duty to offer judicial protection may be subject to any exceptions. In this regard, human rights treaties may contain limitation clauses and state parties may be said to have a 'margin of discretion' or 'margin of appreciation' in relation to the implementation of the treaty.

Major civil and political rights treaties usually provide that rights may be derogated from in extreme circumstances.[76] The International Covenant on Civil and Political Rights[77] and the European Convention[78] allow derogation in time of public emergency that threatens the life of the nation. The American Convention allows derogation 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party'.[79] Orentlicher considers that a fragile government may lack the power to comply with international obligations where the previous military regime gives up office but continues to have *de facto* control.[80] This can be said to be the case, for instance, in Uruguay in the mid-1980s, where the military withdrew from government, but remained undefeated and intact with one of its representatives acting as minister of defence in the new civilian government.[81] This cannot be described as the position in South Africa. It is, however, arguable that the international obligations were derogated from at the time of the political settlement, which incorporated a promise of amnesty provisions.[82] Archbishop Desmond

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[76] The African Charter contains no specific state of emergency clause: as to limitation see *infra*.

[77] International Covenant on Civil and Political Rights of 1966: article 4(1).

[78] European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950: article 15(1).

[79] American Convention on Human Rights of 1969: article 27(1).

[80] See Orentlicher, note 39 *supra*, at 2607.

[81] See Americas Watch, *Challenging Impunity: The Ley De Caducidad and the Referendum Campaign in Uruguay* (Americas Watch Committee, 1989), at 11-21, reproduced in Neil Kritz (ed), *Transitional Justice, How Emerging Democracies Reckon with Former Regimes*, 1995, vol II, at 386; see further chapter 3 *supra*, at 79-80.

Tutu expressed the view that transition to democracy would not have been possible without that political settlement.[83] In that sense this could be viewed as a public emergency threatening the life of the nation.

There are three distinct difficulties with this argument. First of all, the International Covenant requires that the existence of the public emergency is officially proclaimed. Secondly, restrictions must be 'strictly required by the exigencies of the situation'.[84] At the time of the passing of the Truth and Reconciliation Act, the political settlement had already been reached. There is nothing to suggest that it would not have survived had the conditions for the granting of amnesty been more stringent or the statutory provisions interpreted more restrictively by the Amnesty Committee. Very serious violations of human rights could be excluded from amnesty without jeopardizing the political settlement. The National Party that was in power from 1948 to 1994 has consistently rejected direct responsibility for gross violations of human rights such as severe acts of torture.

The third difficulty is that peremptory norms of international law[85] and those specified in article 4(2) of the International Covenant, 15(2) of the European Convention and 27(2) of the American Convention are non-derogable. The right to an effective remedy for the violation of a non-derogable right and the obligation of securing the rights together form the expressed mechanism of these treaties for the enforcement of the right. It is therefore submitted that these provisions are also, by implication, non-derogable.

Apart from the provision on states of emergency, the American Convention contains an express limitation clause of a more general nature. It provides in article 32(2) that '[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society'. The other major human rights treaties do not, as such, contain general clauses that expressly limit the recognized rights. The African Charter, like the

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[82] For a discussion of the negotiations, see Lynn Berat, 'South Africa: Negotiating Change?' in Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, 1995, at 267.

[83] Debate between myself and Archbishop Desmond Tutu on South African national television on 5 November 1996, 'Tuesday Night Debate'.

[84] See article 4(1) of the International Covenant; article 15(1) of the European Convention; and article 27(1) of the American Convention.

[85] Rules of *jus cogens* such as the prohibition on torture: see *Prosecutor v Furundzija* (1999) 38 ILM 317.

American Convention,[86] contains duties that are imposed on the individual in the exercise of his or her rights.[87] The European Convention contains no general limitation clause but only expresses limitations to specific rights.

This feature of the European Convention led the European Commission on Human Rights to speak of 'inherent limitations'. [88] Professor Jacobs describes this doctrine as 'both incorrect and unnecessary' having regard to the scheme of the Convention.[89] The Commission appears to have employed the term 'inherent' in the sense of an inherent feature of a state of affairs, such as that an inherent feature of imprisonment is that the right to correspondence should be limited.[90] It is submitted that while one should not talk of 'inherent limitations', limitations may be derived from the terms of a human rights treaty by implication. This is the approach that has been adopted by the European Court of Human Rights in certain cases.[91]

Take article 27(2) of the African Charter that provides:

> The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Some might say that this was an express limitation clause. It is in fact an express direction to the individual as to the manner in which rights should be exercised. However, it is implicit in this provision that rights may be limited in the interests of the rights of others, collective security, morality and common interest.

If it were possible to imply a general limitation into the International Covenant on Civil and Political Rights and the European Convention, then one could perhaps attempt to identify a general principle that could justify amnesty in those terms. These instruments do not contain a hanger provision such as article 27(2) of the African

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[86] In article 32(1)

[87] See articles 27(1) and (2).

[88] See the *De Courcy* case 2749/66, Yearbook 10, 388 at 412.

[89] See Francis G. Jacobs, *The European Convention on Human Rights*, 1975, at 199.

[90] See the *De Courcy* case, note 88 *supra*, at 412.

[91] See the *Ashingdane* judgment of 28 May 1985, Series A, no. 93, at para 57; the *Lithgow and Others* judgment of 8 July 1986, Series A, no. 102, at para 194; the *Mathieu-Mohin and Clerfayt* judgment of 2 March 1987, Series A, no. 113.

Charter. However, as with any treaty, they must be defined having regard to their object and purpose and in their context,[92] including their preambles, related instruments and rules of international law that may shed light on their interpretation.[93]

The preamble to the International Covenant refers to the United Nations Charter and the preambles to both the Covenant and the European Convention refer to the Universal Declaration on Human Rights. The UN Charter itself gives no guidance as to what are human rights for the purposes of the Charter. The words 'human rights' must be interpreted in the light of subsequent international instruments which define the content of human rights.[94] Particular reference must be made to the Universal Declaration of Human Rights of 1948,[95] which, although not intended to be legally binding at the time of its conclusion, is an authoritative guide to the Charter provisions.[96]

A document which was not intended to be legally binding at the time of its conclusion really cannot be taken as an exact expression of the vague words used in the Charter, which itself is legally binding. That would render the Declaration a legally binding document regardless of the clear intention to the contrary on the part of the parties to the document. Nonetheless, it provides clear evidence of what was meant by the expression 'human rights' in the Charter.

The rights under the Universal Declaration may be limited in accordance with article 29(2), which provides that:

> in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

It is submitted that, in the light of this, there is an implied term in all the general human rights treaties. This term envisages that rights or

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[92] Vienna Convention on the Law of Treaties of 1969: article 31(1).

[93] Ibid: article 31(2) and (3).

[94] See article 31(3) of the Vienna Convention on the Law of Treaties.

[95] See Robinson, *The Universal Declaration of Human Rights*, 1958; Verdoodt, *Naissance et signification de la Declaration Universelle des Droits de L'Homme*, 1963.

[96] *South West Africa Cases (Second Phase)* ICJ Reports, 1966, 6 at 293, per Judge Tanaka (dissenting); Kamminga, *Inter-State Accountability for Violations of Human Rights*, 1992, at 133.

obligations in terms of the treaty may be limited for the preservation of the democratic order that forms the basis of the political and civil rights of all individuals within a society. In other words, there is a proviso that such limitations are necessary for that purpose and proportional to that legitimate aim. Any implied term of this nature should be interpreted restrictively.

Amnesty provisions may be designed to secure the recognition and respect for the rights of victims by obtaining the truth through full disclosure of a perpetrator who has no fear of criminal retribution. They may also be designed for the general welfare in a democratic society by virtue of their effect in reconciling a nation which was previously torn apart.

The South African amnesty process, for instance, can fit into this category. Certain aspects of that process may nonetheless go beyond that objective. The justification of obtaining the truth would not seem to apply to a law that grants amnesty to a person who has already been convicted on evidence proving the case against him beyond all reasonable doubt.[97] However, arguments relating to reconciliation may continue to apply in such cases. There are some violations of human rights so very serious and repugnant that they may be classified as gross violations or crimes against humanity. Even in a politically torn society the majority of the nation, on whichever side of the political fence they sit, will not support such violations and granting amnesty to such perpetrators does little in terms of national reconciliation. It may even in some cases be detrimental to it.

Article 29(2) of the Universal Declaration also has to be read in the context of article 30. This provides that 'nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein'. Many limitations on human rights which courts and international tribunals have upheld have amounted to a person being completely prevented from exercising the right in a particular context. In that sense amnesty is no different

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[97] The Promotion of National Unity and Reconciliation Act does not exclude those who have already been convicted for political crimes. If it were so, it might be argued that the right to equality before the law was infringed, but this argument can be refuted on the basis that the law can lay down the conditions for its application (as with the political and non-political offender) providing it is applied equally and the conditions are not in themselves discriminatory on internationally unacceptable grounds such as race, religion etc.

because it completely prevents the victim from exercising their right to an effective remedy. If the concept of the destruction of a right were liberally interpreted it might cover such limitations. However, the word 'destruction' ought to be read in the light of and balanced against the word 'limitation'. 'Limitation' suggests that the right continues to exist although it may not be exercised in the case in point. 'Destruction', on the other hand, suggests that the right effectively no longer exists. Where the right is limited it is not destroyed and where it is destroyed there is nothing left to limit.

Amnesty provisions do not destroy but limit the principle of judicial protection, providing such provisions are confined to violations taking place under prescribed conditions. In the case of the South African provisions, amnesty will only be granted for acts committed in the past, before a specified date, for acts committed with a political objective and where an application for amnesty has been made with full disclosure before the cut off-date.[98] In such cases the principle of judicial protection has been limited but not destroyed.

In determining whether and the extent to which a limitation on a right and its incidental protection is justified in that it is necessary for the preservation of the democratic order, it is submitted that states possess a degree of discretion in the determination of this issue. The circumstances pertaining within each state will be unique and the state should be able to retain a degree of flexibility in deciding how to organize its domestic order so as to promote human rights. International tribunals have endorsed a similar notion in relation to the application of the express provisions of human rights treaties. The Human Rights Committee speaks of a margin of discretion, while the European Court of Human Rights speaks of a margin of appreciation. However, it is clear that this margin of appreciation is subject to close international supervision. In the *Chorherr* judgment, for example, the European Court, when dealing with the express limitation to the right to freedom of expression in article 10(2), stated that:

> The Court has consistently held that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what

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[98] See post-amble to the Constitution of the Republic of South Africa: Act No. 200 of 1993, as amended by Acts 2/1994, 3/1994, 13/1994, 14/1994, 14/1994 and 29/1994; Promotion of National Unity and Reconciliation Act No. 34 of 1995, as amended by Acts 87/1995, 104/1996, 18/1997, 47/1997 and 84/1994, section 20 (1); see further *supra*, at 56-9.

> extent an interference is necessary, but this margin goes hand in hand with European supervision embracing both the legislation and the decisions applying it; when carrying out that supervision the Court must ascertain whether the impugned measures are "proportionate to the legitimate aim pursued", due regard being had to the importance of the right of freedom of expression in a democratic society.[99]

An amnesty law and the domestic decisions implementing it must be judged on whether they are proportional to the legitimate aim of preserving the democratic order. Whether and to what extent limiting a right's judicial protection is necessary will depend on the nature of the right in question and the circumstances pertaining within the country. In particular, one should have regard to the importance of the right infringed and demanding judicial protection, and the consequences of providing effective judicial protection of the right for the preservation of the democratic order.

With respect to the former, the need to erode the judicial protection of a right that is not subject to the express possibility of limitation in the relevant treaty must be more convincingly established than in relation to a right that is subject to express limitation. The judicial protection of a non-derogable right can never be compromised. With regard to the consequences of demanding judicial protection of the right, one needs to consider whether - and the extent to which - preserving a certain level of judicial protection of a right will compromise the preservation of the democratic order. So, for example, although a country may have suffered widespread human rights violations in the past, a minority of individuals may have been directly responsible for acts of rape and murder. It may be possible to reconcile the nation and preserve democracy without gracing these serious violations with impunity.

Consequently, it is possible to draw some general principles from the foregoing analysis. There is a general obligation to provide effective judicial protection for rights recognized in terms of human rights treaties. This obligation is a necessary corollary to the rights themselves. The state may decide how best to comply with this

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[99] See the *Chorherr* judgment of 25 August 1993, Series A, no 266-B, at para 31; see also e.g. the *Weber* judgment of 22 May 1990, Series A, no 177, at para 47; the *Autronic AG* judgment of 22 May 1990, Series A, no 178, at para 61; the *Observer and Guardian* judgment of 26 November 1991, Series A, no 216, at para 59(c); the *Informationsverein Lentia and Others* judgment of 24 November 1993, Series A, no 276, at para 35.

obligation providing that judicial protection is meaningful and effective. This will usually not be the case with respect to serious violations of human rights without some form of criminal sanction.

An amnesty law may be valid despite this general obligation to ensure the protection of human rights if it is necessary for the preservation of the democratic order. This derives from an implied term in every general human rights treaty. The state has a margin of discretion in determining its needs in this respect, but this is subject to close international supervision to ensure that the law only extends to what is strictly required for the legitimate aim pursued.

6. *Treaties Requiring the Prosecution and Extradition of Specific Human Rights Violations*

Where a treaty expressly requires the prosecution or extradition of an individual accused of a human rights violation, without exception a national law that facilitates impunity for that type of violation would be in breach of the treaty. Three important multilateral treaties fall within this category. They are the Convention on the Prevention and Punishment of the Crime of Genocide of 1948,[100] the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973[101] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1984.[102] The extent to which these treaty obligations are reflected in customary international law will be considered in chapter 9.

A. *Genocide*

By virtue of article IV of the Genocide Convention, persons guilty of committing genocide or any of the other acts listed in Article III of the Convention must be punished, regardless of whether they are agents of

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[100] Approved and proposed for signature, ratification or accession by the General Assembly of the United Nations by resolution 260 A (III) of 9 December 1948; entered into force on 12 January 1951.

[101] Adopted by General Assembly resolution 3068 (XXVIII) of 30 November 1973.

[102] Adopted by the General Assembly by resolution 39/46 of 10 December 1984; entered into force on 26 June 1987.

the state or private individuals.[103] Article V requires state parties to enact legislation to provide 'effective penalties' for persons guilty of genocide or any of the other acts listed in article III.

The granting of amnesty to an individual for an act of genocide or other related act under article III would be a clear violation of a state's international obligations in terms of the Convention.

B. *Apartheid*[104]

The Apartheid Convention provides in its first article that apartheid is a crime against humanity.[105] This was part of a general development in terms of breaking the former necessary connection, reflected in the Nuremberg Charter,[106] between crimes against humanity and war. It is clear that the crime of apartheid can be committed in time of war or in time of peace. Article 2 of the Convention defines the catagories of inhuman acts, which if committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them, constitute a crime. Article 3 establishes international criminal responsibility, 'irrespective of the motive involved', for individuals who commit, participate in, incite or conspire in acts prohibited under article 2, or who abet, encourage or co-operate in the commission of the crime of apartheid.

By virtue of article 4, state parties undertake to punish persons guilty of the crime of apartheid and to introduce any legislative, judicial and administrative measures necessary to prosecute, bring to trial and punish those responsible for the acts enumerated in article 2. Article 5 establishes universal jurisdiction over the crime of apartheid. By virtue of article 11, no political offence exception in any extradition treaty can take effect and there are no express limitations on the obligations with respect to establishing criminal responsibility. It therefore seems plain

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[103] See generally on the elements of genocide and its enforcement: William A. Schabas, 'Le Génocide', in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit International Pénal*, 2000, at 319-32 (chapter 23).

[104] See Article 3 (h) of the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, Appendix, *supra*.

[105] See generally John Dugard, 'L'Apartheid' in Ascensio *et al*, note 103 *supra*, at 349-60 (chapter 25).

[106] See chapter 6 *supra*.

that an amnesty law in a state, party to the convention, which covered the crime of apartheid, would contravene the terms of the convention.[107]

C. *Torture*

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia recently held, in the matter of *Prosecutor v Furundzija*, that the prohibition on torture had reached the status of a rule of *jus cogens*:[108] that is, a peremptory rule of international law from which there can be no derogation except by virtue of another rule of similar status. The Torture Convention imposes on states an obligation to criminalize torture.[109] Article 4 obliges states to criminalize torture and to make it punishable with appropriate penalties. Article 7 incorporates the principle of *aut dedere aut judicare* and requires states to extradite or prosecute.

These provisions are, again, inconsistent with amnesty from criminal prosecution.[110] In *Prosecutor v Furundzija*, the Appeals Chamber demonstrates how the *jus cogens* character of the prohibition on torture would reinforce this conclusion:

> At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce legal effects discussed above and in addition would not be accorded international legal recognition.[111]

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[107] South Africa was of course not a party to the convention and it seems unlikely that other state parties will pursue South Africa's former oppressors: see Dugard note 105 *supra*, at 351.

[108] *Prosecutor v Furundzija* (1999) 38 ILM 317, at 349-50.

[109] See generally Edouard Delaplace, 'La torture' in Ascensio et al, note 103 *supra*, at 369 (chapter 27).

[110] See further article 3 (e) to the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, Appendix, *infra*.

[111] See *Prosecutor v Furundzija*, note 108 *supra*, at 349, para 155.

D. *Slavery*

The international regime for the punishment of acts of slavery is the next oldest such regime in time of peace, after piracy.[112] In the *Barcelona Traction, Light and Power Co.* case,[113] the International Court of Justice gave the prohibition on slavery as an example of an obligation *erga omnes*. The International Slavery Convention of 1926 requires state parties to impose severe penalties for individuals contravening national slavery legislation implementing the Convention.[114] In addition, the Supplementary Convention of 1956 obliges state parties to criminalize and punish slavery under their national laws.[115] Nothing in these Conventions limits this obligation. However, the obligation is to criminalize slavery and punish those who are convicted of it. Presumably, an amnesty law would not directly contravene these provisions since it would not be de-criminalizing slavery, but would merely immunise certain individuals from prosecution.

It might, nonetheless, contravene the spirit of the Conventions. An amnesty law that covered slavery, without it being established that this was necessary for the pursuit of the legitimate aim of the law, might contravene article 5 of the Supplementary Convention. This requires states to co-operate with the United Nations to implement the Convention.

E. *Racial Discrimination*

In terms of the International Convention on the Elimination of All Forms of Racial Discrimination,[116] state parties undertake 'to prohibit and to eliminate racial discrimination in all its forms';[117] and 'to assure to everyone within their jurisdiction *effective protection* and remedies, through the competent national tribunals and other State institutions,

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[112] See generally Emmanuel Jos. 'La traite des êtres humains et l'esclavage' in Ascensio et al , note 103 *supra*, at 337-47.

[113] ICJ Reports (1970), at para 33.

[114] See article 6.

[115] See articles 3-6.

[116] See generally Mylène Bidault, 'La discrimination raciale comme infraction internationale dans la Convention des Nations Unies de 1965' in Ascensio *et al*, note 103 *supra*, at 361-68 (chapter 26).

[117] Article 5.

against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention' [my emphasis].[118] Article 2(d) provides that:

> Each State Party shall prohibit and bring to an end by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.

There is by implication an obligation to prosecute serious violations of the convention, which could not otherwise be eliminated or the victims effectively protected.

This Convention should also be read in the context of the UN Declaration on the Elimination of All Forms of Racial Discrimination of 1963,[119] which is referred to in the preamble to the Convention. This declaration states that:

> All incitement to or acts of violence, whether by individuals or organizations against any race or group of persons of another colour or ethnic origin shall be considered an *offence against society and punishable under law* [my emphasis].

The UNESCO Declaration on Race and Racial Prejudice states in its preamble that the conference parties are '*determined also* to promote the implementation of the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination'. It provides that the state should 'take all appropriate steps, inter alia by legislation ... to *prevent, prohibit and eradicate* racism, racist propaganda, racial segregation, and apartheid...' [my emphasis]. This high onus of protection placed on the state clearly requires the punishment of the most serious racist acts.

An amnesty law that covered serious acts of racial discrimination would not necessarily contravene the Convention, if it could be shown that it contributed to, rather than inhibited the elimination of racial discrimination. Its effects of reconciliation and national therapy could arguably achieve this in a society torn by racial tension.[120] It would help

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[118] Article 6.

[119] See General Assembly Resolution 1514 (XV) of 14 December 1960.

[120] As in South Africa: see chapter 3 *supra*, at 42-7, and chapter 11 *infra*, at 295-301.

if such a law were accompanied by the introduction of stiff measures for future acts of racial discrimination.

7. *Treaties Requiring the Punishment of Specific International Crimes*

The treaties that have been considered hitherto focus on the fundamental rights of individuals, but contain provisions on judicial protection with a view to ensuring the effective protection of human rights. There is also a group of treaties that deal specifically with the punishment of violations of the rights of others, but that are not normally classified in the group of human rights treaties. In this class of treaties one can include treaties on terrorism, offences against diplomatic agents, drug offences, theft of nuclear material, money laundering, fraud, corruption and insider dealing.

A. *Terrorism*

Omer Elagab defines terrorism in the following terms:

> The term terrorism is used to define criminal acts based on the use of violence or threat thereof. and which are directed against a country or its inhabitants and calculated to create a state of terror in the minds of the government officials, an individual or a group of persons, or the general public at large. It could be the work of one individual, but more often than not is the effect of organised groups, whose philosophy is based on the theory that 'the end justifies the means'.[121]

This describes conduct that is common in liberation struggles before a state moves through political transition. One recalls, for example, the 1985 hijacking of the *Achille Lauro*, an Italian cruise liner, by terrorists who demanded the release of 50 Palestinians detained in Israel. These are frequently a major category of politically motivated offences that municipal amnesty laws are designed to cover. They may form a significant part of the criminal offences committed by those who supported the position of the parties that will be in power after political transition to democracy. At the same time these offences affect the most vital interest of the state, its internal security.

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[121] Dr Omer Y Elagab, *International Law Documents relating to Terrorism*, 2nd ed. 1997, at xix.

The international community has made a determined effort to ensure the punishment of terrorists through the conclusion of international agreements, all the provisions of which contribute to the creation of an effective regime for the punishment of international criminals. In this context, one can mention multilateral treaties aimed at aviation, navigation, terrorist bombings and hostage situations. In the field of aviation, one should mention the Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft of 1963; the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970;[122] the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971;[123] the Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 1971; and the Geneva Convention on the High Seas of 1958 (this treaty deals with the offence of piracy on aircraft as well as ships). In the field of navigation one should mention in addition to the Geneva Convention on the High Seas of 1958, the UN Convention on the Law of the Sea of 1982 and the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988.[124] Terrorist bombings are made an offence in terms of the International Convention for the Suppression of Terrorist Bombings of 1998.[125] The taking of hostages is covered by the International Convention against the Taking of Hostages of 1979[126] and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.

The Tokyo Convention seeks to facilitate the exercise of jurisdiction by states over offenders that committed crimes on board any aircraft. In terms of the Geneva Convention on the High Seas and the UN Convention on the Law of the Sea, states must co-operate to the fullest possible extent in the repression of piracy against ships and aircraft.[127] The Hague, Montreal and Rome Conventions, the Protocol to the Montreal Convention, the Terrorist Bombings Convention and the Hostages Convention create international offences that the state

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[122] (1971) 10 *ILM* 133.
[123] (1971) 10 *ILM* 1151.
[124] (1988) 27 *ILM* 668.
[125] (1998) 37 *ILM* 249.
[126] (1979) 18 *ILM* 1456.
[127] See article 14 of the Geneva Convention and article 100 of the UN Convention.

parties undertake to punish with severe penalties.[128] They also require states to take the measures necessary to establish jurisdiction over the offence and acts of violence related to it when the alleged offender is on their territory and where he is not extradited. This does not create universal jurisdiction over the offence since it only applies to the parties to the treaties. However, it does permit collective jurisdiction between the parties. The treaties adopt the principle of *aut dedere aut judicare*. If a state party does not try the offender who is present on his territory, then it must extradite him to one of the states required to establish jurisdiction under circumstances specified in the treaty. The other grounds for establishing jurisdiction differ in each treaty, but the intended effect is to ensure that interested states can establish jurisdiction over the crime, while the offender has no safe haven.

The Hague,[129] Montreal,[130] Terrorist Bombings[131] and Hostages[132] Conventions all include an unqualified obligation, in the strongest possible terms, to extradite or proffer the accused for prosecution in the following terms:

> The Contracting state [State Party] in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, *without exception whatsoever* and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution [through proceedings in accordance with the law of that state]. *Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious* [*grave*] *nature under the law of that state.* [my emphasis].

The European Convention on the Suppression of Terrorism of 1977 repeats this formula and extends it to the offences of kidnapping and serious unlawful detention.[133] It is clear from this provision that the political nature of the offence and the circumstances in the country will not free the state from its obligation to punish or extradite the offender. An amnesty law at most could guarantee the offender impunity within

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[128] See article 2 of the Hague Convention.
[129] See article 7.
[130] See article 8.
[131] See article 7.
[132] See article 8.
[133] See *European Treaty Series*, No. 90: articles 1 and 7.

his own state, but the accompanying obligation to extradite him will render this meaningless.

However, the Terrorist Bombings Convention only applies to offences that affect the interests of another state. This is expressed in terms of another state having jurisdiction under one of the specified classical grounds for the exercise of criminal jurisdiction.[134] So, a terrorist bombing committed within a single state, in circumstances where the perpetrator and the victims are only nationals of that state, the perpetrator is found on the territory of the state and the bombing has no connection with any other state, could be the legitimate subject of a national amnesty law. Additionally, there would be no corresponding obligation on the affected state to extradite the individual to another state.

B. *Offences against diplomatic agents*

An attack on agents of states and international organizations and their families subject to international protection is a crime in terms of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 1973.[135] An alleged offender found on the territory of a state party must be presented to the competent authorities for prosecution within its courts or extradited to another state having jurisdiction in terms of one of the classical grounds for asserting criminal jurisdiction as set out in article 3(1) of the convention.[136]

Article 7 of the convention reproduces the obligation, discussed in the previous section, to present the alleged offender to the authorities for prosecution, if it does not extradite him 'without exception whatsoever'. The interests at stake are those of other states and it is therefore understandable that such crimes should not fall within the scope of a national amnesty law that is based on reasons of domestic policy.

C. *Drug offences*

While one cannot overemphasise the dangers of drug abuse, it is the difficulty in controlling the international traffic in drugs more than the shock to mankind of the crime that has led to the twelve international

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[134] See article 3.
[135] See article 2.
[136] See article 3(2) and 7.

conventions on narcotics. Consequently, at present, the use of and traffic in drugs does not constitute a crime in terms of international law, but only in terms of the national law of the state parties to the narcotics treaties. The control of drugs and other psychotropic substances remains a matter essentially for the domestic jurisdiction of a state. Nonetheless, in the effort to ensure co-operation between states in the suppression of these domestic crimes, a modified form of the obligation to prosecute or extradite has been incorporated into the international system for the control of traffic in drugs.

The most significant drugs treaties that have been concluded are the 1961 Single Convention to which the majority of states are party and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The 1988 Convention describes the aspects of the drugs trade that states must establish as criminal offences under their domestic law.[137] It obliges the state to take measures to establish its criminal jurisdiction over offences committed in its territory or on a vessel or aircraft registered under its laws.[138] It also obliges the state to take measures to establish its criminal jurisdiction when it does not extradite the offender who is one of its nationals. It permits the exercise of jurisdiction for classical reasons and when the offender is found in its territory.

There is no absolute obligation to initiate a prosecution akin to that discussed earlier in relation to the treaties on terrorism and attacks on diplomatic agents. An amnesty law that included such offences would not therefore contravene the Convention per se. However, amnesty laws are by their nature brought into effect in relation to political offences of the past and in most cases a drug-trafficking offence could hardly be considered as political in nature. The offence would thus normally fail to attract amnesty by virtue of domestic rather than international law.

D. *Offences relating to nuclear material*

The horrific devastation caused to Hiroshima and Nagasaki by the allied use of the atomic bomb at the close of the Second World War highlighted the demonic potential of nuclear material as a tool of destruction. The nuclear disaster at Chenobyl was a reminder of the dangers of badly managed nuclear material, supposedly being used for peaceful purposes. Nuclear dangers are clearly the concern of all

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[137] See article 3.

[138] See article 4(1)(a).

mankind. In its advisory opinion the *Legality of the Threat or Use of Nuclear Weapons* the International Court of Justice noted that 'the treaties dealing exclusively with the acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons'.[139] Still, it was unable to reach a conclusion on their absolute prohibition.

The nuclear powers still wish to retain their sovereign rights over nuclear material and reserve the right to use the weapons in self-defence. However, the non-proliferation treaties[140] are testimony to the recognition of the danger for mankind and the ultimate desire to eradicate these beasts from hell. The risks involved in the prospect of nuclear material finding its way into the wrong hands are almost unimaginable. So, while the nuclear question is still predominantly in the hands of the small number of nuclear powers and the law is in an early stage of development, a state cannot legitimately argue that the control of nuclear material is a matter exclusively or even essentially within its domestic jurisdiction. This must be the point of departure to any consideration of national amnesty for nuclear-related offences.

The Convention on the Physical Protection of Nuclear Material of 1980[141] requires state parties to make punishable any offences under their national law, the handling of or threat to use nuclear material resulting or likely to result in death or serious injury to persons or substantial damage to property; the threat to steal, or the theft or robbery of nuclear material; embezzlement or fraudulent obtaining of nuclear material; demanding nuclear material by threat or use of force or by any other form of intimidation.[142] These offences must be punishable by 'appropriate penalties which take into account their grave nature'.[143] State parties have an obligation to take the necessary measures to establish jurisdiction with respect to offences committed on their territory or on vessels or aircraft registered under their laws, and where the offender is a national of the state. Further, the obligation to present to the competent authorities for prosecution an offender that is

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[139] (1997) 35 *ILM* 809, at para 62.

[140] E.g. Treaty on the Non-proliferation of 1968, (1968) 7 *ILM* 811.

[141] Christine van den Wyngaert (ed.), *International Criminal Law, A Collection of International and European Instruments*, 1996.

[142] See article 7.

[143] See article 7(2).

not being extradited is included with the usual indication that this should be 'without exception whatsoever'.[144] An amnesty law could therefore not legitimately cover these offences.

E. *Money laundering, fraud, corruption and insider dealing*

On a regional level, treaties have been concluded to ensure the bringing to justice of individuals guilty of cross-border crimes that affect the interests of states and international organizations. It is foreseeable that this will become a growing development and begin to be reflected in the conclusion of multilateral treaties. However, these are, like drug offences, matters essentially within the domestic jurisdiction of states, rather than crimes against the international community or its fundamental interests as a community. The treaty developments reflect the need for mutual assistance rather than the recognition of the international legal or moral nature of the offence. Consequently, there is no real necessity to limit the scope of national amnesty law with respect to these offences. Offences that are essentially for financial gain are, in any event, unlikely to fall within the purview of a national amnesty law directed at political offences of the past.

8. *Conclusion*

In terms of deriving general principles from the foregoing analysis, one is able to draw some fairly limited conclusions. These conclusions can, with reference to the more detailed analysis undertaken in this chapter, form the basis for a contribution towards the development of a set of guidelines for states. These guidelines can be drafted on the assumption that the international community as a whole aspires, in the field of human rights and international crimes, to a coherent treaty regime that is binding on all states. The specific obligations of a particular state will of course need to be viewed from the perspective of the framework of treaties to which it is a party.

Generally speaking amnesty laws are not compatible with international obligations in terms of human rights treaties, and related instruments on specific international crimes. However, amnesty laws are not necessarily irreconcilable with these obligations. In order to be reconcilable with the treaty framework they should exclude from their purview serious violations of human rights, acts of transnational terrorism, crimes in relation to nuclear material and crimes against

[144] See article 10.

diplomatic agents, all as defined in the relevant treaties.[145] They should also exclude international human rights violations *in toto*, subject to limited exceptions. The exceptions would remain where it can be shown that amnesty for certain less serious violations of human rights violations is essential to the preservation of the democratic order and the scope of the amnesty is proportional to that legitimate aim.

[145] See article 4 of the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, Appendix, *infra*.

CHAPTER 8

DEFINING THE PARAMETERS AND CRITERIA FOR A GENERAL NORM AGAINST IMPUNITY

1. *The Implications and Scope of a Customary Duty to Prosecute*

A customary obligation for states to prosecute international crimes would mean that all states would be bound by this obligation, regardless of whether they are party to a particular treaty,[1] subject to the possible existence of a right to persistently object to the emergence of a customary rule.[2] This would greatly facilitate the implementation of international criminal law, which currently largely depends on national criminal courts. Currently, only two international criminal tribunals exist[3] and one other ad hoc tribunal is planned,[4] but their jurisdiction is restricted to crimes committed in the context of particular wars between specified dates.[5] The Rome Statute, which was concluded as the basis of agreement on the establishment of a permanent international criminal

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[1] See article 38 of the Vienna Convention on the Law of Treaties of 1969; see also R.F. Roxburgh, *International Conventions and Third States*, 1917, at 72-95.

[2] See Brownlie, *Principles of Public International Law*, 1990, 4th ed., at 10; It is far from clear that this exception in fact exists: see Jonathon Charney, 'The Persistent Objector Rule and the Development of International Law' (1985) 56 *BYIL* 1-24; see also Andreas O'Shea, *International Law and Organization, A Practical Analysis*, 1998, at 21.

[3] See further chapter 5 *supra*, at 109-120; chapter 11 *infra*, at 314-5.

[4] See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000. See further chapter 5 *supra*, at 120-1; chapter 11 *infra*, at 315.

[5] See the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) *ILM* 1203; the Statute of the International Criminal Tribunal for Rwanda (1994) *ILM* 1598.

court,[6] needs 60 ratifications before it can enter into force[7] and, in any event, invokes the principle of 'complementarity' by virtue of which the Court is to supplement national jurisdictions.[8]

In examining the question of whether custom provides for such an obligation it would be appropriate to begin by setting out the possible parameters of this kind of rule. The rule might be expressed as a mandatory obligation to prosecute with no other option being open to the state. Alternatively, it may provide for mandatory prosecution subject to the state following another permissible option. A permissible option may take the form of an exception to the rule, as for example with an amnesty provision of limited scope. It might also take the form of an alternative obligation, the obvious example *in casu* being that of extradition. This latter formula is expressed in the maxim *aut dedere aut judicare*.[9]

One can also divide the legal sources of the crimes to which such an obligation would apply into three separate categories to which the rule might extend. First, there are those crimes that are classified as such by virtue of customary international law. In this category I would include slavery, torture, piracy, genocide, most war crimes and crimes against humanity[10] as the phrase would have been understood at the time of the Nuremburg Trial,[11] but also extending to certain crimes covered by later extensive state practice such as apartheid.[12]

Secondly, there are those crimes under international law that have been provided for in treaties but have not yet reached customary status. In this category I would include the taking of hostages, money laundering and attacks on United Nations and associated personnel. I

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[6] See further chapter 5 *supra*, at 121-30; chapter 11 *infra*, at 315-9.

[7] See Article 124 of the Statute of the International Criminal Court (1998) 37 *ILM* 999.

[8] See Andreas O'Shea, 'The Statute of the International Criminal Court' (1999) *SALJ* 243.

[9] See M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, 1995.

[10] Cf. Generally Steven R.. Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 1997.

[11] See the Article 6 (c) of the Charter of the International Military Tribunal, annexed to the London Agreement of 8 August 1945, reprinted in Benjamin Ferencz, *An International Criminal Court, A Step Towards World Peace*, vol. I, 453 at 457.

[12] See Ratner and Abrams, note 10 *supra*, at 113-16.

would also include certain treaty-based war crimes and crimes against humanity which have not yet reached customary status. It is not because a new crime in a treaty is named a crime against humanity or a war crime that it automatically receives customary status. This would give states a legislative capacity which they do not possess and would contravene the principal of *pacta tertiis nec nocent nec prosunt.*[13]

Thirdly, there are those crimes that exist by virtue of the municipal law of a state. For the purposes of the present analysis, such crimes may conveniently be further divided into national crimes generally and national crimes which have been deemed to be of concern to the international community. In this latter class one might include for example drug offences, counterfeiting and the import and export of obscene publications.[14] All these offences are the subject of international co-operation through treaty obligations.[15]

2. *Deriving a Duty from the Criminal Nature of the Prohibition*

Professor Bassiouni is one of the most prolific writers in the field of international criminal law, which appropriately led to him chairing the drafting committee for the Rome Conference for the establishment of an international criminal court. He is one of those who claim the existence of a general rule requiring the prosecution of international offenders. According to Bassiouni the fact that offences are crimes under international law implies that they are of common concern to all states, which gives them both the power and the duty to bring perpetrators to justice. His views are summarised as follows:

> (6) These crimes are the concern of all states;
>
> (7) All states therefore have power to prosecute those who commit them;
>
> (8) For the same reasons all states are bound to assist in bringing those who commit such crimes to justice[16]

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[13] This being the principle that a treaty is not binding on third parties: see article 34 of the Vienna Convention on the Law of Treaties of 1969;

[14] To view some of these treaties see Cherif M. Bassiouni, *International Criminal Law Conventions and their Penal Provisions*, 2nd ed., 2000; Christine van den Wyngaert, *International Criminal Law: A Collection of International and European Instruments*, 1996.

[15] Ibid.

[16] Ibid., at 50.

The connections between these three propositions require close analysis. The actual link between (6) and (7) is not as immediately apparent as one would be led to believe by the baldness of these assertions. International crimes are by their very nature the concern of all states. That much is true. Does it follow from this proposition that all states have the power to prosecute international crimes, i.e. that all such crimes are subject to universal jurisdiction? In the *Barcelona Traction* case the International Court of Justice stated that obligations owed to the international community as a whole are:

> By their very nature ... the concern of all States. In view of the importance of the rights involved, all States can be held to have legal interest in their protection, they are obligations *erga omnes*.[17]

International crimes are indeed based on obligations that may be described as *erga omnes*. However, Rosalyn Higgins has observed that in so far as this dictum is employed to inform the contemporary principle of universal jurisdiction it is 'incorrectly used as authority for more than it can sustain'.[18]

Putting aside the fact that the decision itself concerned diplomatic protection and not universal jurisdiction, the accuracy of this observation will depend on whether universal jurisdiction needs to be enshrined in a rule of law. If it does, then the exercise of jurisdiction by any state must be founded on more than the fact that the obligation is owed to all states as part of the international community. It must further be founded on the existence of a rule of law permitting such jurisdiction. I will argue that the universal exercise of jurisdiction does not require a permissive rule. However, before doing so it is worth examining the extent to which a permissive rule has developed from state practice and *opinio juris*. Higgins claims that the right to exercise universal jurisdiction 'can stem either from a treaty of universal or quasi-universal scope, or from acceptance under general international law'.[19]

State practice is moving towards a customary right to claim

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[17] *Case Concerning the Barcelona Traction, Light and Power Company Limited (Second Phase)*, ICJ Reports (1970) 3 at para.33.

[18] See Rosalyn Higgins, *Problems & Process: International Law and How We Use it*, 1994, at 57.

[19] Ibid., at 58.

jurisdiction based on the universality principle.[20] One finds repeated clauses in the treaties dealing with international crimes permitting all parties the right to exercise jurisdiction, and there are isolated instances of municipal courts and judges being brave enough to rely on the universality principle to uphold the right to prosecute aliens for crimes committed abroad.[21] The formation of a customary rule of general application permitting universal jurisdiction for international crimes is, however, far from being in place. Many more states have refrained from exercising criminal jurisdiction over non-nationals for crimes abroad. In the second judgment of the English House of Lords in the *Pinochet* proceedings, it was held that Pinochet, the former dictator of Chile, could not be extradited to Spain for offences of torture committed before the Torture Convention had been incorporated into English law.[22] This was because extra-territorial torture was not an offence in terms of English law before then and the double-criminality requirement for extradition was therefore not satisfied.[23] The majority did not follow the line of Lord Millet, dissenting on this point, that English courts had jurisdiction pursuant to the customary right to exercise universal jurisdiction over torture.[24] In *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia based its view that the crime of torture was subject to universal jurisdiction, not on the basis of custom, but as a result flowing from the *jus cogens* character of the prohibition.[25]

Furthermore, some treaties incorporate more restricted grounds for the exercise of international criminal jurisdiction. Under the Genocide Convention, a person charged with genocide is to be tried in the state in the territory of which the act was committed or by an international

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[20] For recent discussions of the developments in this area see *Africa Legal Aid Quarterly*, April-June 2000, Seminar: Universal Jurisdiction for Crimes against Humanity.

[21] See *A.G. of Israel and Eichmann* (1961) 36 ILR 5 (Israeli Supreme Court); *Demjanjuk v Petrovsky* (1985) 603 F Supp 1468; *R. v. Evans, ex parte Pinochet Ugarte* (No. 3) (1999) 6 BHRC 24, at 102, per Lord Millet (partially dissenting).

[22] This was achieved by the Criminal Justice Act 1988, which came into force on the 19 September 1988.

[23] *R. v. Evans, ex parte Pinochet*: see note 21 *supra*, esp. at 588, per Lord Brown-Wilkinson.

[24] Ibid.

[25] See *Prosecutor v. Furundzija* (1999) 38 ILM 317, at 349; see also chapter 6 *supra*, at 186-7.

criminal tribunal.[26] The Convention on the Protection of the European Communities' Financial Interests of 1995[27] adopts territorial jurisdiction and jurisdiction based on nationality.[28] Treaties that are not of universal or virtually universal application but permit the exercise of jurisdiction by any state party, do not create universal jurisdiction for the offence in question because the treaty can only apply as between the parties to it. In the present state of customary law it is possible to claim that there is a customary right to universal jurisdiction in relation to an important but small range of international crimes. These include piracy, the crime of aggression, war crimes and crimes against humanity, providing the latter are sufficiently connected to war (notwithstanding the developing existence of crimes against humanity unconnected with war).[29]

Nevertheless, it is in fact questionable whether the exercise of universal jurisdiction over international crimes does require a customary rule permitting it. Would this not entail that there was to begin with a rule of international law that prevented states from exercising jurisdiction over aliens committing offences outside the territory of the state, and that the scope of this rule extended to international crimes? In the *Lotus* case,[30] a French steamer collided with a Turkish collier on the high seas. When the French steamer pulled into the Turkish harbour, members of its crew were arrested and tried in the Turkish courts for culpable homicide. The Permanent Court of International Justice stated that:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[31]

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[26] See Article 6.

[27] Brussels Council Act of 26 July 1995 drawing up the Convention on the Protection of the European Communities' Financial Interests, *Official Journal of the European Communities* No C 316, 27/11/1995 at 48.

[28] See Article 4.

[29] See Higgins, note 18 *supra*, at 61.

[30] (1927) PCIJ, Ser. A, no. 10, page 23.

[31] Ibid., at 18-9

The Court found that there was no prohibitive rule regarding the prosecution of aliens for offences committed outside a state's territory.[32] With respect to this finding Lauterpacht has observed that:

> In so far as the Judgment of the Court purports to express a general and unqualified proposition of international law, it has been subjected to criticism and is unlikely to secure general acceptance.[33]

It would certainly appear that, in the practice of states with regard to the prosecution of aliens for extra-territorial offences, a distinction should be drawn between crimes against the domestic law of a state and crimes against international law. States have generally refrained from prosecuting extra-territorial municipal offences committed by non-nationals.[34] For the purposes of identification of a customary norm, it is difficult to pin down the subjective element of state practice. However, it may be implied that this behaviour stems from the widely understood notion that criminal jurisdiction is an intrinsic part of state sovereignty and to claim jurisdiction over offences committed in another state by a non-national would be to infringe upon the sovereignty of that other state.[35] On the other hand, it has long been established that piracy and

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[32] Ibid., at 20 and 32.

[33] Hersch Lauterpacht, *International Law, Collected Papers, vol. 1, General Works*, at 489.

[34] Exceptionally, states exercise jurisdiction over extra-territorial municipal offences committed by non-nationals where these crimes have an adverse impact on the citizens or territory of the state: see e.g. *United States v Yunis (no 2)* 681 F Supp 896 (1988). In 1989, the United States government invaded Panama, deposed the Panamanian dictator, Manuel Noriego, and put him on trial in the United States on drug and racketeering charges: see Robert L. Jackson and Mike Clary, 'Noriega Convicted on 8 Drug and Racketeering Charges', *Los Angeles Times*, 10 April 1992.

[35] There is strong support for the proposition that *opinio juris* may, in appropriate cases be implied: Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958 (revised edition), at 380; Ian Brownlie, *Principles of Public International Law* 7; In the *Lotus* case the Court found that 'The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law ... Restrictions upon the independence of States cannot therefore be presumed.' note 30 *supra*, at 18. The impression created by this passage has been criticized on the basis that legal sources 'are not limited to the express manifestation of states': see Lauterpacht, ibid., at 360-1.

war crimes fall outside the exclusive criminal jurisdiction of any state due to the fact that such criminals are the enemies of all mankind.[36] One could not therefore assert a general and consistent practice of refraining from prosecuting aliens for extra-territorial crimes against international law. As far as there is such practice, one is unlikely to find evidence that this is done pursuant to a sense of legal obligation and this certainly could not be implied. Indeed, in most cases there are fairly clear political motivations for such behaviour.[37]

In other words, while the reasoning of the Court in the *Lotus* decision has questionable application to domestic offences such as the one at issue in that case, it makes perfect sense in the context of crimes against international law. Here, because this is a matter that concerns all states, customary law has not prohibited the exercise of jurisdiction by any state and states are thus free to prosecute such crimes without the need for a permissive customary rule of universal jurisdiction.

It is Bassiouni's second link between universal jurisdiction and an obligation to prosecute that presents the most difficulties. The learned author explains this at another place when he says:

> They are offences against world public order. They are of concern to all states, and all states ought therefore to co-operate in bringing those who commit such offences to justice. In the absence of a system of direct enforcement through prosecution before an international criminal court, reliance has to be placed on individual states to prosecute international offenders before their own courts. The whole effort to bring such offenders to justice will be frustrated if states do not accept a duty to prosecute or else extradite them to a state which is prepared to prosecute.
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> .....Whatever may be the case with respect to ordinary crimes, a duty to extradite or prosecute therefore follows from the common interest which all states have in the suppression of international offences.[38]

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[36] See *Demjanjuk v. Petrovsky* (1985) 603 F Supp 1468 at 1472.

[37] For a consideration of the political influences on the Law Lords in the Pinochet proceedings see John Dugard, 'Dealing with Crimes of A Past Regime. Is Amnesty Still an Option?' (2000) 16 *Leiden Journal of International Law* 1; for a response see Andreas O'Shea, 'Pinochet and Beyond: the International Implications of Amnesty' (2000) 4 *South African Journal on Human Rights* Vol. 16: 642-668.

[38] See note 9 *supra*, at 20.

While it is true that an effective international criminal justice system depends on the co-operation of states, the very existence of such a system also depends on the consent of states.[39] Any assertion that states must prosecute international crimes, no matter how desirable, needs, itself, to be derived from the accepted sources of international law.[40] In the first place, not every international crime is an offence under customary international law. Even with respect to those crimes that are prohibited under customary international law, such as piracy, slavery, torture and crimes against humanity, it does not follow that there must be a simultaneous duty to prosecute. It could not be argued that states' consent to the existence of a crime under international law necessarily implies their consent to a duty to prosecute or even a duty to prosecute or extradite. Such a finding would depend on the assumption that the concept of a crime under international law is meaningless without a corresponding duty to extradite or prosecute. This is simply not the case. There are several purposes served by classifying an offence a crime under international law, notwithstanding the absence of an obligation to extradite or prosecute.

First, a crime under international law may enable a national court to try a person for such crime where it could not otherwise. The international crime may not constitute a crime as such under the national law of a state. By virtue of its status as a crime under international law, national courts can charge the individual for the crime under international law and may even be persuaded to introduce the crime into its national legislation as a crime under the law of the state. For example, for a soldier to kill civilians in time of war, may not, depending on the circumstances, constitute an offence under the national law of the state, but may constitute a grave breach of the Geneva Conventions. National authorities therefore have the valuable option of charging a person for a crime under international law.

Secondly, a crime under international law may enable a court to try a person for an offence of a more serious nature than exists under its own law. The act or omission may constitute an offence under the law of a state but there may be some value in the person being charged for a distinct crime under international law, even though based on the same facts. So, torture may not be a separate offence under the law of the state but may be covered by the law on assault.[41] The value of charging

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[39] See *infra*, at 207.

[40] See article 38 of the Statute of the International Court of Justice.

[41] See the analysis of state practice in relation to torture in chapter 8, *infra*.

the individual with the separate crime under international law lies in emphasizing the opprobrium attached to the offence in question.[42] States may also be persuaded to introduce the more serious crime under international law into their own national legislation.[43]

Thirdly, the will of states to classify an offence as a crime under international law means that it may further be accompanied by universal jurisdiction. This has its own value independent of any need to impose a duty on states to prosecute the crime. Such is illustrated by the crime of piracy, which has long been voluntarily enforced on the basis of universal jurisdiction, owing to the vested interest of states in freedom of navigation.[44]

Fourthly, even though a permanent international criminal court has not yet been established, states and/or the UN always have the option to enforce international criminal law by setting up international tribunals as happened with the Nuremberg Tribunal,[45] the International Criminal Tribunal for the Former Yugoslavia[46] and the International Criminal Tribunal for Rwanda,[47] or as is envisaged in Sierra Leone.[48]

Finally, classifying an offence as a crime under international law has an additional value in attaching stigma to certain categories of violations of international law. Article 19 (2) of the International Law Commission's Draft Articles on State Responsibility of 1976[49] provided that:

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[42] See Jacob W. F. Sundburg, 'Piracy and Terrorism', in Bassiouni, *A Treatise on International Criminal Law*, vol. I, *Crimes and Punishment*, at 473.

[43] As is required by a number of treaties on international crimes; consider e.g. the Slavery Conventions: see chapter 8 infra.

[44] See Sundberg, note 42 *supra*, at 473.

[45] Established by the London Agreement: see note 11 *supra*. See further chapter 5 *supra*, at 104-9; chapter 11 *infra*, at 313-4.

[46] Established by Security Council resolution 827 (1993) on the Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia (1993) *ILM* 1192. See further chapter 5 *supra*, at 109-120; chapter 11 *infra*, at 314-5.

[47] Established by Security Council resolution 955 (1994) on the Establishment of the International Tribunal for Rwanda (1994) *ILM* 1598. See further chapter 5 *supra*, at 109-120; chapter 10 *infra*, at 314-5.

[48] See note 4 *supra*.

[49] *Report of the International Law Commission* 28th Session UNGAOR 31st Session Supp No 10 A/31/10 (1976); See also *International Law Commission*

> An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by the international community as a whole constitutes an international crime.

This has proved to be a somewhat controversial provision. The International Law Commission appears to have taken a new direction in its 52nd session.[50]

Therefore, while the effective enforcement of international criminal law certainly requires the co-operation of states which would be most meaningful in the form of a duty to extradite or prosecute, international crimes do have meaning without the existence of such a duty. It should be remembered that international criminal law like any other branch of international law, must depend largely on the mutual benefit to states of ensuring compliance rather than on enforcement as such. It cannot therefore be properly asserted that such a duty is implicit in the very classification of an act or omission as an international crime.

3. *An Obligation to Prosecute Deriving from the Definition of a Crime Against International Law*

The obligation to prosecute or extradite may derive from the definition of the crime itself in the sense that a complete failure on the part of the state to protect persons against international crimes may amount to complicity in the crime. It would be difficult to assert that every failure to prosecute or extradite perpetrators of international crimes is tantamount to participation in the crime. It will ultimately depend on the definition of the crime in question and the particular facts. For instance, the crime of torture in terms of the Torture Convention includes acquiescence in the commission of acts of torture.[51] A state that promotes an atmosphere of impunity by tolerating such acts might find itself in violation of the Convention.

Report. 1996 (http://www.un.org/law/ilc/reports/chap03.htm). See also chapter 4 *supra*, at 80.

[50] See International Law Commission, fifty-second session, Geneva, 1 May-9 June and 10 July-18 August 2000. *Third report on state responsibility*: UN Doc. A/CN.4/503; see *infra*, at 208.

[51] Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

Whether the state may be held directly accountable for the crime in question will depend on the definition of the crime and or on whether the general rule on state crimes permits the application of international criminal law to the state.[52] This is one of the most problematic theoretical questions of developing notions of international criminal law and state responsibility. Article 19 of the International Law Commission's Draft Articles on State Responsibility seeks to define the concept of a crime for the purpose of state responsibility.[53] Barboza has described the definition as being 'as logically irrefutable as it is useless'.[54] The controversial nature of article 19's reference to the possibility of holding a state to have committed a crime, has led the International Law Commission to thinking about the problem in a different way. At its 52nd Session in 2000,[55] it addressed the definition of an injured state and the consequences of international crimes as defined in article 19 by distinguishing between different levels of international delicts. So, in defining 'injured state,' the Commission draws a distinction between specially affected states and other states. For this purpose, obligations are classified as *erga omnes*, *erga omnes partes* and multilateral obligations generally. The Commission refrained from employing the concept of international crimes. For determining the threshold for the entitlement of countermeasures, it is suggested that a notion such as 'well-attested gross breaches' be employed. It may be that in terms of what this implies for the states direct responsibility for international crimes, the practical effect is for our purposes the same.

The question of direct state responsibility for the Commission of a crime is one of the matters to be addressed by the International Court of Justice in proceedings brought against the Republic of Yugoslavia by Bosnia and Herzegovina, which allege that Yugoslavia is guilty of acts of genocide.[56] Whatever the outcome of these developments on the

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[52] See 206-7 *supra*; chapter 6 *supra*, at 139-40.

[53] See *International Law Commission Reports* for 1976 and 1996, note 49 *supra*.

[54] See J. Barboza, 'International Criminal Law' (1999) 278 *Recueils des cours* 1, at 87.

[55] Concluded in August 2000, but not yet published.

[56] See *Case concerning the Application of the Genocide Convention (Order on Provisional Measures)* [1993] ICJ Reports 3; *(Judgment on Preliminary Objections)* [1996] ICJ Reports 595; and see Memorial of the Governments of the Republic of Bosnia and Herzegovina, dated 15 April 1994; see further Nina Jorgensen, 'State Responsibility and the 1948 Genocide Convention', in Guy

capacity of a state to commit a crime, the general rules on state responsibility may nevertheless result in indirect responsibility for the acts of individuals. These rules themselves imply certain duties with respect to the prosecution of alleged offenders.

4. *An Obligation to Prosecute Deriving from the Rules Relating to State Responsibility for the Acts of Individuals*

Article 1 of the International Law Commission Draft Articles on State Responsibility provides that 'every internationally wrongful act of a State entails the international responsibility of that state'.[57] An internationally wrongful act is said to include 'conduct consisting of an action or omission that is attributable to the State under international law' and 'conduct that constitutes a breach of an international obligation of that state'.[58]

In the event that an official violates the human rights of an individual while acting in that capacity, even if not within the scope of his specific instructions or authority, responsibility for that injury vests in the state.[59] If the injured person is a foreign national then this becomes a direct injury to the state of which he is a national[60] and that state may exercise its right of diplomatic protection over the injured national. Sometimes, however, the matter may be addressed through the civil and criminal courts of the responsible state.[61] Punishment of the official in such circumstances may constitute partial satisfaction for the wrong done to the foreign national, and therefore to the foreign state. If the state fails to punish the culprit, the foreign state may demand punishment as part of its reparation through diplomatic interposition. In terms of article 45 of the International Law Commission's Draft Articles on State Responsibility a state injured by an internationally wrongful act arising from the criminal conduct of officials or private parties is entitled to satisfaction, which may take the form of

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S. Goodwin Gill and Stephen Talmon (eds.), *The Reality of International Law: Essays in Honour of Ian Brownlie*, 1999.

[57] See International Law Commission Report, note 53 *supra*.

[58] *Idem*.

[59] See Eagleton, *Responsibility of States in International Law*, 1928, at 52; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, at 155 *et seq*.

[60] See Vattel, *Le Droit des Gens*, Bk. II, ch. vi, para. 71.

[61] See Eagleton, note 59 *supra*, at 53.

punishment of those responsible.[62] In the *Borchgrave* case,[63] for instance, a Belgian national who had been working in the Belgian Embassy in Spain, was found dead in Spain. Belgium exercised its right to diplomatic protection and as part of its reparation it demanded just punishment of the guilty.

Early writers on state responsibility declared that international law was not concerned with injuries done to a state's own citizens.[64] This is no longer the case and an infringement of the human rights of a state's own citizens is an injury to all states in so far as the human rights obligation is *erga omnes*, or to all the other parties to the treaty that has been violated. The new draft articles on state responsibility draw a distinction between an injury to a state directly affected by the breach and an injury to all other states.[65] This distinction may have some bearing on the question of whether any state can demand the punishment of the perpetrators for human rights violations, as satisfaction for an injury done to them under a treaty or custom.

The position with respect to injuries committed by individuals who are not agents of the state or, although agents are acting not in an official but in a private capacity, is that such acts are generally not attributable to the state, which is therefore not liable for such acts.[66] However, the failure to prosecute or extradite the perpetrator of an international crime may in itself be relevant to the primary question of whether a violation of an international norm is attributable to the state under international law. The confidence instilled in all human rights violators[67] deriving from the state's unwillingness to prosecute the acts of officials or failure to prosecute others generally can contribute to subsequent violations.[68] In the *Noyes* claim,[69] in an arbitration between the United States and Panama, the Arbitral Commission held, obiter,

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[62] See International Law Commission Report, 1996, note 49 *supra*.

[63] P.C.I.J. Rep., Ser. A/B, No. 72 (1937), at 165.

[64] See Eagleton, note 59 *supra*, at 84.

[65] This provision was included at the International Law Commission's most recent meeting in August 2000 and has not as yet been publicized on its website.

[66] See Eagleton, note 59 *supra*, at 79.

[67] Noting, of course, that not all human rights violations are subject to prosecution.

[68] In Rwanda, for example, general impunity preceding the genocide appears to have been a major contributory factor: see *Report of the International Crisis Group on Rwanda: the Justice Question*, 1999.

[69] (1933) 6 *Royal Institute of Arbitration Awards* 308.

that a general failure to comply with the state's duty to maintain order, to prevent crimes or to prosecute and punish criminals could give rise to international responsibility for an individual incident involving private perpetrators.

Furthermore, international law imposes a general minimum standard on states with respect to the treatment of aliens and this includes a satisfactory administration of justice.[70] A failure to prosecute a perpetrator of an injury to an alien may be viewed as a denial of justice.[71] In the *Janes* claim,[72] the US-Mexican General Claims Commission awarded damages for the non-apprehension and failure to punish the murderer of Janes, a US national. The facts clearly show a failure of the state to act on the murder. The killer was well known to the community where the murder occurred. The killer left on foot and the Mexican police magistrate became aware of the murder within five minutes of its execution. Eight years had elapsed up to the date of the arbitration and the murderer had still not been apprehended. It therefore appears that at least in the context of the treatment of aliens, arbitral decisions on state responsibility support a duty to investigate and prosecute offenders.

A number of arbitral decisions support the proposition that a municipal amnesty which results in a denial of justice will not excuse a state from its responsibility for failing to prosecute the perpetrator. Thus, in a dispute between the United States and Mexico, the US claimed damages for the murder of an American oil-well driller by Mexican bandits. A General Claims Commission held that an amnesty granted to the bandits 'has the same effect, under international law, as not punishing such a crime, not executing the penalty or pardoning the offence. It fastens upon Mexico an indirect liability for the murder'.[73] Similarly, in the *Montijo* case, it was decided that 'the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon'.[74]

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[70] See Eagleton, note 59 *supra*, at 83.

[71] See generally, Freeman, *International Responsibility of States for Denial of Justice*, 1938.

[72] See Brierly, 'The Theory of Implied State Complicity in International Claims' (1928) 9 *BYIL* 42-9.

[73] See *United States and Mexico: General Claims Commission*, 21 July 1927. (1931) AD (1927 and 1928), at 212-13, Case No. 143.

[74] *Montijo* Case, reported in Moore, *Arbitrations and Security: systematic survey of arbitrations and treaties of international security deposited with the League of Nations*, at 1438; see further *Case of Cotesworth and Powell*, ibid.,

At first blush, this stance would seem to follow logically from the existence of an international obligation to maintain order and the rule that the state may not rely on its own laws to evade international responsibility.[75] Nevertheless, it is questionable whether a distinction should not be drawn, for these purposes, between public crimes incidental to the conflict and international crimes, at least in the context of civil war.[76] Amnesty following a civil conflict constitutes an exceptional measure in a particular moment in time,[77] and does not necessarily constitute a failure to maintain order. While it is clear that circumstances may arise where the requirements of international law may lead to aliens getting better treatment than nationals,[78] it is not clear that the rules on denial of justice apply even where interests of national peace and stability are at stake. Thus, in the *Divine* case, it was said that the fact that amnesty had been granted to the confederates after the American civil war did not render the United States responsible for their acts.[79] Further support for this distinction may be found in Article 6 of Protocol II to the Geneva Conventions of 1949 on the laws of war,[80] which invites the parties to the conflict to afford the

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at 2085, where it was stated that 'The amnesty laws of the state took away from the claimants all appellate recourse and all means of address before the authorities at Bolivar.'; see also the *Case of Bovalins and Hedlund*, in Ralston, *Venezuelan arbitrations*, at 952-3.

[75] See Aroa Mines Case: the Umpire observed that 'By the proper application of the usually accepted rules of international law governing such commissions, controlling courts and defining the diplomatic conduct of nations there could be no question that national laws must yield to the law of nations if there was a conflict': see Ralston, *Venezuelan Arbitrations*, at 344, 362, 365 and 378; see also the *Baron Stjernblad*, Grant, *Prize Cases*, III, at 22: 'It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law'.

[76] Hyde suggests an overlapping but alternative distinction between public acts incidental to the conflict and acts of a private nature: see Hyde, *International Law*, vol. I, at 542-3.

[77] See Ruti Teitel, *Transitional Justice*, 2000.

[78] See Eagleton, note 59 *supra*, citing a Mexican-American Claims Commission in the *Case of George W. Hopkins*: 'it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under municipal law'.

[79] See the *Divine Case*, Moore, *Arbitrations*, note 74 *supra*, at 2981.

broadest possible amnesty to the combatants at the end of hostilities.[81] While this provision was not intended to evade punishment for international crimes, its unequal application according to nationality could in defined circumstances unnecessarily compromise its purpose.

More significantly, a state may be able to invoke the defence of necessity.[82] The International Law Commission's Draft Articles,[83] in article 33, only excludes reliance on the plea of necessity under prescribed conditions. The plea is permitted where 'the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril' and the 'the act did not seriously impair an essential interest of the state towards which the obligation existed'. The second condition would prevent the operation of the excuse for international crimes.

5. *Forms of State Practice and* Opinio Juris

An independent customary obligation to prosecute or extradite international crimes will ensue from a general state practice accepted as law. There are a variety of forms of evidence of state practice[84] and the weight to be attributed to these different sources will often depend on the nature of the customary right or obligation under review. Given that most international law deals with the relations between states, it is often in inter-state relations that one starts one's search for evidence of custom.[85] The treatment by the state of the international criminal is however more closely related to the domestic legal systems of states. Therefore, the kind of practice that would indicate a customary

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[80] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (1979) *UNTS* 609-99.

[81] It reads: 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.'

[82] See *Gabcikovo-Nagymaros* (Hungary v. the Republic of Slovakia) (1998) 37 ILM 162.

[83] See note 57 *supra*.

[84] See Ian Brownlie, *Principles of Public International law*, 1990, 4th ed., at 5.

[85] Some more traditional international lawyers may argue that it is only in inter-state relations that one can search for the evidences of custom: see e.g. Louis Henkin, 'Human Rights and State "Sovereignty" (1995-6) 25 *GA J Int'l & Comp* L 31, at 38.

obligation to bring to justice the international criminal is more likely to situate itself within the domestic arena or at the level of inter-state exchanges about human rights and their domestic implementation. In other words, the most pertinent sources of state practice for the purposes of the present inquiry are national law, together with treaties and the resolutions of international organizations pertaining to the protection of human rights and their enforcement.[86]

Treaties and national law as evidence of custom pose some theoretical difficulties that have not been adequately resolved in the general literature or hardly addressed at all in the literature relating to the duty to prosecute international crimes.[87] These problems stem from the controversial relationship between treaties and custom.[88] This is an understandable lacuna at one level, since the development of customary norms through national legislation implementing a treaty regime that encroaches into the national procedural framework for criminal justice is a relatively recent development. On the other hand, neither the growth of customary norms from treaty obligations or from legislation, nor the application of international law to the national criminal process breaks new ground. The development of customary law from treaties is a frequent process as illustrated by the growth of customary norms from the UN Charter, the Kellogg-Briand Pact of 1928 on the non-use of

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[86] For confirmation of the relevance of these sources to customary human rights law generally see Arthur M. Weisburd, 'The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights' (1995-6) *Ga J Int'l & Comp* L 99, at 123; Jordan J. Paust, 'The Complex Nature, Sources and Evidences of Customary Human Rights', ibid., 147, at 158.

[87] The matter is touched upon by Niomi Roht-Arriaza: 'Nontreaty Sources of the Obligation to Investigate and Prosecute' in Roht-Arriaza (ed.), *Impunity and Human Rights in International Law*, 1995, at 40-1.

[88] See generally Baxter R.R., 'Multilateral Treaties as Constitutive of New Customary International Law' (1970) Recueil des Cours; Charles Rousseau, 'Rapports du Droit Coutumier et du Droit Conventionnel' in Charles Rousseau, *Droit International Public*, vol. I., 1970, at 342-63; Oscar Schachter, 'Entangled Treaty and Custom' in Yoram Dinstein (ed.), *International Law in a Time of Complexity: Essays in Honour of Shabtai Rosenne*, 1989; Thirlway, H.W.A., *International Customary Law and Codification*, 1972; Mark E. Villiger, *Generation of New Customary International Law*, 1985; *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources*, 2nd ed., 1997; Karol Wolfke, 'Customary Rules and Other Rules of International Law' in Wolfke, *Custom in Present International Law*, 2ed ed., 1993.

force or the Geneva Conventions of 1949 on the laws of war.[89] National legislation has, for instance, formed a significant component of the basis of the development of customary norms on diplomatic immunities and privileges before national criminal courts.[90]

A. Treaties as evidence of custom

Treaties have proved to be a very fruitful source for the development of human rights protection and a duty to bring international criminals and human rights violators to justice.[91] The-less than-universal participation in these agreements has prompted enthusiastic debate over the applicability of such treaties to non-parties. As a general principle it is well established that treaties do not *per se* bind non-parties.[92] Zealous commentators have attempted to extend their application to non-parties through linking their provisions to the binding provisions of the UN Charter, by claiming their value as authoritative interpretations of the vague provisions of the Charter.[93] While this exercise has some limited value in determining a state's Charter obligations, the fairly elastic duty in the Charter to promote human rights cannot give true expression to the specific duties in detailed human rights instruments. For instance, a duty to prosecute or extradite in terms of the Charter could only be a very flexible element in a general notion of the promotion of human rights.[94]

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[89] Anthony D'Amato suggests that Vattel (who, in line with the writing tradition of his time, did not disclose his sources) must have relied heavily on the bilateral and multilateral treaties at his disposal for his propositions of customary international law: see Anthony D'Amato, Human Rights as Part of Customary International Law: A Plea for Change of Paradigms (1995-6) 25 *Ga J Int'l & Comp L* 47, at 95.

[90] See Badr, G.M., *State Immunity: An Analytical and Prognostic View*, 1984; Christoph H. Schreuer, *State Immunity: Some Recent Developments*, 1988.

[91] Consider the large number of treaties cited by Bassiouni and Wise: see Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, 1987, at 355-475, Bassiouni and Wise, note 9 *supra*.

[92] See article 34 of the Vienna Convention on the Law of Treaties of 1969.

[93] See Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) *American University Law Review* 1.

[94] See *supra*, chapter 8.

On a general level, the relationship between treaties and custom has been a long-standing issue for international jurists.[95] As a preliminary proposition, it is clear that a treaty norm can develop into and coexist with an independent customary norm of identical content and that such customary norm can bind a state that has not become a party to the treaty.[96] It can also be safely asserted that the negotiation, adoption, signature and ratification or accession to a multilateral law making treaty constitutes a form of state practice, which, at the point of ratification or accession, indicates a willingness to be legally bound by its normative content. In the *North Sea Continental Shelf* cases the International Court of Justice stated, *obiter*, that:

> With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.[97]

In the present context, the interests of no states are more specially affected than any other states but rather the interests of all states are more or less equally affected. Even if the Court's proposition is valid and was meant to read as it does, it is unclear what exactly is meant by the phrase 'very widespread and representative'. This will inevitably depend on the circumstances and in the situation under discussion the fact that all states have an equal interest in the maintenance of the

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[95] See Henry Wheaton, *Elements of International Law*, 1866, at para. 15 (James Brown Scott, *The Classics of International Law*, at 20-1); Hall, *International Law*, 1904, 5th ed., at 12; Lawrence, *The Principles of International Law*, 1915, 6th ed., at 101-7; Oppenheim, *International Law: A Treatise*, 1955, 8th ed. (by H. Lauterpacht), at 28; R.R. Baxter, 'Multilateral Treaties as Constitutive of New Customary International Law' 129 *Hague Recueil* (1970, I); Brownlie, note 2 *supra*, at 12-3.

[96] See article 38 of the Vienna Convention on the Law of Treaties of 1969. In the *North Sea Continental Shelf* cases the International Court of Justice noted that 'There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.': I.C.J. Reports (1969) 3, at para. 71.

[97] [1969] ICJ Reports 43 (para. 73).

international rule of law would tend to suggest that a more stringent understanding of 'very widespread and representative' would be appropriate. It is stated in Lauterpacht's eighth edition of Oppenheim's work that,

> *Universal* International Law is created when all or practically all the members of the Family of Nations are parties to these treaties [law making treaties][98]

This statement should also be looked at in the light of the fact that the family of nations is very much larger now than at the time this was written. The idea that a very widely accepted agreement could, by itself, create custom is a very controversial proposition. The even more radical proposition that consensus at an international conference can create instant custom[99] fails because there is at that moment no clear intention to undertake a legal obligation.[100] With respect to treaties, Hall explained that:

> While, therefore, treaties are usually allied with a change in the law, they have no power to turn controverted into authoritative doctrines, and they have but little independent effect in hastening the moment at which the alteration is accomplished. Treaties are only permanently obeyed when they represent the continued wishes of the contracting parties[101]

There seems no valid reason to deny treaties at least an equal value to other forms of state practice. There is, however, merit in the suggestion that for the formation of a customary rule capable of being imposed universally, and even on third states, it should be backed up by the credible convictions of the international community. General consent must not merely be ephemeral, but confirmed in the subsequent practice of states. Put another way, the evidence of *opinio juris* from the treaty alone is inadequate because there is a mere undertaking to comply with a rule as opposed to actual compliance, confirming credible acceptance

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[98] See Oppenheim, note 95 *supra*, at 28.

[99] See Sohn, ' "Generally Accepted" International Rules' (1986) 61 *Wash L Rev* 1073, 1077-8.

[100] See Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989, at 87.

[101] See Hall, note 95 *supra*, at 12.

of the rule.[102] One form of subsequent practice that would appear of particular relevance to the present debate is the repetition of rules in subsequent treaties.[103]

B. *Municipal laws as evidence of custom*

Another important form of subsequent practice in our inquiry would appear to be national legislation.[104] This is a particularly important source of state practice and *opinio juris* with respect to a duty to prosecute since it is on the national level that this duty would be complied with. Meron has made the general observation that human rights are incorporated into domestic law and therefore exist in national practice. He suggests that this is a preferred indicator of customary human rights.[105]

In considering the provisions of domestic law, Roht-Arriaza states that torture, abduction, summary execution and probably disappearances are prohibited and subject to penal sanction throughout the world.[106] She indicates in a footnote that summary execution would usually be prohibited as murder and that disappearances would normally be prohibited as abduction or kidnapping.[107] One needs to use extreme caution with this approach. Such offences exist under domestic law for domestic reasons, regardless of any obligation in terms of international law. Certainly, the existence of these offences in national law is an indicator of general state practice. However, where the crime is phrased as an ordinary domestic criminal offence, there is no indication in that fact that this practice is followed pursuant to a belief on the part of the state that it is legally required. In other words, such practice provides no evidence of *opinio juris* per se and this subjective element must be derived from some factual element additional to the mere existence of a criminal norm of a domestic nature in the domestic law of the state.

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[102] The restrictive understanding of *opinio juris* that would require a belief that the norm is already customary law is rejected further down when I discuss the relevance of national legislation: see *infra*, at 219 *et seq.*

[103] See Meron, note 100 *supra*, at 93-4.

[104] Consider the examination of national legislation in relation to the punishment of torture in chapter 8 *infra*, at 229-38.

[105] See Meron, note 100 *supra*, at 88-9.

[106] Niomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' 78 *Cal L R* 451, at 494.

[107] Ibid., footnote 241.

The most significant area of national practice for determining state practice accompanied by *opinio juris* involves those crimes under international law that have been introduced into domestic law as crimes which are distinct from ordinary domestic crimes. *Opinio juris* might be implied from the name of the offence, the time of the introduction of the penalty into domestic law or any link to international law expressed in the law itself or in the history of its introduction as found in parliamentary debates, explanations to international bodies etc. Torture, genocide and slavery are examples of crimes against international law which, on examination of national laws, may provide good evidence of state practice accompanied by *opinio juris*.[108]

C. Opinio juris *derived from compliance with treaty obligations*

Whereas crimes having their equivalent in domestic law present the difficulty of the identification of the subjective element, crimes with a distinct international element, while overcoming this obstacle, present another difficulty. This lies in the nature of *opinio juris* and the developments in treaty law with respect to crimes against international law. If this difficulty cannot be overcome the effect will be that the potentially most fruitful source of evidence of a customary obligation to prosecute or extradite is in fact of little use in determining the status of the rule. The nature of *opinio juris* will have a crucial impact on the outcome of one's analysis of the customary position. It is therefore worth spending some time on this question.

Writers frequently refer to *opinio juris* as an acceptance by states that their actual conduct is required by law, without defining what is meant by law – that is, whether it refers to customary law or to any legal obligation including one arising out of a treaty. One is frequently left with the impression that custom itself is being referred to. Thus, Villiger states in the first edition of his renowned work on the subject that:

> This structure of *opinio juris*, viewed together with the requirement of general State practice, on the one hand, and the implications of passive conduct, on the other, suggests that the basis of the binding character of customary law results from the general consensus of

[108] See chapter 9, *infra*.

> States, that is, from the *communis opinio* that the rule has "passed into the general *corpus* of international law".[109]

The international community has been at pains to reinforce international criminal law by concluding treaties incorporating an obligation to bring the perpetrators of major crimes against international law to justice.[110] When a state complies with such a treaty obligation by introducing provisions into its domestic law, it is usually difficult if not impossible to tell whether it is doing so pursuant to its treaty obligations, to a perceived duty in terms of customary law or to both.

For the purposes of our present research, the consequence of the narrow interpretation of the concept of *opinio juris* would be that an examination of national law would be of little assistance in determining the existence of a customary obligation to introduce domestic law. This would be because it could easily be, and in most cases probably is, at least partly based on a perceived duty pursuant to treaty rather than custom.[111] It would also mean that, if on the evidence, the predominant intention of states in legislating on crimes against international law is to give effect to a treaty obligation, then such state practice would also make little if no contribution to *opinio juris*, and therefore to the formation of custom.

This result verges on absurdity. It means that in the international community's enthusiasm to create an obligation by concluding treaties it has effectively made it far more difficult for a general norm of the same nature to develop. With respect to the particular norm requiring prosecution or extradition, it would make such a development virtually impossible because state practice will principally involve domestic law. It is most unrealistic to expect that states would expressly recognize the customary nature of a norm in their domestic legislation giving effect to a treaty, when this has seldom if ever been the practice of states.

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[109] Mark E. Villiger, *Customary International Law and Treaties*, 1985, at para. 71; cf. Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources, 2nd ed., 1997, at para. 71 ('Thus, the express statement of a State that a given rule is obligatory (or customary, or codificatory), furnishes the clearest evidence as to the state's legal conviction').

[110] See Bassiouni and Wise, note 9 *supra*.

[111] There is a greater push for states to comply with treaty obligations owing to their clarity and the reporting obligations in terms of the treaty.

On a more general level, the artificiality of the notion that a state must believe in the existence of a customary norm in order to contribute to its creation has long been recognised.[112] Viewed in its illogical simplicity it requires the assumption that states might be ignorant of the law. It also means that custom is created by a mistake of fact. The present inquiry only serves to identify a more acute consequence of an already unhappy doctrine.

It is often difficult to decipher the views of leading international scholars on the nature of *opinio juris*. It is well known that the customary law-making process continues to be plagued uncertainties.[113] The broad expositions on the elements of custom portray a large measure of agreement on the essential conditions of customary law. Yet, Kelsen's apt observation still holds true. He remarked that: 'this agreement may itself prove deceptive to the extent that it serves to gloss over the possible disparity of views on the more detailed manner in which the constituent elements of custom are to be appreciated, let alone applied to concrete cases.'[114]

A number of eminent international jurists have not taken a narrow view of *opinio juris* and have given the concept an interpretation that escapes the artificiality of the restrictive approach previously adopted. At one extreme, a small minority of writers have asserted that *opinio juris* is not required for the formation of customary law.[115] This theory

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[112] See Kelsen, 'Theorie du droit international coutumier', *Revue internationale de la Theorie du droit*, 1939, at 253 *et seq.*; Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 662; Quadri, Cours general de droit international public, 113 *Recueil des cours*, 1964-III, at 323-4; Thirlway, H.W.A., *International Customary Law and Codification*, 1972, at 47 *et seq.*

[113] See a similar observation in Hans Kelsen, *Principles of International Law*, 1967, second edition (edited by Robert W. Tucker), at 448.

[114] Ibid., at 448-9.

[115] See Kelsen, 'Theorie du droit international coutumier' (1939) *Revue international de la theorie du droit* 253; 'Les deux elements de la coutume en droit international', *Etudes en l'honneur de G. Scelle*, vol I, 275; see also Kopelmanas, 'Custom as a Means of the Creation of International Law' (1937) 18 *BYIL* 127; Guggenheim, 'Les deux elements de la coutume en droit international', in *Les techniques et les principes de droit public: Etudes en honneur de G. Scelle*, 1950, vol. I, at 275; Both Kelsen and Guggenheim later revised their views on this matter: see Kelsen, *General Theory of Law and State*, 1945, at 114; Guggenheim, *Traite de droit international public*, 2nd ed., 1967, at 104-5.

has hardly survived in modern writings.[116] Apart from the fact that this view does not correspond to actual practice and the understanding of states of the process, it fails to answer the problem that forms the basic justification for the requirement. This problem is the one of distinguishing between usages, which are followed for reasons of courtesy or political expedience, and usages followed as law.

A more tenable proposition emphasizes the sense of legal obligation or undertaking without prescribing the source of that obligation or undertaking. Thus, Lauterpacht describes *opinio juris* as 'the consciousness that the conduct, frequently or constantly pursued, is due to the existence of a sense of legal obligation or at least the will to undertake a legal obligation'.[117] Oppenheim suggests that usage becomes customary law 'as soon as a line of international conduct frequently adopted by States is considered legally obligatory or legally right'.[118] Kelsen explains the second condition of custom in terms of 'actions undertaken because it is felt to be obligatory or right'.[119]

Another view claims that *opinio juris* is the belief that a usage ought to be law to respond to the needs of the international community.[120] Alternatively, it is argued that the custom-making process starts by a belief on the part of states that a practice should be law and is sufficient to create law but its survival then depends on subsequent practice accompanied by the belief that it has become law.[121] These various definitions would not exclude the possibility of practice accompanied by a sense of legal obligation deriving from a law-making treaty from maturing into custom.

However, these interpretations of the concept are not merely remedial but arguably express the better view of how *opinio juris* has in fact developed. The idea of international law as a law between states was born out of an absence of defined rules to regulate the horrors of

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[116] But see the more refined version of the proposition offered by M. H. Mandelson, 'Formation of Customary International Law', (1998) 272 *Recueil des cours* 155, at 290.

[117] See Lauterpacht, *Development*, note 35 *supra*, at 379.

[118] See Oppenheim, *International Law*, 1955, eighth edition (edited by Hersch Lauterpacht)

[119] See Hans Kelsen, *Principles of International Law*, 1967, second edition (edited by Robert W. Tucker).

[120] See *Oppenheim's International Law*; Verdross, *Volkerrecht*, at 138; Charles de Visscher, 6 *Recueil des cours*, 1925-I, 325, at 249-353.

[121] See H.W.A. Thirlway, *International customary law and codification*, 1972, at 54-6.

war. Grotius, for instance, turned to the Roman law conception of *jus naturae* or *jus gentium* as the basis of rules of reason that could direct states in the conduct of war.[122] Maine made the poignant observation, in the second of a series of Whewell lectures delivered before the University of Cambridge in 1887, that,

> What we have to notice is, that the founders of International Law, though they did not create a sanction, created a law-abiding sentiment.[123]

Even then one can see the seeds of tacit consent forming the basis of the law of nations. The Roman law of *jus gentium* itself constituted principles derived from those commonly adopted in the customs of Italian tribes.[124] However, the original basis of international law was the writings of natural law thinkers. While states, as human actors, could always feel obligated by impulses of morality and reason, the viability of international law would face considerable challenges in the absence of legally binding norms. John Austin, in his famous treatise entitled *The Province of Jurisprudence Determined*, considered international law to be more a regime of morality than law.[125] Thus, usages as evidence of the consent of states gradually became the firm basis of international legal obligation.

The central tenet of international legal obligation is the consent of states, either express or tacit, and it is *opinio juris* that provides the evidence of such tacit consent. Thus, in *R v. Keyn* (1876) Coleridge CJ noted that 'The Law of Nations is that collection of usages which civilized states agreed to observe in their dealings with one another.'[126] This is given modern expression in article 38 of the Statute to the International Court of Justice, which describes custom as being evidence of state practice 'accepted as law'. Lawrence asserted that,

> If we take the source of law to mean its beginning as law, clothed with all the authority required to give it binding force, then in regard

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[122] See Hugo Grotius, *de jure belli ac pacis*, 1652.

[123] See Maine, *International Law*, 1888, at 51.

[124] Ibid.

[125] John Austin, *The Province of Jurisprudence Determined*, Lecture V, in Robert Campbell (ed.), *Lectures on Jurisprudence or the Philosophy of Positive Law*, 1885, vol. I, at 173.

[126] *R v. Keyn* (1876), 2 Ex. D. 63.

> to international affairs there is but one source of law, and that is the consent of nations.[127]

If it is consent to the rule that gives international law its binding force, then it should not matter why states feel legally obligated as long as they do. Both Oppenheim and Kelsen explain that customary international law predates treaties as a source of international law.[128] Certainly, law-making treaties such as those requiring penal legislation and prosecution of international crimes had no place in the early existence of customary international law. Such treaties as there were could be described as mere bargains or contracts, which if anything evidenced recognition that the customary law took another direction. So, early conceptions of *opinio juris* are unlikely to have given much thought to the source of a state's sense of legal obligation as long as general usages were accompanied by evidence of consent to be bound.

Theories of custom have developed from writers who drew concepts from their own national jurisprudence and in the early writings the concept of custom was not often distinguished according to its application in the national or international arena. The national concept of custom does not appear to have been based on repeated conduct in the mistaken belief that it was law but rather on the continuance of a custom in order that men should be bound by it. Thus, for Blackstone, a judge would declare the legality of a custom not from whether it was law but from whether it was good.[129] Suarez also expressed the view that evil custom does not create law.[130]

The actual development of the international customary law-making process therefore supports the notion of a sense of legal obligation, rather than a specific belief in the existence of customary law, as the basis for *opinio juris*.

Given the flow of concepts from the national to the international arena, it is perhaps a failure to grasp the differences between the

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[127] See Lawrence, *The Principles of International Law*, 1915, 6th ed., at 97; see also *Oppenheim's International Law* (ed. Hersch Lauterpacht), 8th ed., 1955, at 17 (The customary rules of international law have grown up by common consent of the states ...).

[128] See *Oppenheim's International Law*, ibid., at 17-8.

[129] See *Blackstone's Commentaries on the Laws of England*, bk. I, at paras. 69 & 76-78.

[130] See Suarez, *A Treatise on Laws and God the Lawgiver*, Bk. VII, ch. I, at para. 5 (*Classics of International Law*, Suarez, vol. II, translation, at 445)

national and international legal systems that has led to the confused doctrinal conceptions of *opinio juris*. National laws were developed within the framework of a hierarchical institutional framework of legislators and judges. International law was developed within the framework of the consent of a community of legally equal sovereign states, with no hierarchy or centralized institutional framework of scaled authority.

Two points arise here. In the first place, the early history of national legal systems is characterized by lacunae and ambiguities arising out of the scarcity of written law, if compared to the complexity of modern codes and statutory regimes. In the national arena custom filled the lacunae where general conduct clearly indicated the need for law. The secondary role played by custom as compared to written law would have explained the lack of any notion of written law becoming custom. Franscisco Suarez explains,

> Thus, if a custom has arisen through the influence of a written law, it lacks for that reason power to introduce law for it was begun and continued, not that men should be bound by it, but that they should obey some law already in existence.[131]

This must be understood in its national context. The purpose of custom creation is to create law that does not already exist in written form for reasons of justice. Where it does already exist in written form there is no need for it, and the conception that it should be law is senseless because it already is law.

However, as we have seen, in international relations custom is not so much a means of filling the lacunae left by the lack of written law, but a means of confirming general consent to the existence of a norm. The law is based more on mutual consent than on justice, although justice as defined by states is one of its aims. Whereas custom does nothing to supplement written law in the national arena, this is not the case on the international plane. It is well established that the same norm can exist independently in both treaty and custom. States that consent to treaties consent to specific obligations with specific parties, which can, under defined circumstances, be retracted. The formation of custom turns this specific obligation into a general norm usually applying to all states.

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[131] Ibid., chap. II, para. 2 (*Classics*, Suarez, vol. II, at 451)

Secondly, in municipal law, the conduct relevant to the customary process is that of the people and those that confirm the creation of custom are the courts for the purposes of custom creation. In international relations, the state follows the practice and declares the existence of the custom itself. In relation to one influential example of national law, Allen observes that,

> [I]f a custom is proved in an English court by satisfactory evidence to exist and to be observed, the function of the court is merely to declare the custom operative law.[132]

So, it is possible that this declaratory role of the court, as developed by some of the 20th-century national jurists, has in some way found itself into theories of how states possess *opinio juris*. This neglects the fact that the practice of states, unlike national courts, forms the basis of, as well as the confirmation of, custom in the international arena.

Having established the importance and relevance of treaties and domestic law to the development of a general norm against impunity, the foundation has now been laid for embarking on the task of investigating the existence and content of such a norm through an examination of the sources.

D. *The need for an empirical analysis of treaty and domestic practice in the determination of the customary nature of a duty to prosecute*

The foregoing analysis demonstrates that the growing need for reliance on treaties and domestic practice in the determination of customary human rights accords with the nature and development of the customary process. An analysis of treaties and national practice as supplemented by other forms of state practice, and in particular declarations and General Assembly resolutions, ought to provide a reasonably accurate picture of the customary status of the duty to prosecute or extradite, as given expression in the maxim *aut dedere aut judicare*. Meron has acknowledged that:

> Empiric studies of state practice are ... of the highest importance in establishing whether a particular right has matured into customary law.[133]

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[132] See Allen, *Law in the Making*, 4th ed., 1946; cf. Blackstone, note 129 *supra*, at para. 69.

An appraisal of state practice is a difficult task and often one cannot hope to uncover much more than the flow and ebb of opinion. That notwithstanding the trend of asserting the existence of a legal duty to prosecute international crimes, based on pure assumption, tends rather to undermine the viability of that assertion. As Meron observes:

> The credibility of international human rights requires that attempts to extend their universality utilize irreproachable legal methods.[134]

The task of reviewing state practice including national legislation has been greatly facilitated by information forwarded to the United Nations through the reporting mechanisms established in terms of human rights treaties, and also by the increasing ease with which information can be obtained through new technologies and networks.

The kind of logical leaps and broad brush methodology invoked by international tribunals, municipal courts, writers and non-governmental organizations in the determination of customary rules is becoming less necessary in the light of these developments. The greater flow of information will create a greater expectation among states and critical analysts that more exacting methods are employed in the proof of custom. Nevertheless, the exercise remains fraught with difficulties, not least of which consists in the appraisal of the subjective standpoint of 190-odd members of an increasingly complex international and multilingual community. Therefore, implication, acquiescence, progression and broad analysis will remain significant elements in all determinations on the existence of custom.

The next chapter will attempt to analyse the current customary position in relation to the duty to prosecute human rights violations having regard to these requirements and limitations.

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[133] See Meron, note 100 *supra*, at 94.
[134] See Meron, note 100 *supra*, at 81.

CHAPTER 9

STATE PRACTICE, *OPINIO JURIS* AND A DUTY TO PROSECUTE

1. *Introduction*

In this chapter I have presented a more thorough than usual, but nonetheless limited, study of the important evidences of state practice relating to the issue of whether there is a customary obligation to prosecute international crimes. This forms the basis for reaching some credible conclusions on the customary status of the principle of *aut dedere aut judicare*.

The most extensive analysis relates to torture because it has the greatest practical significance to the amnesty debate. A duty to punish torturers has the most profound impact on most post-conflict situations where acts of torture have frequently been prevalent whether in time of war or peace. In any event a fairly thorough empirical presentation is long overdue in relation to the duty as to this crime because of the uncertainty over this issue. This uncertainty derives partly from the continued practice of torture in some states, and more significantly from less than complete participation in the Torture Convention. The latter position is rapidly changing.

A less thorough analysis of state practice has been pursued in relation to other crimes, where the customary position is less controversial in the present context, or more easily established or disavowed.

The final section of this chapter, before concluding, reviews the impact of the practice of amnesty on the customary position.

2. *Torture*

The customary nature of the prohibition on torture can now be said to be beyond doubt.[1] There is also considerable support for the proposition that this is a *jus cogens* norm;[2] that is, a norm so fundamental to the interests of the international community that it can only be derogated from by a norm of similar status. While one must resist the temptation to imply the existence of or the customary nature of a duty to bring to justice violators of the norm merely from this status, the *jus cogens* nature of the norm does have limited implications for the present inquiry.[3]

In so far as there is inevitably some degree of relativity in the determination of the question of whether a rule is supported by state practice accepted as law, an affirmative answer is more easily attained where the rule purports to protect the fundamental interests of the international community. This is because it is easier to imply consent to a norm from meagre evidence where the norm protects the fundamental interests of those to whom such consent is being attributed.[4] Conduct that is capable of being interpreted as consent to the norm is more likely to actually reflect such consent, and a failure to clearly denounce consent to the norm by other states is more likely to constitute acquiescence in the creation of the norm.

There is in fact a significant body of state practice and *opinio juris* in support of a rule requiring the prosecution of torturers in the absence of extradition. Treaty provisions, national legislation and UN General Assembly resolutions provide such evidence. Several multilateral law making treaties require the prosecution or extradition of alleged torturers. In the context of war, all four Geneva Conventions of the Laws on War require the prosecution of torture as a war crime, being, it

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[1] See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 1997, at 111; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989; Restatement of the Law Third, Restatement of the Foreign Relations Law of the United States para. 703(1).

[2] *Prosecutor v. Furundzija* (1999) 38 ILM 317, at 349.

[3] See chapter 7 *supra*, at 186.

[4] It was argued earlier that the need for the consent of states forms the proper basis for understanding the requirement of *opinio juris* in customary international law: see chapter 8 *supra*, at 223-4.

is submitted in all cases, a grave breach of their provisions.[5] Practically all states have adhered to these provisions[6] and most states have been parties for at least ten years.[7] One global and one regional convention against torture[8] equally incorporate the principle of *aut dedere aut judicare*.[9] The large majority of states (almost two thirds) have ratified the UN Convention against Torture as at 10 December 1999,[10] with nine of the non-parties nonetheless expressing the desirability of the rule through signature, bringing the total commitment in principle to just over two thirds. Equally, the majority of American states have ratified the Inter-American Convention to Prevent and Punish Torture,[11] and, together with the four other signatories, a total of nineteen states

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[5] First Geneva Convention for the Amelioration of the Condition of the Wounded in the Field of 12 August 1949, article 49 (1950) 75 *UNTS* 31-83; second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, article 50 (1950) 75 *UNTS* 85-133; third Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, article 129 (1950) 75 *UNTS* 135-285; fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12th August 1949, article 146 (1950) 75 *UNTS* 287-417. The obligation to prosecute is not extended to the provisions of 1977 Protocol II Additional to the Geneva Conventions of 1949. Some also argue that the obligation does not apply to violations of common article 3 applicable in non-international armed conflicts, although a different view is taken here: see chapter 6 *supra*, at 143-51.

[6] As at 3 September 2000 the four Geneva Conventions boast 188 parties: see the website of the International Committee of the Red Cross (*http://www.icrc.org*).

[7] Even in 1988 there were 165 state parties to the fourth Geneva Convention: see Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 2nd ed., 1989.

[8] See chapter 7 *supra*, at 186-7.

[9] See article 7 of the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment of 1984; Articles 1 and 12 of the Inter-American Convention to Prevent and Punish Torture of 1985. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987 sets up a system of visits for those deprived of their liberty and was therefore not specifically intended to deal with the question of punishment.

[10] 118 parties.

[11] Fifteen ratifications as at February 2000 (Argentina, Brazil, Columbia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama, Peru, Suriname, Uruguay and Venezuala).

that have expressed their willingness to commit themselves to the duty to prosecute or extradite in terms of that convention.[12] The Dominican Republic, which has only signed the UN Convention, has ratified the American Convention.[13] Haiti has not signed or ratified the UN Convention, but has signed the Inter-American Convention. Including the ratifications and signatories of both conventions against torture, a total of one hundred and twenty-eight states that have expressed their willingness to support a rule on the duty to prosecute or extradite alleged torturers, through some form of adherence to one of the two conventions incorporating the rule.[14]

The Torture Conventions are declaratory of customary international law insofar as the prohibition on torture is concerned.[15] The parties to these treaties clearly intended to build upon existing customary international law by creating an obligation to bring the perpetrators of acts of torture to justice.[16] This clearly formed part of the object and purpose of the Torture Conventions and was therefore a central aspect of the parties' consent to the torture regime.

Substantial *opinio juris* on the part of the international community as a whole may also be derived from the Declaration on Protection from Torture which was adopted in the General Assembly of the United Nations by consensus in 1975.[17] This requires the investigation of and prosecution for acts of torture.[18]

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[12] The four signatories that had not as yet ratified in February 2000 are Bolivia, Haiti, Honduras and Nicaragua.

[13] On 29 January 1987.

[14] One hundred and eighteen parties to the UN Convention plus nine signatories and one extra signatory of the American Convention which has not signed or ratified the UN Convantion.

[15] Cf. Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, 1992, at 86. Sunga asserts that '... torture is widely practised in many countries ..... it cannot be realistically stated that the norm against torture has become firmly established as a rule of general international law'. These should not be regarded as inconsistencies in state practice but rather as violations of a norm which is in fact recognised by the states which violate it. Most if not all states which practice torture deny that it is a deliberate state policy and have legislation which in fact prohibit it.

[16] See J. Herman Burger and Hans Danelius, *The United Nations Convention against Torture: a handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 1988, at 1.

[17] See General Assembly resolution 3452 (XXX) of 9 December 1975.

[18] See articles 8, 9 and 10.

Furthermore, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights all require member states to secure the respect for the provisions of the respective conventions,[19] including the prohibition on torture.[20] In the previous chapter we observed that tribunals have interpreted these provisions to require prosecution of offenders at least in cases of the most serious violations where only penal measures constitute a sufficient deterrent. The African Charter on Human and Peoples' Rights requires states to adopt measures to give effect to the rights set out in the Charter.[21] The *jus cogens* character of the prohibition on torture would tend to suggest that criminal measures are indispensable to adequate protection against torture. The vast majority of states are now party to the International Covenant.[22] All members of the Council of Europe are parties to the European Convention on Human Rights and Fundamental Freedoms[23] and practically all members of the Organization of American States are parties to the American Convention on Human Rights.[24] The two states that have not ratified the treaty have nevertheless signed it.[25] At the time of writing, fifty-two out of the fifty-three African states are parties to the African Charter. If one adds the state parties to these general human rights instruments, which are not also party to one of the torture conventions, this brings

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[19] See article 2(1) of the International Covenant on Civil and Political Rights of 1966; article 1 of the European Convention on Human Rights and Fundamental Freedoms of 1950; article 1(1) of the American Convention on Human Rights of 1969.

[20] In accordance with article 7 of the International Covenant on Civil and Political Rights of 1966; article 3 of the European Convention on Human Rights and Fundamental Freedoms of 1950; and article 5(2) of the American Convention on Human Rights of 1969.

[21] Article 1. Torture is prohibited by article 5 of the African Charter on Human and Peoples' Rights.

[22] One hundred and forty-four parties as at 10 December 1999: see *UN Treaty Series, Multilateral Treaties: Status of Signatures and Ratifications* at that date.

[23] That is forty-one parties as at 3 September 2000: see the website of the Treaties Office of the Council of Europe (*http://conventions.coe.int/treaty/EN/cadreprincipal.htm.*)

[24] Twenty-four parties as at 3 September 2000: see website of the Inter-American Commission of Human Rights (*http://www.cidh.oas.org/basic.htm*)

[25] Trinidad and Tobago and the United States of America: ibid.

the figure to one hundred and fifty-two.[26] There are therefore one hundred and eighty-eight states that have in time of war and one hundred and fifty-two states that have in time of war or peace, expressly or by implication, committed themselves to a rule. This rule may be expressed as requiring the prosecution of alleged torturers as one of the most serious human rights violators, as a necessary component to the general duty to secure human rights.

If one then goes further and adds the twelve signatories, which have not as yet followed up with ratifications, then this gives a figure of one hundred and sixty-four states that have expressed a willingness to adhere to such a rule in time of war or peace. This constitutes a very substantial portion, and indeed the vast majority of the members of the world community.[27] Only twenty-eight states have not signed or ratified any instrument containing an express or implied undertaking to prosecute torturers in time of peace as well as war.[28]

It is against this background of what is essentially a very widespread and repetitive treaty undertaking to bring torturers to justice that I move on to consider the extent to which this undertaking has been confirmed in the domestic practice of states.[29]

Fewer than half of all African states are party to the Torture Convention, but forty-one African states are party to the International

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[26] Twenty-six non-parties to the torture conventions that are parties to the International Covenant on Civil and Political Rights; 6 non-parties that are parties to the African Charter; 2 non-parties that are party to the European Convention; zero non-parties that are party to the American Convention.

[27] Currently consisting of one hundred and ninety-one states (one hundred and ninety-two sovereign countries including China (Taiwan)), one hundred and eighty-eight of which are members of the United Nations): see (2000) *Europa World Yearbook* 4.

[28] Bahamas, Bahrain, Bhutan, Brunei Darussalem, Fiji, Kiribati, Korea (Democratic People's Republic), Korea (Republic of), Leo People's Democratic Republic, Malaysia, Maldives, Mauritania, Micronesia, Myanmar, Oman, Pakistan, Palau, Papua New Guinea, Qatar, St Kitts and Nevis, St Lucia, Samoa, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates, Vanuatu.

[29] It was earlier pointed out that a widespread and representative participation in a treaty, while capable of forming a substantial basis for the creation of a customary norm, might not on its own be enough for the emergence of custom. This would require some evidence exterior to the treaty: see chapter 8 *supra*, at 217-8. Domestic legislation constitutes a very relevant evidence of consent to the norm: see chapter 8 *supra*, at 218-9.

Covenant on Civil and Political Rights. A relatively small number of states have incorporated a separate offence of torture or made some specific reference to it in their penal law. Algeria,[30] the Congo,[31] Egypt,[32] Libya,[33] Morocco,[34] Senegal,[35] Sudan[36] and Togo[37] all refer to torture in their penal law. Certain states that are not parties to the Torture Convention have nonetheless incorporated specific references to torture in their penal law. These include the Congo,[38] Djibouti,[39] Mali,[40] Mauritania[41] and Nigeria.[42]

However, it would appear that all African states prohibit torture through ordinary criminal provisions on assault. Some states that are party to the Torture Convention or the International Covenant on Civil and Political Rights have referred to this fact in their reports to the Committee Against Torture or the Human Rights Committee. This is done as a form of justification that they have complied with their obligations in terms of the treaty. Here one can cite Cameroon,[43] Guyana,[44] Mauritius[45] and Namibia.[46]

With respect to the classification of torture as a criminal offence that ought to be punished, one can therefore identify African state-practice accompanied by *opinio juris* subsequent to the conclusion of

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[30] See article 11 *bis* of the Criminal Code: CAT/C/25/Add. 8.

[31] See UN Doc. CCPR/C/63/Add. 5 of 5 May 1997.

[32] Penal Code, article 126: see UN Doc. CAT/C/34/Add.11 of 28th January 1999.

[33] Penal Code, article 435: see UN Doc. CAT/C/25/Add.3 of 24th August 1994.

[34] Penal Code, article 399 and 438.

[35] Torture is not a specific offence but it is specifically referred to in the context of broader offences: Penal Code, articles 106 and 288: see Concluding observations of the Committee Against Torture, UN Doc. A/51/44, paras 102-119.

[36] See section 4 of the Criminal Act 1991.

[37] See Constitution of Togo, article 21.

[38] See The Congolese Constitution of 15 March 1992: article 16.

[39] See Penal Code, articles 324, 325 and 382.

[40] See the Constitution of Mali, article 3.

[41] All breaches of the constitution are criminal offences.

[42] See UN Doc. CCPR/C/92/Add. 1 of 26th February 1996.

[43] See UN Doc. CCPR/C/63/Add. 1 of 5 April 1993.

[44] Referring to Prison rule 172, s. 72 of the Defence Act and s. 4 of the Police Discipline Act 1975: see CCPR/C/GUY/99/2.

[45] See UN Doc. CAT/C/24/Add. 1.

[46] See UN Doc. CAT/C/28/Add. 2.

the Torture Convention on the part of sixteen out of fifty-three African states. In addition, the state practice of all African states supports the punishment of acts of torture, although in most cases it is not clear whether states are acting in accordance with any perceived international obligation in the absence of a specific reference to torture in domestic law.

In Europe, torture is a specific offence in Croatia,[47] Cyprus,[48] the Czech Republic,[49] Estonia,[50] France,[51] Greece,[52] Hungary,[53] Kyrgyzstan,[54] Latvia,[55] Luxembourg,[56] Malta,[57] Monaco,[58] The Netherlands,[59] Portugal,[60] Romania,[61] Slovakia, Spain,[62] Turkey,[63] United Kingdom[64] and Uzbekistan.[65]

In Hungary, the Convention is fully incorporated into the legal system and is directly enforceable. Similarly, the government of Liechtenstein has explained in its reports to the Committee against

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[47] CAT/C/CROA, para. 4.

[48] Law No. 235 of 1990: section 3.

[49] Section 259 (a) of the Criminal Code: see UN Doc. CAT/C/21/Add. 2, 20 May 1994.

[50] Article 114 of the Criminal Code: see UN Doc. CCPR/C/81/Add. 5, 7 October 1994.

[51] Articles 689 (1) and (2) of the Code of Criminal Procedure: see Second Periodic Report to the Committee against Torture CAT/C/17/Add. 18, 8 October 1997.

[52] See UN Doc. A49/44, paras. 148-58.

[53] Article 123 of the Criminal Code: see UN Doc. CAT/C/HUN, 19 November 1998.

[54] Article 111 of the Criminal Code: see UN Doc. CAT/C/42/Add. 1.

[55] Article 111 of the Criminal Code: see UN Doc. CCPR/C/81/Add. 1/Rev. 1, 19 October 1994.

[56] Article 260 (1) of the Criminal Code: see Second Periodic Report to the Committee against Torture. CAT/C/17/Add. 20, 1 December 1998.

[57] See UN Doc. A51/44, paras. 163-173.

[58] See UN Doc. CAT/C/21/Add. 1.

[59] See A50/44, paras. 116-131.

[60] Articles 243-4 of the Criminal Code: see UN Doc. CAT/C/44/Add. 7.

[61] Art. 5(c) of the Code of Criminal Procedure: see UN Doc. CCPR/C/95/Add. 3, 29th April 1992.

[62] See UN Doc. CCPR/C/95/Add. 1, 5 August 1994.

[63] Art. 16 of the Constitution of November 1982

[64] Criminal Justice Act 1988.

[65] See Concluding observations of the Committee Against Torture: UN Doc. CAT/C/237 of 19 November 1999

Torture that, since international law forms an integral part of the law of Leichtenstein and is directly applicable, there was no need to introduce specific legislation and all acts of torture are offences under the law of Leichtenstein.[66] It is therefore possible to conclude that the crime of torture exists in the national law of these states even though there is no specific provision on it in the national criminal law.

The Russian Federation[67] is a party to the Torture Convention and in the Federation the right not to be subjected to torture is enshrined in article 21 (2) of the Constitution of 12 December 1993. By virtue of article 171 an official who acts *ultra vires* and has caused substantial harm to the legally protected rights and interests of citizens is liable to punishment by deprivation of liberty. Article 15 (4) provides that the rules prescribed by international agreements are an integral part of the legal system and prevail over those stipulated by law. One may therefore conclude that torture is a crime in the Federation.

In Denmark, Finland, Germany, Iceland, Italy, Norway, Poland and Switzerland torture is not a specific offence under the law of the state but other provisions cover the elements of torture for most if not all purposes. Although it is clear that these provisions of criminal law were not introduced with a view to complying with international obligations, all these states have complied with their reporting obligations in terms of the Convention, and have justified the non-existence of a specific crime of torture on the basis that it is covered by the existing provisions of the law.

There is a general trend of incorporating the international crime of torture into domestic law or justifying its non-incorporation on basis of the adequacy of existing rules for the prosecution of the international crimes. We have not been able to identify any evidence of denunciation of the duty to prosecute the crime of torture in terms of international law. American, Asian, Australasian and Middle Eastern legislation and diplomatic explanations of it also seem to reflect this trend. For instance, in the Middle East, while Armenia has created a specific offence of torture,[68] Israel[69] and Jordan[70] justify the adequacy of

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[66] See UN Doc. CAT/C/12/Add. 4, 10 August 1994.

[67] See UN Doc. CAT/C/17/Add. 11 (report of the Russian Federation) and CAT/C/5/Add. 11 (initial report of the government of the Union of the Soviet Socialist Republics).

[68] A/51/44 of 9 July 1996: paras. 84-101.

[69] A/49/44 of 12 June 1994: paras. 157-71.

[70] CAT/C/16/Add. 5 of 3 March 1995.

existing legislation. In Asia, Sri Lanka has passed the Convention against Torture Act No. 22 1994.[71] India argues the adequacy of its existing law.[72] Nepal interprets its law as requiring the punishment of torturers.[73] It is difficult to decipher the views of some Asian and Middle Eastern states with respect to their duty to prosecute torturers in cases where they have not properly complied with their reporting obligations under the Torture Convention or the International Covenant. In the Americas Peru,[74] Columbia,[75] Ecuador,[76] Guatemala[77] and Mexico[78] all have a specific crime of torture, while the United States and Cuba[79] specifically justify the non-incorporation of the internationally defined crime on the basis of the adequacy of existing national provisions. New Zealand has passed the Crime of Torture Act 1989,[80] while Australia has claimed that its existing law adequately covers the crime under international law.[81]

A number of states have therefore introduced the specific crime of torture into their national legislation indicating an intention to give effect to the duty enshrined in the Torture Convention. An even greater number of state parties to the UN Convention against Torture have either introduced the crime of torture or have justified their failure to do so on the basis that their existing criminal laws are adequate to cover the crime, thus confirming their duty.

One is therefore left with the picture of a human rights treaty regime, including the torture conventions and general human rights, that has bound the vast majority of states to prosecute torturers as one of the most serious categories of human rights violations. This has been confirmed in the domestic laws and state reports of the parties to the

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[71] CAT/C/28/Add. 3 of 21 November 1997.
[72] CCPR/C/76/Add. 6 of 17 July 1996.
[73] CAT/C/16/Add. 3 of 16 December 1993.
[74] 1993 Constitution, article 2 (g) & (h).
[75] Constitutional Court ruling No. C-587 of 12 November 1992; Decree Law No 180 of 1988 amending article 279 of the Penal Code: UN Doc. CAT/C/20/Add. 4.
[76] Penal Code, articles 187, 204, 205 and 206: see UN Doc. CCPR/C/84/Add. 6 of 1 December 1997.
[77] Penal Code, article 425: see CAT/C/12/Add.5.
[78] Federal Act to Prevent and Punish Torture: see CAT/C/17/Add. 17 of 10 June 1996.
[79] See UN Doc. E/CN. 4/1998/69.
[80] CAT/C/29/Add.4 of 29 July 1997
[81] CCPR/C/Aus/98/3 of 22 July 1999.

UN Torture Convention. Most non-parties to the relevant treaties have nonetheless indicated their support for the norm in the adoption by consensus of General Assembly resolutions that in at least one case expressly, and in other cases implicitly, confirm their support for the rule. There is therefore a very widespread state practice and *opinio juris* for a rule imposing a duty to prosecute alleged torturers. It follows that there is at least an emerging customary obligation to prosecute, where there is no intention to extradite, those alleged of having committed acts of torture.

There is no need to prove the consent of every state, since it is the consent to the rule of the international community as *a collectivity of states*, expressed through extensive state practice, that is sought, rather than the consent of every individual state.[82] This is evident from the references to generality in the writings[83] and the evident existence of customary rules where some states have clearly not participated in or consented to the practice. Moreover, acts of torture attributable to states should not, as some have suggested,[84] be considered as inconsistent state practice, but rather as violations of the rule, the formation of which they nevertheless support. In the present state of play, therefore, and having regard to the low threshold of proof required in relation to a rule for the protection of the fundamental interests of the international community, it is my opinion that the rule has indeed now matured into one of customary status.

3. *Genocide*

As with torture, genocide is prohibited by customary law.[85] The Genocide Convention is 'widely and correctly regarded as declaratory of customary law'.[86] The Convention introduced a regime for punishment,[87] which included a duty to punish acts of genocide committed within the territory of the state.[88] Punishment was therefore a central theme of a Convention that codified an existing customary

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[82] Mendelson, 'Formation of Customary International Law' (1998) 274 *Recueil des cours* 197, at 219.

[83] See chapter 8 *supra*.

[84] See note 15 *supra*.

[85] See *Reservations to the Genocide Convention* case ICJ Reports (1951). 15 at 23.

[86] Meron, note 1 *supra*, at 11.

[87] See chapter 7 *supra*, at 184-5.

[88] See articles I, IV and V.

prohibition. It has been argued, in line with Bassiouni's reasoning that since the prohibition of genocide is the concern of all states, all states must co-operate in bringing those who commit such offences to justice.[89] The flaws in this reasoning were highlighted at the start of the previous chapter.[90] No matter the *erga omnes* character or serious nature of the prohibition on genocide, as compared to other crimes, one still requires clear evidence in state practice and *opinio juris* that such a duty exists.

In this context, the most significant element of state practice and *opinio juris* lies in the fact that the Convention has been ratified by 130 states.[91] Therefore the rule that requires the punishment of genocide has received the approval of a large majority of states in the world. Very few states have in fact introduced the crime of genocide into their domestic law, but this means very little in practice because the crime will be covered by the crime of murder, which usually carries the maximum penalty in any event.

The drafters of the Convention apparently felt that they were making a major historical breakthrough.[92] Yet, the early history of the implementation of the Genocide Convention is not a happy one.[93] Neither states nor the United Nations did much to ensure or insist upon the punishment of those responsible for the massacres since the Convention's entry into force. These may be said to include those of the Balubas in the Congo in 1960;[94] the Hutus in Burundi in 1965 and 1972; the Ache Indians in Paraguay prior to 1974; and that of the Cham and Bhudists in the Democratic Republic of Kampuchea (as Cambodia then was) between 1975 and 1978.[95] One can search in vain for General Assembly resolutions calling for punishment in relation to these events

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[89] Lee A. Steven, 'Genocide and the Duty to Extradite or Punish' (1999) *Va JIL* 425, at 441-2.

[90] See chapter 8 *supra*, at 199-207.

[91] As at 30 December 1999: see United Nations Treaty Series, Status of Multilateral Conventions at that date.

[92] See Antonio Cassese, *Human Rights in a Changing World*, 1988 (1990 translation), at 75.

[93] *Idem*; see also Hurst Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence' (1989) 11 *HRQ* 82, at 135-6; Steven, note 89 *supra*, at 427-8.

[94] See Cassese, *Human Rights in a Changing World*, note 92 *supra*, at 79.

[95] See Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985), at 9-10.

during the relevant periods. There have apparently been only two national prosecutions for genocide in terms of the Convention between its entry into force and the mid-1980's, against Pol Pot in absentia in Cambodia and against Macias Nquema in Equatorial Guinea.[96]

Despite this, there are important strands of evidence in recent state practice to establish the international community's confirmation of the general rule already widely accepted through participation in the Convention.[97] In terms of the Convention, the duty to punish acts of genocide may be fulfilled by the territorial state or by an international tribunal.[98] Through the Security Council and the UN the international community has, set up two ad hoc international criminal tribunals to punish acts of genocide principally.[99] It has also adopted an agreement for the establishment of a permanent international criminal court, having as one of the major elements of its jurisdiction the punishment of acts of genocide.[100] The preamble to this same agreement asserts the existence of a duty to prosecute international crimes.[101] It seems clear that the recent atrocities in the former Yugoslavia and Rwanda were a significant impetus to the establishment of all three tribunals.[102] The international community has therefore responded to the recent principal

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[96] See Leo Kuper, *The Prevention of Genocide*, 1985, at 16-7; As to the prosecution of Macias Nquema, see International Commission of Jurists, *The Trial of Macias in Equatorial Guinea*, 1979.

[97] As is required for the creation of custom: see note 29 *supra*.

[98] As to the comparative advantages of these alternatives see chapter 5 *supra*, at 98-104.

[99] See Security Council resolution 827 (1993) on the Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia (1993) *ILM* 1192; Security Council resolution 955 (1994) on the Establishment of the International Tribunal for Rwanda (1994) *ILM* 1598.

[100] See article 6 of the Statute of the International Criminal Court (1998) 37 *ILM* 999.

[101] See *infra*, at 256.

[102] The ad hoc tribunals were established while the International Law Commission was working on the question of a permanent international criminal court (culminating in the Draft Statute: see Report of the International Law Commission, 46th Session, *UNGAOR*, 49th Session, supp No 10 UN Doc. A/49/10 (1994)), and this motivated the International Law Commission to expedite a working document: see John Dugard, *International Law: A South African Perspective*, 2000, at 152.

acts of genocide with the assertion that the perpetrators must be punished.[103]

Equally, there has been a marked change in the responsiveness of national jurisdictions. In Spain charges were laid against Augusto Pinochet, former dictator of Chile, for genocide.[104] But, he could not be extradited from the United Kingdom for genocide because of that state's reservation to the Convention because of the former dictator's ill-health.[105] The findings of the House of Lords[106] and the lifting of the sovereign veil of a former head of state have done much to facilitate the demystification of the legal and political obstacles to the exercise of universal jurisdiction.[107] In recent years, there have been prosecutions within Rwanda for genocide and in European domestic courts of Bosnian and Rwandan offenders.[108]

Additionally, one can cite recent General Assembly resolutions arising out of the conflicts in Rwanda and the former Yugoslavia in support of the international community's commitment to the punishment of perpetrators of genocide and as evidence of *opinio juris* with respect to the duty to do so. This is expressed in the strongest and clearest terms in resolution 50/200 of 22 December 1995 on the situation of human rights in Rwanda. This recalls 'the *obligations of all States* to punish all persons who commit or authorize genocide or other grave violations of humanitarian law or those who are responsible for

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[103] The importance of viewing national transitional justice in the context of such international developments was emphasised in chapter 5 *supra*, at 95-6.

[104] See further chapter 11 *infra*, at 312-3.

[105] See Amnesty International – News Release – EUR 41/01/00, 3 February 2000: 'Pinochet case: Where is Spain?'; actual release reported by CNN 2 March 2000.

[106] See *R. v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet (No 1)* (1998) 37 ILM 1302; *R. v Bartle and the Commissioner of Police for the Metropolis, ex parte Pinochet (No 2)* (1999) 38 ILM 581 (cited as no. 3 in other sources: the matter came before the House of Lords on a total of three occasions. On the second occasion in *In Re Pinochet*, it held that its first decision must be set aside owing to a connection between one of their Lordships and Amnesty International, an intervener in the case).

[107] See Ruth Wedgwood, 'International Criminal Law and Augusto Pinochet' (2000) 40 *Va JIL* 830.

[108] See Ruth Wedgwood, 'National Courts and the Prosecution of War Crimes', in G. Kirk McDonald and O. Swaak Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*: The Experience of International and National Courts, 2000.

grave violations of human rights ...'[109] The international community's position with respect to the punishment of genocide is further evidenced by the series of General Assembly resolutions supporting the necessity or duty to prosecute crimes against humanity.[110]

Given this evidence, the comparative scarcity of domestic practice in relation to genocide should have little bearing on the customary analysis since it is to be expected and is explicable by the rarity of the commission of the offence. It is also arguable that the existence of a maximum penalty for murder would generally lead states to consider it unnecessary to pass legislation for a separate offence of genocide.[111]

Inactive states in this field may be said to have acquiesced in these developments, particularly since the prohibition on genocide is widely regarded as *jus cogens*[112] and its protection is therefore in the fundamental interests of all states. Accordingly, there is certainly at least an emerging customary duty to punish acts of genocide in accordance with the jurisdictional guidance of the Convention. Again, it is my opinion that there is in fact at this stage, and particularly since the Rome Conference, sufficient state practice and *opinio juris* to declare that the international community has collectively assented to the duty to punish genocide, and that this rule is of customary status.

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[109] See (1995) 49 *United Nations Yearbook* 787; see also General Assembly resolution 49/206 of 23 December 1994. Situation of human rights in Rwanda, adopted without vote: (1994) *United Nations Yearbook* 1073, at 1074-5 (*Requests* States that have given refuge to persons involved in serious breaches of international humanitarian law, crimes against humanity or acts of genocide to take the necessary steps, in co-operation with the International Tribunal for Rwanda, to ensure that they do not escape justice); and General Assembly resolution 47/147 of 18 December 1992. Situation of human rights in the territory of the former Yugoslavia, adopted without vote: (1992) 46 *United Nations Yearbook* 799, at 800 (*Reaffirms* that all persons who perpetrate or authorize crimes against humanity and other grave breaches of humanitarian law are individually responsible for those breaches and that the international community will exert every effort to bring them to justice ...).

[110] See *infra*, at 231 *et seq.*

[111] A similar argument is employed less convincingly by states in relation to torture: see *supra*.

[112] See Antonio Cassese, *International Law in a Divided World*, 1986, at 179; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports, 1993, 325, at 440, per ad hoc judge Lauterpacht (separate opinion); Third Restatement of the Foreign Relations Law of the United States, 1997, at para. 702 (comment); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, at 715 (9th Cir. 1992).

4. *Crimes against Peace, War Crimes and Crimes against Humanity*

There is growing support for the proposition that custom requires the prosecution, failing extradition, of crimes against humanity. Apart from his views on the relevance of necessity to the existence of a duty,[113] Bassiouni argues that this is so because international law requires the prosecution or extradition of all international crimes.[114] This view is based on the repetition of the principle of *aut dedere aut judicare* in a number of treaties, none of which purport to deal comprehensively with crimes against humanity or international crimes in general. These treaties alone therefore fail to provide the *opinio juris* for a general rule.[115] Others place great reliance on the developments leading up to the adoption and reformulation of the Nuremberg principles by the General Assembly and the International Law Commission.[116] The coming analysis of the period, however, does not reveal this early birth of a duty. Some also place reliance on more recent General Assembly resolutions,[117] which form a much sounder, although possibly inadequate, basis for asserting the actual creation, as opposed to gradual emergence, of the rule.[118]

The Nuremberg documentation and General Assembly resolutions embrace not only crimes against humanity, but two other categories of crimes related to war, that is, war crimes and crimes against peace. The latter category of crimes against peace has received no particular attention on the issue of a duty to prosecute. There has been a dearth of state practice in this area. This is principally because of the political difficulties for the home state in prosecuting the leaders of a prior regime and the perceived scope of the rules on sovereign immunity

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[113] See chapter 8, *supra*, at 199-207.

[114] See Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1992, at 500-1.

[115] See *infra*, at 255-6.

[116] See Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, *100 Yale LJ* at 2584-5, 2591-3.

[117] See Carla Elenbos, Human Rights Violations: A Duty to Prosecute? (1994) 7 *Leiden Journal of International Law* 5, at 12; Orentlicher, note 116 *supra*, at 2593; Steven, note 89 *supra*, at 442.

[118] Cf. Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law and Contemporary Problems* 41.

within foreign jurisdictions. Nonetheless, the House of Lords in England opened the door to a whole new approach to the prosecution of former heads of state and government officials. It made the world sit up in responding to an application for judicial review of a decision to arrest Pinochet with a view to his extradition to Spain. It held, in two brilliant sets of judgments containing differing permutations on the question, that the doctrine of sovereign immunity does not apply for acts of torture, which could not be considered as functions of a head of state.[119]

However, there is virtually no state practice in support of universal jurisdiction for crimes against peace, except the occasional General Assembly resolution embracing all categories of serious crimes associated with war.[120] In line with this trend the International Law Commission's Draft Code on Crimes against Peace and the Security of Mankind excludes aggression from the scope of the duty of all states to prosecute or extradite perpetrators of crimes against international law.[121] An independent rule on the duty to prosecute crimes against peace clearly requires a much greater foundation in state practice. That having been said the historical inter-connection between the three categories of crimes in the context of war means that the general duty to prosecute in war may, but not necessarily, prove to stand or fall in relation to all of them.

The horrors of the First World War inaugurated the 20th century era of state practice and *opinio juris* on the punishment, by the co-operative efforts of an international community of nations, of individuals for the three inter-related categories of crimes associated with the waging of an aggressive war. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties[122] classified the culpable acts into 'acts which provoked the world war and accompanied its inception', 'violations of the laws and customs of war' and violations of

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[119] See note 106 *supra*.

[120] See e.g. General Assembly Resolution 35/199 of 15 December 1980. *supra*.

[121] See Article 9 of the Draft Code on Crimes against Peace and the Security of Mankind, 1996, 48th Session, U.N. Doc. A/CN.4/L.522 of 31 May 1996, as adopted with amendments on 1996.

[122] Established pursuant to a resolution of the Preliminary Peace Conference of 25 January 1919 to inquire into the responsibilities relating to the First World War.

'the laws of humanity'.[123] These were essentially the predecessors of the more developed notions of crimes against peace, war crimes and crimes against humanity, adopted in the later Nuremberg Charter after the Second World War. Although at the time of the first war prosecution of these crimes was still viewed as an exercise of power and authority rather than legal duty, the Commission pronounced on the moral duty of states to punish the perpetrators. It remarked that 'the public conscience insists upon a sanction which will put clearly in light that it is not permitted cynically to profess a disdain for the most sacred laws and the most sacred undertakings'.[124]

The first allusion to an obligation to prosecute crimes of war appears to have been made by Professor Vespasien Pella in his report to the 23rd Inter-Parliamentary Conference held in 1925. Within that report were drafted 'Fundamental Principles of an International Legal Code for the Repression of International Crimes'. These included the principle that 'all States Members of the League of Nations should be declared to be under a virtual obligation to take part in sanctions', apparently against individuals as well as states where so directed by the Council of the League of Nations.[125]

At the close of the Second World War the Allies felt authorized, but in no way compelled, to prosecute war criminals. Indeed, the summary execution of the Nazi leaders was an option seriously considered by some important personalities in the Allies' ministries.[126] When the United Nations War Crimes Commission addressed the question of punishment before the end of the war, its draft convention[127] acknowledged in its preamble that, in general, national courts were the most appropriate forum, but made no mention of a duty to prosecute.

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[123] See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Conference, March 29, 1919 reproduced in (1919) 13 *AJIL*, Supplement, and also in Benjamin Ferencz, *An International Criminal Court, A Step Towards World Peace*, 1980, vol. 1, 169, at 177.

[124] See Ferencz, ibid.

[125] See Fundamental Principles of an International Legal Code for the Repression of International Crimes, Principle 17: in Ferencz, ibid.

[126] See Ferencz, note 123 *supra*, at 67-8.

[127] Draft convention for the establishment of a United Nations war crimes court with an explanatory memorandum: see *Historical Survey of the Question of International Criminal Jurisdiction*, 30 September 1944, United Nations General Assembly, International Law Commission, reprinted in Ferencz, note 123 *supra*, at 427-33.

This silence with respect to such a duty is also reflected in the Moscow Declaration of 30 August 1943, the London Agreement of 8 August 1945, the Nuremberg Charter and the judgment of the International Military Tribunal.[128] Most significantly Allied Control Council Law No 10 of 20 December 1945 afforded occupying authorities 'the *right* to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal' [my emphasis].[129]

By its resolution 177(II) of 21 November 1947, the General Assembly of the United Nations directed the International Law Commission to formulate the principles recognized in the Nuremberg Charter and prepare a draft code of offences against the peace and security of mankind. While the desirability of a duty to prosecute is addressed, there is little evidence in the earlier work of the Commission of recognition of an existing or even emerging customary duty in relation to the crimes under review. In a report to the International Law Commission of 26 April 1950[130] it is suggested that with regard to the implementation of the code by municipal courts, the solutions adopted for the Genocide Convention be employed. In particular, this is said to entail that:

> The parties to the code would have to undertake to try persons responsible under the code by the competent tribunals of the State in the territory of which the criminal act was committed.[131]

Similarly, in the consideration of the Sixth Committee of the Report of the International Law Commission on the work of its second session, it is noted that some members:

> ... agreed that individuals who committed crimes under international law should be subject to trial and punishment, but asserted that this aim could be achieved by imposing upon States the obligation to punish the authors of such crimes ...[132]

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[128] As to the judgment see chapter 5, *supra*, at 107-9.

[129] See Ferencz, note 123 *supra*, at 488.

[130] Report by J. Spiropoulos, Special Rapporteur, 26 April 1950, Document A/CN.4/25: *Yearbook of the International Law Commission*, 1950, vol. II, reproduced in Ferencz, *supra*, 181, at 204-5.

[131] Ibid., Section C, at para. 166(b).

[132] See General Assembly Official Records, Doc. A/1639, reproduced in Ferencz, *supra*, 306, at 307.

The Commission's 1996 Draft incorporates the principle of *aut dedere aut judicare* in articles 8, 9 and 10 in line with its previous examination of the desirability of such a duty, but also in recognition of the growing practice of including this principle in treaties on international criminal law.[133]

In the immediate post-war years it is only those crimes covered by the Geneva Conventions of 1949 and which are classified as grave breaches of those Conventions that clearly involved a duty to prosecute the offenders.[134]

Opinio juris of the existence of a duty to prosecute all war crimes and crimes against humanity is found in later General Assembly resolutions. Thus, General Assembly Resolution 2840(XXVI) of 18 December 1971 notes that:

> Refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.

Principle 1 of the Principles of International Co-operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity[135] states that:

> War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the person against whom there is evidence that they have committed such crimes shall be subjected to tracing, arrest, trial and, if found guilty, to punishment.

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[133] See commentary to article 9 on the International Law Commission Web site (http://www.un.org/law/ilc/report/1996/96repfra.htm).

[134] See Chapter 6, *supra*; Bassiouni somewhat precipitously, it is suggested, also asserted the existence of a customary duty to prosecute crimes against humanity merely by virtue of a general customary norm to prosecute international crimes. He argued a general norm on the basis of repeated references in treaties to the principle of *aut dedere aut judicare*: see Cherif Bassiouni, *Crimes against Humanity*, 499-502.

[135] Adopted through General Assembly Resolution 3074 (XXVIII) of 3 December 1973.

More recently, General Assembly Resolution 35/199 of 15 December 1980 confirmed this position and included crimes against peace within the scope of the duty. It stated:

> Reaffirming that the prosecution and punishment of war crimes and crimes against peace and humanity ... constitute a universal commitment for all states.

This exact sentiment is repeatedly expressed in several other General Assembly resolutions,[136] most of which were adopted without vote. There is a recorded vote for one of these resolutions, being the most comprehensive resolution on measures against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror. The vote is recorded as one hundred and twenty-one in favour to two against, with twenty-seven abstentions. The much earlier 1971 General Assembly resolution was adopted by a vote of seventy-one for to none against, with forty-two abstentions. The 1973 resolution enshrining the Principles of International Co-operation was adopted by a vote of ninety-four for to none against, with twenty-nine abstentions. These resolutions suggest overwhelming support and rhetorical commitment by states to the duty in question.

Scharf correctly notes that General Assembly resolutions are not intended to be legally binding.[137] In particular, he rejects the assertion of some commentators that the Declaration on Territorial Asylum[138] was the earliest international recognition of a legal obligation to prosecute perpetrators of crimes against humanity.[139] Apart from the

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[136] See GA resolution 37/179 of 17 December 1982 (1982) 36 *United Nations Yearbook* 1063; GA resolution 38/99 of 16 December 1983 (1983) 37 *United Nations Yearbook* 818; GA resolution 40/148 of 13 December 1985 (1985) 39 *United Nations Yearbook* 842; GA resolution 41/160 of 4 December 1986 (1986) 40 *United Nations Yearbook* 687.

[137] See Michael P. Scharf, note 118 *supra*; see also Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507, at 520.

[138] General Assembly Resolution 2312, 22 *UNGAOR Supp.* (No. 16) at 81, U.N. Doc. A/6716 (1967).

[139] The Declaration on Territorial Asylum is far less recognized in state practice than the Universal Declaration on Human Rights, which itself only has legal weight as an authoratitive interpretation of the UN Charter: see chapter 7, *supra*, at 180. Some commentators and states have wrongly argued

clear indications in the negotiations leading up to the resolution that new legal norms were not envisaged,[140] it dealt with asylum and not the duty to prosecute.[141] Its very relevance is therefore highly questionable. It is also inappropriate for commentators to rely too heavily on resolutions that call upon states to punish offenders, but which do not expressly acknowledge a duty to do so.[142]

However, one should distinguish these types of resolutions from ones that clearly express the opinion that states have a duty to prosecute international crimes. While General Assembly resolutions are not intended to create norms they nonetheless constitute evidence of state practice and *opinio juris* supporting belief in and consent to the emergence or existence of such a norm. Repeated, widely representative General Assembly resolutions of this nature may accordingly have a significant impact on the development of the norm.[143]

The state practice represented by treaty provisions dealing with crimes against humanity or particular crimes falling within that category also evidence the emergence of a duty, but are possibly still insufficiently coherent to give a proper foundation for the rule rhetorically expressed in non-binding General Assembly resolutions. At least three of the principal forms of crimes against humanity are subject to an accompanying duty of prosecution, that is, genocide, torture and inhuman acts. However, others such as murder, enslavement, deportation, imprisonment, rape, persecutions, property crimes and disappearances[144] have not been incorporated into treaties containing

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its customary status: see Andreas O'Shea, *International Law and Organization: A Practical Analysis*, 1998, at 57-8 and the citations included (a number of, but not all, the norms contained therein have entered the corpus of customary law).

[140] (1967) *United Nations Yearbook* 759.

[141] It provides that states shall not grant asylum to 'any person with respect to whom there are serious reasons for considering that he has committed a ... crime against humanity'.

[142] See for instance United Nations Resolution on War Criminals, G.A. Resolution 2712, 25 *UNGAOR* Supp. (No. 28) at 78-9, U.N. Doc. A/8028 (1970): '*Calls upon* the States concerned to bring to trial persons guilty of such crimes' [my emphasis].

[143] As already intimated earlier: see chapter 8 *supra*., at 226.

[144] For a discussion of the various forms of crime against humanity see Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 1997, at 67-74.

the *aut dedere aut judicare* principle, except in the defined and specific domain of the Geneva Conventions of 1949.[145]

The growth, but not the emergence of the duty in relation to crimes against humanity is also supported by the conclusion of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968[146] and its European counterpart.[147] These treaties were premised on the desirability and necessity of ensuring that war criminals were punished.[148] The preamble states that 'the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes'. A duty to prosecute is implied in the requirements of this Convention. The Convention was adopted in the General Assembly by a vote of fifty-eight in favour to seven against, with thirty-six abstentions. However, it has only been ratified by thirty-nine states. Clearly, the Statutory Limitations Conventions are not sufficiently representative in their participation to provide the backdrop of state practice necessary to give meaning to the cited General Assembly resolutions. Nor can one rely on a consistent body of national legislation and case law apparently deriving from such a duty.

Nonetheless, one perceives a growing consensus from the conclusion of the Statutory Limitation Convention in 1969 and the General Assembly resolutions of 1971, 1973, 1980, 1982, 1983, 1985 and 1986 which would later be consolidated in the adoption of the Rome Statute.[149] The states that voted against the adoption of the Convention in 1969,[150] have all experienced significant political change in their internal or external relations and seem more committed to global justice. What was required to tie these strands of evidence together into the emergence of a customary duty was a widely acknowledged legal commitment to a rule, not for specific crimes but of general application. General Assembly resolutions could evidence a belief in the existence of that commitment but alone could possibly not

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[145] See chapter 6, *supra*, at 141-51.

[146] 754 *UNTS* 73 (entered into force on 11 November 1970)

[147] European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes of 1974, *European Treaty Series*, No. 82.

[148] See Natan Lerner, 'The Convention on the Non-Applicability of Statutory Limitations to War Crimes' (1969) 4 *Israel Law Review* 512, at 533.

[149] See *supra*, at 237-9.

[150] Australia, El Salvador, Honduras, Portugal, South Africa, United Kingdom and the United States.

conclusively establish the existence of that commitment. This would be achieved by the representative adoption and signature of the Rome Statute as a document intended to have legal effect and to seriously consolidate *opinio juris* on the existence of certain basic legal principles.[151]

State practice and *opinio juris* therefore evidenced an emerging customary duty to prosecute war crimes, crimes against peace and crimes against humanity, which would later be absorbed into a general duty to prosecute customary crimes.[152]

5. *Slavery*

Among the international crimes under review, slavery has perhaps the least practical significance to the present context of transitional justice. Slavery is not endemic to internal conflicts, although one should recall the case of the Japanese comfort women in the Second World War. However, it is also the least controversial when narrowly defined in accordance with the slavery conventions.[153] These are very widely ratified, with most states having adhered to at least one of the conventions requiring the penal legislation.[154] This broad consent to the rule is confirmed in an almost universal incorporation of the crime of slavery into national legislation,[155] and bolstered by the significance

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[151] See *infra.*

[152] See *infra,* Bassiouni also, it is suggested somewhat precipitously, asserted the existence of a customary duty to prosecute crimes against humanity merely by virtue of a general customary norm to prosecute international crimes. He argued a general norm on the basis of repeated references in treaties to the principle of *aut dedere aut iudicare*: see Cherif Bassiouni, *Crimes against Humanity*, 499-502.

[153] See chapter 7 *supra*, at 187.

[154] The 1926 Convention has ninety-one parties while the 1956 Convention has 114 parties.

[155] According to Yasmine Rassam, 'every state on earth' has penalized the crime of slavery: see Yasmine Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law' (1998-9) 39 *VaJIL* 303.

attached to the prohibition through its regular inclusion in national bills of rights.[156]

Nevertheless, as alluded to in an earlier chapter, this national legislation gives effect to a duty to create penal legislation as opposed to a duty to prosecute.[157] While such a duty implies a will on the part of the state to implement its own penal legislation, it cannot found sufficiently clear and consistent state practice and *opinio juris* for an obligation to prosecute the alleged perpetrators in all cases. It can merely support a customary rule for the establishment of effective penal measures in general terms. In the various international instruments dealing with slavery there are differing levels of obligation, but no consistent basis for an absolute duty to prosecute in all cases.[158]

A further difficulty arises in extending the duty to some contemporary forms of slavery. Repeated General Assembly resolutions may have resulted in an emerging if not emergent customary rule of broader application than the conventions. Yet, here again the emphasis appears to be on strengthening legislation with a view to punishing the offenders as opposed to ensuring the punishment of offenders in all cases.[159]

6. *Extra-judicial Executions*

While there is no treaty provision specifically dealing with the punishment of extra-judicial executions that has attracted near global participation, the international community has assented to such a rule through repeated General Assembly resolutions adopted by consensus specifically referring to the duty of states to punish this crime. For instance, Resolution 53/147 declares that member states are:

> Dismayed that in a number of countries impunity, the negation of justice, continues to prevail and often remains the main cause of the

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[156] For example, the South African Bill of Rights provides in section 13 that, 'No one may be subjected to slavery, servitude or forced labour': see The Constitution of the Republic of South Africa, Act 108 of 1996.

[157] Contrast the view of Yasmine Rassam, who asserts that no state would dare to deny the existence of such a duty: ibid.

[158] See M Cherif Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985*, 1986, at 499-508.

[159] See e.g. GA Resolution 51/66 of 31 January 1997.

> continuing occurrence of extrajudicial, summary or arbitrary executions in those countries[160]

The General Assembly then:

> Reiterates the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, to grant adequate compensation to the victims or their families and to adopt all necessary measures to prevent the recurrence of such executions.[161]

This consensus for the existence of a duty is further reinforced by the widespread participation to the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the European Convention on Human Rights and the American Convention on Human Rights. All of these widely ratified instruments protect the right to life. Extra-legal executions constitute the most serious infringement of the right to life and it is implicit in the obligation to ensure the rights under the Covenant that the most serious violations of the right to life must be punished. Accordingly, in the cases of *Barboeram v. Suriname*[162] and *Dermit v. Uruguay*,[163] the Human Rights Committee requested Suriname and Uruguay to investigate and bring to justice those responsible for the extra-legal deaths of a number of individuals in police custody. It is submitted that these sources provide sufficient evidence of an emergent customary norm requiring the investigation and prosecution of such offences.[164]

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[160] General Assembly 8 March 1999.

[161] Ibid; see also GA Resolution 44/162 of 1989, reaffirming the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions: ECOSOC Resolution 1989/65; see further GA Resolution 51/92 of 28 February 1997.

[162] Communications Nos. 146/1983 and 148-154/1983, UN Doc A/10/10/1985.

[163] Communication No. 84/1981, UN Doc A/38/40 (1983).

[164] Cf. Diane F. Orentlicher, note 116 *supra*, at 2582-5; Naomi Roht Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations' 78 *Cal L R* 451 at 499.

7. *Enforced Disappearances*

Professor Orentlicher approaches the question of the customary duty to prosecute enforced disappearances by grouping this category of human rights violation with torture and extra-legal executions.[165] This seems a logically coherent avenue for the discussion of the problem since these crimes share the distinction of being the most serious infringements of human dignity. She starts from the premise that 'there is general agreement that customary law prohibits torture, disappearances, and extra- legal executions and that these prohibitions are peremptory norms'.[166] She subsequently concludes that 'the frequent reiteration of a duty to punish grave violations of physical integrity in international instruments is evidence that the duty is – or is emerging as a customary norm'.

Such logical coherency however, is not always neatly reflected in state practice. The category of human rights violation known as 'enforced disappearances' or simply 'disappearances', as Orentlicher refers to it, does not exist as an independent crime, either in international law or in the national laws of most states. It involves a particular application of the right to security of person and the right to life, which may involve kidnapping, extra-legal execution or both. It is not specifically dealt with in international treaties, save for the Inter-American Convention on the Forced Disappearance of Persons.[167] Further it is not clear that the decisions of the Human Rights Committee dealing with disappearances require punishment on the basis that the cases involve disappearances.[168] It may simply have relied on a general duty to investigate and prosecute the most serious instances of human rights violations, in these cases involving serious infringements of the right to life, so as to ensure the rights in the Covenant. It is therefore difficult to assert from treaty law alone the development of the crime as a peremptory norm or a duty specifically in relation to that crime, without further elucidation in state practice.

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[165] Orentlicher, note 116 *supra*, at 2582-5

[166] Ibid., at 2582

[167] (1994) 33 *ILM* 1529.

[168] See *Bleier v. Uruguay*, Communication No. R.7/30, U.N. Doc. A/37/40 (1982); *Quinteros v. Uruguay*, Communication No. 107/1981, UN Doc A/38/40 (1983).

There has been limited state practice supporting the treatment of enforced disappearances as an independent crime involving a specific duty on the state to prosecute. Thus, the Draft Declaration on the Protection of All Persons From Enforced or Involuntary Disappearances provides in article 4 that every state 'shall ensure that all forms of participation in enforced or involuntary disappearance ... are specific crimes of the gravest nature under its criminal law'.[169] This mandatory language is, unfortunately, not reflected in other General Assembly resolutions, which do not clearly 'reiterate a duty to punish' such violations. For instance, General Assembly Resolution 53/150 of 10 March 1999 reiterates 'its *invitation* to all governments to take appropriate legislative or other steps to prevent and suppress the practice of enforced disappearances'. It further '*reminds* governments of the *need* to ensure that their competent authorities conduct prompt and impartial inquiries in all circumstances' and that 'perpetrators *should* be prosecuted'. This persuasive rather than peremptory language contrasts with the clear undertaking reflected in the resolutions on extra-legal executions, and is found in other resolutions on the subject.[170]

Therefore, in so far as there exists a customary obligation to prosecute enforced disappearances, this must derive, not from the state practice in relation to such disappearances, but from state practice establishing a general duty to prosecute the most serious violations of human rights.

8. *The Development of a General Rule for Serious Violations of Human Rights and Crimes Against International Law*

This analysis has revealed the existence of an obligation to prosecute attaching specifically to most of the serious violations of human rights. It has further unveiled an emerging state practice in that direction for slavery and enforced disappearances, and in relation to the former there is already a customary duty to introduce criminal legislation. There is therefore a sound basis in the practice of states for a broader obligation to prosecute or extradite all systematic and very serious violations of human dignity. However, for this state practice in relation to disparate kinds of human rights violations to give rise to a broad, all-embracing

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[169] See U.N. Doc. E/CN.4/1991/49.

[170] See General Assembly Resolutions 49/193 of 23 December 1994 and 51/94 of 28 Febraury 1997.

obligation with respect to serious human rights violations generally, it must be accompanied by *opinio juris* indicating assent to the creation of a general broadly defined rule.[171] Otherwise, the international community has simply assented through state practice to a set of identical individual rules for particular violations.

Opinio juris in support of such a general rule is implicit in General Assembly resolutions adopted by consensus. Thus, General Assembly resolution 53/142 of 8 March 1999 on strengthening the rule of law provides that 'States must provide appropriate civil, criminal and administrative remedies for violations of human rights.' This implies the necessity of prosecution in the most serious cases.

More decidedly and significantly, *opinio juris* can be implied from the widely attended negotiations preceding the conclusion of the Statute of the International Criminal Court (hereinafter Rome Statute) establishing the International Criminal Court and the representative provisions of the Statute itself.[172] The Statute covers only the most serious crimes against international law, and reflects not only a desire, but also a perceived duty on the part of the international community to punish these crimes. International crimes generally cover all those violations of human dignity that are so serious in nature that they constitute an attack on the fundamental interests of the international community.[173] They therefore generally cover the most serious examples of human rights violations.

The preamble to the Rome Statute provides that:

> ... it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.[174]

The Court is to function on the principle of 'complementarity',[175] whereby international criminal law is enforced jointly through the Court and municipal courts.[176] So far as the Court is concerned, neither the prosecutor nor the Court has any discretion to refrain from pursuing

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[171] On the issue of *opinio juris* see chapter 8 *supra*, at 219-26.

[172] See note 100 *supra*.

[173] See article 19 of the International Law Commission's Draft Articles on State Responsibility, International Law Commission Report, 1996 (*http://www.un.org/law/ilc/reports/chap03.htm*).

[174] See note 100 *supra*.

[175] See article 1 of the Statute of the International Criminal Court, note 100 *supra*.

[176] See chapter 5 *supra*, at 125-6.

proceedings against an alleged perpetrator, save where there are substantial reasons for believing that it would not be in the interests of justice to continue with the prosecution.[177] The stated determination in the preamble to ensure 'an end to impunity' requires, in a regime of 'complementarity', that the states are similarly obligated to pursue international offenders. The principle of 'complementarity' therefore itself appears to rest on the premise that states have an obligation to prosecute those crimes covered by the subject-matter jurisdiction of the court and that are not brought before the court.

In consequence, state practice can be said to have developed to a stage where at least a general obligation to prosecute the perpetrators of the most serious violations of human dignity in the eyes of the international community has emerged. The term employed here of 'the most serious violations of human dignity' would cover those crimes that the international community has clearly indicated fall within such a category. Neither would it include international crimes that were not subject to the jurisdiction of the future International Criminal Court and for which there has already developed a body of treaty law supporting an accompanying obligation to prosecute.

The term would not include the crime of aggression for which the international community has not yet shown a determined and concerted revulsion or a common understanding. Neither would it include international crimes that were not subject to the jurisdiction of the future Court, which itself delineates the lowest common denominator on the international community's understanding of the most serious affronts to the rights of man, nor were established as crimes under customary law.

Can one go further and assert the emergence of a customary duty to prosecute all international crimes in line with the actual wording of the preamble? The immediate difficulty here is that in so far as the reference to a duty to prosecute international crimes represents *opinio juris*, it is unclear what is intended by the phrase 'international crimes'. This could potentially embrace crimes under customary international law, crimes created in terms of treaties and crimes under municipal law that were subject to a treaty regime.[178]

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[177] See article 53 of the Statute of the International Criminal Court, note 100 *supra*; see further Andreas O'Shea, 'Pinochet and Beyond: the International Implications of Amnesty' (2000) 16 *SAJHR* 642.

[178] See chapter 8, *supra*, at 198-9.

The difficulty with including the latter two categories of international crimes under the umbrella of the duty in question is that a number of these treaty crimes employ a duty less onerous than that of *aut dedere aut judicare*. Furthermore, it is a far from closed category, which may incorporate unrepresentative treaties relating to all kinds of crimes. Although treaties covering crimes against global public order such as terrorism and drug offences incorporate the *aut dedere aut judicare* principle,[179] they are not widely ratified. Terrorism is emerging as a crime,[180] not only in national, but also in international law, as evidenced in General Assembly resolutions that declare terrorism to be a crime against the international order.[181] However, there are still significant disparities in state practice in this area. Even more contentious is the law on mercenaries. The voting with respect to General Assembly resolutions requiring the punishment of nationals acting as mercenaries abroad and the existence of less prescriptive resolutions reflect significant disparities in the views of states on this matter.[182]

Accordingly, it would not be safe to assume adequate consent on the part of the community of states with respect to these categories when the expression of *opinio juris* in the preamble is itself ambiguous. State practice in relation to international crimes other than those under customary international law is moving in the direction of an emerging duty to bring perpetrators to justice, but is not sufficiently widespread or consistent to declare the existence of an emergent norm of a general character.

The duty does, however, legitimately cover other crimes under customary international law since these derive from a global consensus that the offence in question is such a serious infringement of the interests of the international community that it should be classified as a crime against international law. The application of the principle in

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[179] To view some of these treaties see Cherif M. Bassiouni, *International Criminal Law Conventions and their Penal Provisions*, 2nd ed., 2000; Christine van den Wyngaert, *International Criminal Law: A Collection of International and European Instruments*, 1996.

[180] See chapter 6 *supra*, at 189-92.

[181] See General Assembly resolution 51/210 of 16 January 1997 and General Assembly resolution 52/165 of 19 January 1998.

[182] For an example of a less prescriptive resolution see e.g. General Assembly resolution 51/83 of 28 February 1997: 'Convinced that it is necessary for Member States... to develop and maintain international co-operation among States for the prevention, prosecution and punishment of mercenary activities.'

question to all customary crimes as well as those crimes falling under the jurisdiction of the court and already recognized as sufficiently serious to warrant a duty to prosecute indisputably concords with the minimum intention expressed in the preamble's reference to 'international crimes'.

The general customary obligation to prosecute, if not extradited, the participants in violations of human rights or international criminal norms is therefore, in the present state of development, confined to two overlapping categories of crimes. These are crimes under customary international law or other crimes within the current jurisdiction of the International Criminal Court. They include piracy, slavery, genocide, torture, crimes against humanity and war crimes, as these various offences are defined in terms of customary law. Genocide, torture and grave breaches of the Geneva Conventions already independently involve a customary duty to prosecute. The emergence of a general duty in relation to serious international crimes had brought piracy, slavery, crimes against humanity and the laws and customs of war on the periphery of the Geneva Conventions within its scope.

Barboza recently noted that '[t]he creation of a permanent international criminal court may be decisive in the definitive consolidation of our subject'.[183] It may seem surprising that such a recent development as the agreement on the establishment of an international criminal court should constitute the point of emergence of a customary duty of a general nature. However, this is both explicable and fortuitous. It is explicable because, notwithstanding hitherto consistent state practice in the form of treaties and their implementation in relation to disparate crimes, it is the first time that an express, committed, coherent and representative *opinio juris* has emerged for a general duty to prosecute international crimes. It is fortuitous because it brings our understanding of the enforcement of international criminal law firmly within the framework of the most elaborate and comprehensive agreement on the subject to date.

9. *Effect of Amnesty for Serious Human Rights Violations on the Customary Position*

During the course of the past fifty years, while state practice and *opinio juris* has moved in the direction of the formation of rules for the

[183] See J. Barboza, 'International Criminal Law' (1999) *Recueils des cours* 111.

effective protection of human rights, there have been elements of state practice on the use of amnesty.[184] In this section we shall consider the impact of this trend on the customary regime.

In principle, in order that a norm can reach customary status, state practice in the area must be uniform and consistent. However, minor inconsistencies will not affect the position and providing the practice is widespread, it is not essential that all states participate in the practice. At least in relation to crimes against humanity, it has been convincingly argued that the fashion of amnesties creates sufficient inconsistencies in state practice for one to be unable to conclude that a customary duty to prosecute these crimes has emerged.[185] If one confines one's analysis to crimes against humanity as a category of offence, with little more than unrepresentative treaties on statutory limitations and General Assembly resolutions to support the rule, then the argument has almost irresistible force. However, the more broadly based rule derived from state practice in the form of widely representative treaties and clear *opinio juris*, or the specific rules on torture and genocide presented in this chapter, may withstand the nature and degree of inconsistency created by municipal amnesties.

The practice of amnesty comes in various forms. First, there are examples of laws of general application such as criminal codes and specific laws that permit the use of amnesty. Such laws should not be considered as inconsistencies in state practice any more than the power of pardon simply because these are discretionary powers that do not specifically apply to international crimes and may be exercised consistently with a state's international obligations.

Some of the more modern versions of these general provisions specifically exclude international crimes from their scope. Others may be interpreted consistently with an international duty to prosecute grave international crimes.[186] So, in a case concerning the applicability of article 30 of the Amnesty Law of 18th June 1966 to crimes committed

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[184] See chapter 2 *supra*.

[185] See Michael Scharf, 'The Letter of the Law', note 118 *supra*; John Dugard, 'Reconciliation and Justice: The South African Experience' (1998) 8 *Transnational Law and Contemporary Problems* 277.

[186] See, for instance, Loi no. 95-884 du 3 aout 1995, article 25(16), annexed to the French Penal Code: *Code Penal, Nouveau Code Penal; Ancien Code Penal*, Dalloz, 1996-97, 1967 at 1973 ('Sont exclus du benefice de la presente loi: Les delits d'apologie des crimes de guerre, des crimes contre l'humanite...).

by Georges Bouderelles between 1952 and 1954 in Indochina, the French *cour de cassation* noted that,

> 'alors qu'aucune regle de droit interne ne peut porter atteinte au jugement et a nition d'une action ou d'une omission qui, au moment ou elle a ete commise, etait criminelle d'apres les principes generaux du droit reconnus par l'ensemble des nations; que la repression des crimes contre l'humanite trouvant sa source dans des textes de droit international, la loi interne ne peut y deroger'.[187]

Having acknowledged the supremacy of international law over the national amnesty law, the court, however, went on to exclude the crimes in question from the definition of crimes against humanity and held them to be covered by the amnesty law. Equally, Protocol II to the Geneva Conventions of 1949 on the Laws of War has been erroneously interpreted as a call on states to give amnesty for international crimes committed in internal conflicts.[188] The provision was intended to promote reconciliation through amnesty within the limits of international law and amnesty for grave breaches of humanitarian law would be inconsistent with the spirit of the Geneva Conventions. It is highly unlikely that the parties intended this clause to constitute a licence to immunize such crimes.

There have been sporadic examples of exercises of presidential discretion granting amnesty pursuant to general amnesty laws or general legal authority.[189] Most of these examples consist of incentives for rebels to cease hostilities or return to the country. There is usually no specification as to the crimes covered but the rebels in question are likely to have been guilty of insurrection, treason and other internal crimes rather than crimes against the international legal order. Again, this should not be interpreted as dissent in a rule requiring the prosecution of international crimes.

There are isolated examples of amnesty laws that expressly do or that have been interpreted by the municipal courts as having equal application to international crimes. Here one can mention the French

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[187] See cour de cassation, 1er avril 1993, *M. Sobansky Wladyslav et association nationale des anciens prisonniers internes d'Indochine*, no 92-82.273 (1994) XCVIII Revue Generale de Droit International Public 471, at 472.

[188] See Lauren Gibson and Niomi Roht-Arriaza, 'The Developing Jurisprudence on Amnesty' (1998) 20 *HRQ* 843, at 862-6. See also chapter 3 *supra*, at 47-51; chapter 6 *supra*, at 154-5.

[189] See chapter 2 *supra*, at 22.

law No. 53-112 of 20 February 1953, which amnestied Alsaciens incorporated into the German army who participated in the massacre at d'Oradour-sur-Glane on 10 June 1944.[190] One could also mention the decision of the *chambre d'accusation* of the *cour d'appel de Paris* of 7 January 1987 relating to the amnesty of crimes committed in the Algerian war. This holds the law to extend to crimes against humanity, confirmed by a *cour de cassation* in the *Yacoub* case of 29 November 1988.[191] Further, one can cite the decisions of the South African Constitutional Court and the Cape Provincial Division, as well as the decisions of the Supreme Courts of Argentina, Chile, El Salvador, Peru and Uruguay.[192]

However, the effect of these laws and decisions should not be overstated. Some do not in fact constitute evidence of a belief on the part of these states that there is no maturing or existing obligation to prosecute international crimes. They were concluded in circumstances where the state really had no other alternative. Chile's amnesty law was a self-amnesty that in the initial stages should be viewed as a willing disregard for international norms rather than an expression of perceived rights and obligations, present or future. Chile's old government could not be overthrown and only embraced democracy within a constitutional framework that would make it politically difficult, if not impossible for the amnesty law to be reversed.[193] In Uruguay, desperate attempts were made to secure the prosecution of the tyrants of the former regime, but because the military had given up power voluntarily it became politically impossible to achieve that objective. The first amnesty law expressly excluded violators of human rights, but military solidarity defied the courts and with threats and defiance a blanket closure on prosecutions was secured and retained.[194] In Argentina, prosecutions were started and would have been continued had it not been for extreme pressures from the former junta including a military revolt.[195] Essentially, the rule of law was in political suspension for a

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[190] See Denis Alland, 'Jurisprudence francaise en matiere de droit international public' (1994) XCVIII Revue Generale de Droit International 471, at 480.

[191] Ibid., at 481.

[192] See chapter 3 *supra*, at 47-64.

[193] Neil J. Kritz, *Transitional Justice, How Emerging Democracies Reckon with Former Regimes*, 1995, Vol II, *Country Studies*, 455-61.

[194] Ibid., at 397-412.

[195] Ibid., at 363.

moment in time and this said nothing of the general attitude of these states to the premises of the duty to prosecute serious international crimes. Much in the same way as a contract is not an expression of the free will of a party if that party has been subjected to duress, these reluctant digressions from the pursuit of justice were as good as involuntary. They cannot be viewed as cogent or contrary state practice or *opinio juris* in the circumstances, as confirmed by the subsequent support of these states for international criminal law treaties and the ethos of the Rome Statute. The South African process also sprung from necessity but was less of a forced result. The degree of latitude and free will involved in the South African negotiations were somewhat exceptional and unique to the political context.

All of these states have otherwise or subsequently acceded to a duty to prosecute serious international crimes by becoming parties to treaties that are difficult to reconcile with their amnesty laws. Indeed, in most cases the courts of these countries, rather than negate the nature of these obligations in terms of the treaties or customary law, have justified the legality of their laws on the basis of the date of the commission of the offences covered by the law.[196] An offence committed in the 1960s, 1970s or 1980s would not be covered, in most cases, by the treaty provisions due to the principle of non-retroactivity. So the claim of most of these courts was not so much that there was no duty, but that the duty had not matured at the relevant time.[197] Even in relation to custom, which was in general not dealt with by the municipal courts addressing this question, the fact that a duty had not emerged at the time of the commission of the offences would not affect its subsequent maturation.

A widely representative practice does not need to be supported by every state at every moment in its political history. Seen in the context of general state practice and *opinio juris*, certainly in relation to crimes such as torture and genocide, these instances may be regarded as minor inconsistencies in the state practice that were momentary digressions from the general direction of state practice and opinion.

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[196] See Lauren Gibson and Niomi Roht-Arriaza, note 188 *supra*, at 862.

[197] The Inter-American Commission has responded to this by asserting the existence of a continuing violation of the right to judicial protection: see chapter 3 *supra*, at 66.

A more significant source of state practice of amnesties is the long-standing practice of including amnesty clauses in peace treaties.[198] This practice clearly covered violations of the laws of war and was so constant that where it was not express, it was implied. For centuries it would seem, states have acted under the belief that they were entitled to negotiate these clauses, even in relation to crimes that constituted violations *erga omnes*. Consequently, there was a customary right to include amnesty clauses in peace agreements. To what extent has this right survived?

The right would not in itself prevent the development of a rule requiring the punishment of international criminals, subject to an exception where there is an amnesty clause in a peace treaty. For the right to be reversed there would need to be a clear and uniform practice to the contrary. This is the case with respect to torture and genocide. With respect to these crimes, a solid body of state practice has grown out of clearly expressed treaty provisions that are irreconcilable with a right to agree on amnesty. It is less clearly so with respect to those other crimes falling under the general duty to prosecute. However, while there is a customary duty to prosecute or extradite perpetrators of extra-judicial executions, because this duty does not originally derive from clearly defined treaty provisions, its existence is subject to a customary exception permitting states to contract out of the duty following conflict. While there is no logical distinction to be drawn between arbitrary executions and torture, this result would appear to follow by default.

Here, the older customary right to agree on amnesty may be viewed not as inconsistent state practice, but as a surviving exception to the new customary duty in the particular moment in time of a society emerging from conflict or oppression.[199] There is no inconsistency in state practice here because, as Professor Teitel aptly points out as the central theme of her inspiring work on transitional justice,[200] transitional justice mechanisms are an exceptional response to an extraordinary event in a particular moment in time.[201] Normal considerations and understandings of the rule of law are inapplicable and this is why general state practice supporting a general duty to

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[198] See chapter 2, *supra*, at 5-20.

[199] See the incorporation of this exception in the suggestion solution in Annex 1, *infra*.

[200] See Ruti G. Teitel, *Transitional Justice*, 2000.

[201] Ibid.: chapter 1, 'The Rule of Law in Transition'.

prosecute can emerge and can be reconciled as consistent with a right not to prosecute in exceptional circumstances.

10. *Conclusion*

This chapter has highlighted a determination on the part of the international community to ensure the punishment of international criminals and establish an unmitigated respect for the international rule of law. This has led to the emergence of a number of distinct customary rules requiring the prosecution, in the absence of extradition, of offenders. Attempts to assimilate the accumulated evidence into a general customary duty to prosecute international crimes do not hold up to scrutiny.

In my judgement, in the current climate of state practice and *opinio juris*, the current obligations to prosecute or extradite cover the most serious and systematic violations of human rights and humanitarian norms. More specifically, there is a particular obligation to prosecute torture and extra-legal executions, and there is a general duty to prosecute customary crimes and those covered by the jurisdiction of the International Criminal Court.[202] There is also an unmitigated duty to punish or extradite torturers and those that commit genocide. The duty to punish extra-judicial executions and customary crimes other than torture and genocide, while emergent, may be avoided through the negotiation of a peace treaty between states. This would also apply to crimes against humanity and serious violations of human rights. In the case of purely civil wars, an amnesty covering these crimes would need to be negotiated between the state and the international community as a whole, possibly through the agency of the UN.

This state of affairs has its advantages in reconciling the need to secure peace with the need to maintain the international rule of law. States can lawfully give amnesty from prosecution in their own courts providing they are prepared to surrender an individual to the international Court. In the event that the establishment of peace absolutely requires amnesty from both prosecution and extradition, this can be negotiated between the parties and the international community as a whole. In chapter 10, I will consider how this reality can be reconciled with the emerging regime of the International Criminal

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[202] See further Article 3 of the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, Annex I, *infra.*

Court. The next chapter will complete the picture with respect to international legal limitations on amnesty by looking at the question of civil liability.

CHAPTER 10

AMNESTY, CIVIL LIABILITY AND REPARATIONS

1. *Introduction*

The principal part of this work addresses the proper limitations on the failure to prosecute international criminal offences and serious human rights violations resulting from domestic amnesty. International criminal law forms the main corpus of that part of international law binding upon individuals. International human rights law is directly binding on the state. A state cannot unilaterally revoke an individual's international obligations or its own. Therefore, the legality or international acceptability of a domestic amnesty that immunizes from state punishment an international crime or serious human rights violation naturally forms the major component of an inquiry into the international limits of domestic amnesty. For the moment, there is no general international civil law which directly binds the individual and allows an international civil claim to be brought against an individual for his wrongs. However, there is a growing part of international human rights law which requires that a victim of human rights violations receive reparations either through the national courts or directly from the state, otherwise having judicial competence. In chapter 4, I considered the rationale of amnesty from civil liability in the national courts.[1] Here I will analyze the international normative limits on the extension of amnesty to civil liability and the corresponding state obligation to provide reparations.[2]

An amnesty law may enable the granting of immunity for civil as well as criminal liability, or only for criminal or civil liability. While

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[1] See chapter 4 *supra*, at 87-93.

[2] See further article 5 of the Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition, Appendix, *infra*.

amnesties in Argentina,[3] Chile[4] and Uruguay[5] only covered criminal liability, those in El Salvador[6] and South Africa[7] covered both. I am aware of no examples of such laws that only cover civil and not criminal liability. This is understandable. Given that the major objectives of an amnesty law are usually to facilitate political transition and the reconciliation of the nation, the principal concern for immunity is in the criminal field. The potential deprivation of liberty and, in those states still employing the death penalty, the potential loss of life of the political offender, are the gravest consequences for - and the immediate concern of - the political offender. Although civil liability may also be a concern, the lesser gravity of the consequences and the improbability of civil action are already a form of comfort for perpetrators of injustice. The consequences of civil action are normally confined to financial loss. As to the likelihood of proceedings being instituted, a previously oppressed population will largely not have the motivation or economic resources to pursue civil actions. Moreover, civil actions are normally subject to limitation periods for the institution of proceedings, which have frequently expired by the time the victim is in a position to sue for his or her losses.

There are nonetheless important incentives for the incorporation of civil liability within the scope of an amnesty. On one level it may be felt that a firm closure on the animosities of the past and the commencement of the reconciliation process could be compromised by ongoing litigation.[8] The novel requirement, introduced into the South African amnesty process, that amnesty is given in exchange for full disclosure, raises another more cogent reason to include civil liability. For a society in transition, one of the major benefits of this model of amnesty is the potential it creates for painting the fullest possible picture of the truth of past violations.[9] It is the break in the former conspiracy of silence and the telling of the story of the old hatreds that forms the first step in reconciling with the past in order to face a

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[3] Law No. 22.924 of 22 September 1983, reproduced in Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, at 447.

[4] Decree Law 2191 of 10 March 1978.

[5] Law No. 15, 848 of 22 December 1986, reproduced in Kritz, ibid., at 598-9.

[6] Decree No. 486 of 20 March 1993, reproduced in Kritz, ibid., at 546-8; also the earlier Decree No. 805 of 27 October 1987.

[7] Promotion of National Unity and Reconciliation Act No 34 of 1995.

[8] A view expressed by Didcott J. in the *AZAPO* case: see chapter 4 *supra*, at 93 and note 72 *infra*.

[9] See also chapter 4 *supra*, at 90.

brighter future. Jose Zalaquett, a former member of Chile's National Commission on Truth and Conciliation has explained that,

> Truth was considered an absolute, unrenounceable value for many reasons. To provide for measures of reparation and prevention, it must be clearly known what should be repaired and prevented. Further, society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably, the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from recurring.[10]

While the perpetrators of human rights violations will by no means have a monopoly on the truth of past oppression, aspects of the truth may depend on their co-operation. In particular, the actual fate and whereabouts of family members might only be revealed through the confessions of offenders. There thus emerges an incidental necessity of ensuring that the full disclosure model of amnesty fulfils its purpose in terms of obtaining the truth. Without adequate safeguards to ensure that the evidence provided for amnesty cannot be employed in civil proceedings,[11] a perpetrator's amnesty application may unwittingly supply the evidence for a civil action, evidence that would otherwise be difficult to obtain from other sources. Therefore, a person who may be tempted to come forward and confess his wrongs to avoid prosecution might also be discouraged if he knows that he may be exposing himself to civil proceedings. This explains the acceptance and subsequent justification by the ANC of the immunity from civil as well as criminal liability in South Africa. Archbishop Tutu said of the South African amnesty,

> This is a position that was not arrived at lightly. It was something that caused a great deal of anguish, but it is clear even in the case of civil damages that had those applying for amnesty known that it might remove their criminal liability but not their civil liability, it is

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[10] José Zalaquett, 'The Mathew O. Tobriner Memorial Lecture: Balancing ethical imperatives and political constraints: The dilemma of democracies confronting past human rights violations' (1992) 43 *Hastings Law Journal* 1425, at 1433.

[11] Consider the possible safeguards suggested in chapter 4 *supra*, at 90-2.

> highly unlikely that they would have come forward at all. The carrot that drew them to the Truth and Reconciliation Commission would have been significantly diminished.[12]

2. *The Right to Reparations in Terms of International Law*

Whatever the desirability of victims paying such a high price for peace and reconciliation, international law protects the rights of victims to access the courts to obtain reparation. Amnesty from civil process must therefore be reconciled with these rights or its legality will be abrogated by these rules. Discussions of impunity and international law have frequently focused on the failure to punish human rights violations. This emphasis reflects the usual criminal focus of amnesty laws and the clear attribution to the state of de facto impunity. It is also justified, considering the implications of criminal impunity, for the maintenance of international public order. Punishment of offenders also constitutes a form of satisfaction for the victims of human rights violations and monetary compensation adds little to remedy the indignities suffered, whereas civil proceedings serve a very minimal role in deterring future violations. It is clear, however, that the reparation of victims for human rights violations remains an important aspect of transitional justice and has generally received insufficient consideration from states, organizations and commentators.[13] The introduction of full disclosure as a condition for amnesty in the South African process has brought to light the importance and difficulty of the civil side of the amnesty question. The message of the South African model is that in future victims of past oppression may have to choose between truth and full monetary compensation as two diametrically opposed and irreconcilable objectives.

An examination of international instruments and their interpretative jurisprudence reveals a considerable body of support for the protection

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[12] Desmond Tutu, *No Future Without Forgiveness*, 1999 at 54.

[13] See Ellen L. Lutz, 'After the Elections: Compensating Victims of Human Rights Abuses', in Ellen L.Lutz, Hurst Hannum and Kathryn J. Burke (eds.), *New Directions in Human Rights*, 1989, at 195; see also Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report submitted by Mr. Theo van Boven, Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, conclusions and recommendations, point 1: reproduced in (1996) 59 *Law and Contemporary Problems* 283 at 342.

of the rights of victims. International instruments address the plight of victims through general protective clauses, the right of access to court, the right to an effective remedy and the right to compensation.[14] International human rights treaties contain clauses that generally require the effective implementation of the substantive rights set out therein.[15] Article 2 of the International Covenant on Civil and Political Rights of 1966 (hereinafter ICCPR) requires state parties:

> ...to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...
>
> and
>
> ... to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognized in the present Covenant.

It is implicit in this provision, as with other 'ensure and respect' provisions of other human rights treaties,[16] that human rights violations should be investigated and that the victims should be afforded reparation for the wrongs done to them.

More specific provisions indicate this in concrete terms. Article 2 (3) (a) of the ICCPR provides for an obligation 'to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy ...'. The right to an effective remedy is

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[14] See Study concerning the right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, ibid.

[15] See Article 2(2) of the International Covenant on Civil and Political Rights of 1966; Article 2(1) of the International Covenant on Economic, Social and Cultural Rights of 1966; Articles 2 & 3 of the International Convention on the Elimination of All Forms of Racial Discrimination of 1966; article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979; article 2(1) of the Convention on the Rights of the Child of 1989; article 1 of the European Convention on Human Rights and Fundamental Freedoms of 1950; article 1 of the American Convention on Human Rights of 1969; article 1 of the African Charter on Human and Peoples' Rights of 1981.

[16] On the potential generation of an obligation to prosecute deriving from the 'ensure and respect' provisions see chapter 7 *supra*, at 166-71.

repeated in a number of human rights instruments.[17] For a remedy to be effective it would normally require, in addition to a thorough investigation, access to court and fair compensation.[18]

It is submitted that the right of access to court is required by article 14 of the ICCPR, which provides that in the determination of a person's rights in a suit at law, he has the right to a fair and public hearing before an independent and impartial tribunal.[19] One finds a similar provision in the European Convention on Human Rights and Fundamental Freedoms of 1950.[20] In the *Golder* judgment, the European Court of Human Rights held this provision to incorporate a right of access to court. It must be read in the light of the principle 'that a civil claim must be capable of being submitted to a judge' as being 'a universally recognized fundamental principle of law', and in the light of 'the principle of international law which forbids the denial of justice'.[21]

Judicial opinion supports not only a duty to investigate but also a specific right to compensation. This is supported in the jurisprudence of the Human Rights Committee,[22] the European Court of Human Rights,[23] the Inter-American Commission of Human Rights[24] and the

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[17] See article 8 of the Universal Declaration of Human Rights; article 13 of the European Convention on Human Rights and Fundamental Freedoms of 1950; article 25 of the American Convention on Human Rights of 1969 ('effective recourse'); article 6 of the Declaration on the Elimination of All Forms of Racial Discrimination.

[18] For its bearing on the question of criminal prosecution see chapter 7 *supra*, at 171-6.

[19] In *C.A. v. Italy*, Doc A/38/40, at 237, the applicant attacked legislation which excluded the possibility of a suit at law when an appeal was made to the President. The Human Rights Committee decided against the applicant on the basis that he had chosen to use an alternative procedure.

[20] Article 6 provides that 'In the determination of his civil rights and obligations ... every one is entitled to a ... hearing by [a] ... tribunal'.

[21] *Golder* judgment of 21 February 1975, Series A no. 18, at 17-8.

[22] See *Eduardo Bleier v. Uruguay*, Communication No. R.7/30 (23 May 1978), U.N. Doc. Supp.No 40 (A/37/40) at 130 (1982), par. 15 (although the state was here 'urged' to pay compensation).

[23] See *Silver and Others v. U.K.*, judgment of 25 March 1983, par. 113 (although compensation was here said to be a component specifically of an effective remedy for dispossession and 'where appropriate').

[24] See *Martin Javier Roca Casas v. Peru*, Case 11.233, Report No 39/97, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 799 (1997); *Pastor Juscamaita Laura v. Peru* 10.542, Report No. 19/99, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc.7 rev. at 776 (1998)

Inter-American Court of Human Rights. In the landmark *Velasquez Rodriguez* case the Inter-American Court of Human Rights stated that:

> The State has 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 victims adequate compensation* [my emphasis].[25]

Subsequently, the Inter-American Commission has held amnesty laws that restrict civil liability to contravene the provisions of the American Convention on Human Rights of 1969. In *Masacre Las Hojas v. El Salvador*,[26] the Inter-American Commission cited this passage with approval when it held El Salvador's first amnesty law of 1987, which covered both civil and criminal proceedings,[27] to violate the right to judicial protection.[28] A similar decision was reached in *Lucio Parada Cea v. El Salvador* with respect to El Salvador's amnesty law of 1993, where it was stated that, 'in expressly eliminating all civil liability (article 4), this law prevented the surviving victims and those with legal claims on behalf of Lucio Parada and Héctor Miranda Marroquín from access to effective judicial recourse and a decision on their possible efforts to seek civil compensation'.[29] This logic was extended to an amnesty solely for criminal liability in *Juan Meneses v. Chile*, on the basis that the Chilean Amnesty Decree Law made it 'virtually impossible to establish responsibility before civil courts'.[30]

However, all these obligations are frequently only acceded to by states in transition once they have transformed into democratic institutional frameworks. The resulting doubts over the retrospective application of these treaty provisions raises the important question of the position in terms of customary international law. Neither the municipal courts of transitional societies nor the international human rights bodies have adequately addressed this issue.

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[25] (1989) 28 *I.L.M.* 291, at 324.

[26] Case 10.287, Report No. 26/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993).

[27] See note 6 *supra*.

[28] Note 26 *supra*, at paras. 9-11.

[29] See *Lucio Parada Cea et al v. El Salvador*, Case 10.480, Report No. 1/99, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 531 (1998).

[30] See *Juan Meneses et al v. Chile*, Cases 11.228, 11.229, 11.231 and 11.182, Report No.34/96 of 15 October 1996 (1999) 6 IHRR 89, at 99, para. 65.

However, Catherine Jenkins has remarked that:

> Despite the increasingly strong line taken by the human rights bodies of the UN and the American Convention concerning amnesties from criminal prosecution, it may fairly be said that the customary international law position remains confusing and unsatisfactory. Leaving aside the question of criminal prosecution and the satisfaction of a judgment establishing criminal responsibility, however, there is universal agreement that reparation in the form of official investigation, compensation and rehabilitation must be made.[31]

The previous two chapters have attempted to clear up some of the confusion over the customary position with respect to the obligation to prosecute human rights violations. The assertion that there is universal agreement that custom requires compensation is, however, possibly overstating the reality.[32] The decisions of human rights bodies that assert the existence of such a duty do so clearly within the framework of the treaties that they are interpreting, and even then do not foreclose the possibility of reasonable limitation of their provisions.

The fact that the treaties entered into force for states in question in those cases after the events giving rise to the infringements of human rights does not necessarily imply that the human rights bodies were relying on customary law for their positions. In *Consuelo v. Argentina*, the Inter-American Commission[33] held that the violation is of the right to judicial protection which continues to apply after the entry into force of the treaty for Argentina, even though the initial infringements of human rights occurred before Argentina was a party to that Convention. This approach differs from that taken by the Committee against Torture in *O.R., M.M. and M.S. v. Argentina*, where petitions were held to be inadmissible on the basis that the alleged acts of torture preceded the

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[31] See Catherine Jenkins, 'After the Dry White Season: the Dilemmas of Reparation and Reconstruction in South Africa' (2000) 16 *SAJHR* 415.

[32] A similar view is also expressed in the *Truth and Reconciliation Commission of South Africa Report*, 1998, at 172: 'The right of victims of human rights abuse to fair and adequate compensation is well established in international law.'

[33] See *Consuelo et al. v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993), at para. 16.

entry into force of the Convention for the state in question.[34] In that case, reliance was placed on customary law to rule on the invalidity of the impugned amnesty law,[35] but this was the customary law on torture and in relation to a law that immunized the offender from criminal as opposed to civil liability.

The human rights treaties and their implementation at the domestic level do not, in any event, seem to provide clear and strong evidence of a customary right to compensation. The duty to compensate asserted by human rights bodies is at best normally implicit in the right to an effective remedy. It is, on the face of the provisions, not an express and absolute right in the case of all human rights violations in all circumstances.

There are provisions in human rights treaties that expressly require compensation. However, these relate to specific contexts, in most cases where there has been an unlawful detention or miscarriage of justice in a criminal matter. Article 9 (5) of the ICCPR provides that, 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation', and Article 14(6) of the same Covenant provides that 'the person who has suffered punishment as a result of such conviction [being a miscarriage of justice] shall be compensated according to law ... '. Article 5(5) of the European Convention on Human Rights and Fundamental Freedoms requires that '[e]veryone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation'. Article 10 of the American Convention on Human Rights provides that '[e]very person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice'. Article 21(2) of the African Charter on Human and Peoples' Rights stipulates that '[i]n case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'. The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment[36] also provides in Article 11 for 'redress and compensation in accordance with national law'. Similarly, the Convention against

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[34] See *O.R., M.M. and M.S. v. Argentina Communication* Nos. 1, 2 and 3/1998, 23rd December 1989, U.N. GAOR XLV Sess. (1990), at para. 111-2.

[35] *Idem.*

[36] Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975.

Torture and Other Cruel, Inhuman and Degrading Treatment requires 'an enforceable right to fair compensation'. It is only in time of international armed conflict that Protocol I of 1977 to the Geneva Conventions of 1949 makes a general stipulation in Article 91 to the effect that '[a] party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to compensation.'[37]

The right to compensation would of course usually be implicit in the broader notion of a right to an effective remedy, as reflected in the opinion of the bodies interpreting these treaties. However, this is not necessarily always the case and, as was argued in chapter 6, these protective rights may by implication be subject to reasonable limitation in the interests of achieving or preserving the democratic institutions of a state. It is difficult to read anything from the domestic implementation of the right to judicial protection, which forms part of all democratic societies independently of their international obligations.

Expert opinion reflects this broad position. At its 41st session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities passed resolution 1989/13, whereby it mandated special rapporteur Theo van Boven to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights.[38] The special rapporteur presented his final report at the Sub-Commission's 45th session in 1993. In the *Proposed Basic General Principles and Guidelines*, the existing duty is expressed widely as one to prevent violations, investigate violations, take appropriate action against violators and *afford remedies* to the victims.[39]

This ambiguity in the customary obligation to provide compensation is also reflected in the UN Draft *Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of*

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[37] For the pronouncement of the duty in specific contexts of war see article 68 of the Geneva Convention relative to the Treatment of Prisoners of War (prisoners of war) and article 55 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (requisitioned goods).

[38] See note 13 *supra*.

[39] See note 13 *supra*: IX. Proposed Basic Principles and Guidelines (It is, however, noteworthy that although the special rapporteur reviews state practice and judicial decisions, he does not in the study make any general findings about the customary position).

violations of International Human Rights and Humanitarian Law.[40] Compensation is not listed among the existing obligations under international law, as opposed to affording appropriate remedies and reparation to victims.[41] In subsequently describing the forms of reparation, the *Principles and Guidelines* then provide that 'States *should* provide ... restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition., and that 'Compensation *should* be provided' [my emphasis].[42]

The *Principles and Guidelines* include among existing obligations the duty to adopt 'appropriate and effective judicial and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.' They further specify that the obligation to respect, ensure respect for and enforce international human rights includes within its scope the duty to '[p]rovide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of the responsibility for the violation'. The rules on denial of justice originally developed in the context of the rules on state responsibility for injuries to aliens now extend to the human rights violations of a state's own citizens. They do not, however, clearly exclude the legitimacy of amnesties for the maintenance of national peace and may equally be limited for the preservation of democracy.

Human rights treaties do, on the other hand, evidence a basic minimum requirement of the investigation of human rights violations and some form of reparations or redress for the victims. These constitute the basic common denominator of the procedural protection requirements of all human rights treaties. These requirements are consistently reflected in the jurisprudence and expert opinion.

The foregoing analysis reveals that there is a general obligation on the state to ensure that victims receive reparation for wrongs done to them deriving from the obligation to ensure rights in conjunction with the rights to fair trial and effective remedy. Nonetheless, the state does appear to have some latitude in the execution of this obligation. The

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[40] UN Doc. E/CN.4/2000/62 of 18 January 2000 (Commission on Human Rights: final report of the Special Rapporteur, Mr. M. Cherif Bassiouni. submitted in accordance with Commission resolution 1999/33).

[41] Ibid., esp. principle 3(d) and (e).

[42] Ibid., principles 21 and 23. Paragraph 9 of Professor Bassiouni's report provides that '[t]he principles and guidelines use the word "shall" for existing international obligations and the word "should" for emerging norms and existing standards.'

question arises as to what extent can civil amnesties be accommodated within this latitude.

3. *Reconciling Municipal Amnesties for Civil Liability with International Law*

There can be little doubt that amnesty from civil liability for human rights violations can only be reconciled with the exigencies of international law in so far as the state has furnished some mechanism of investigation and some form of reparations. This is reflected in principle 25 of the *Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*,[43] which provides that:

> Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:
>
> (b) They shall be without effect with respect to the victim's right to reparation

The determination of issues of the legality of amnesty from civil liability enjoins an inquiry into the precise measures required in order for a state to comply with its duty to provide reparations. The concept of reparation is a broad notion involving some form of making amends to the victim of past wrongs. Its scope reaches beyond any particular institutional, procedural, form or time constraints. It does not therefore necessarily employ the courts or any of the procedural constraints of a court including time limits for claiming redress. Thus, the duty to provide reparations has been and continues to be acknowledged or claimed in relation to the pre and post World War II Nazi[44] and

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[43] Annexed to the revised final report on the question of the impunity of perpetrators of human rights violations, prepared by Louis Joinet pursuant to decision 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

[44] See Frederick Honig, 'The Reparations Agreement Between Israel and the Federal Republic of Germany' (1954) 48 *AJIL* 564; Kurt Schwerin, 'German Compensation for Victims of Nazi Persecution' (1972) 67 *Northwestern University Law Review* 477.

Japanese[45] persecutions, the 1904 extermination of the Herero in the former South West Africa[46] and the European and American enslavement of Africans.[47] By definition the forms of reparations in these instances would require flexible and ingenious sculpturing that would go beyond the needs of the original direct victims and overcome calculus and economic impediments. The forms of reparation have been said to include: 'restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.'[48]

The 'reparations' concept therefore differs from and embraces the idea of an effective remedy. This narrower conceptualization represents a tighter, more procedural and less pliable abstraction, which subsumes access to justice, revelation of truth and restoring worth. While the right to an effective remedy may be limited in very restricted circumstances and ways in terms of international human rights obligations, it is doubtful whether a state can ever escape the duty to provide some form of reparations to victims of human rights violations. This is a basic minimum component in all circumstances of the general obligation to ensure and respect the victim's rights.

The real point of contention in relation to amnesty therefore rests in what exactly is required in terms of the duty to proffer reparations. In this regard, some commentators have referred to the celebrated passage in the judgment of the Permanent Court of International Justice in the *Chorzów Factory (Indemnity)* Case,[49] where the Court stated that:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been

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[45] See Tong Yu, 'Reparations for Former Comfort Women of World War II' (1995) 36 *Harvard International Law Journal* 528.

[46] See Regina Jere-Malander, 'The tribe Germany wants to forget' *new african*, March 2000, at 16.

[47] See Rhonda V. Magee, 'The Master's Tools, From the Bottom up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse' (1993) 79 *Virginia Law Review* 863; 'For whom the bell tolls ... the legal basis for the African reparations claim' *new african*, December 1999, issue 380, at 20.

[48] See *Principles and Guidelines*, note 40 *supra*, principle 21.

[49] PCIJ Reports, Series A, No. 17, 1.

> committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

The International Law Commission's Draft Articles on State Responsibility provide that 'the injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.' It would be fair to say that it is a general principle of law that damages should put the person injured by a wrong back in the position in which that person would have been had the wrong never been committed.

However, it should be born in mind that the Permanent Court and the International Law Commission were in each case addressing their minds to injuries to states as opposed to injuries by a state mainly to its own nationals on its territory. The latter is governed by the international law of human rights. In terms of international law the relations between states is one of legal equality. That is not the case with respect to individuals and states since individuals only have qualified legal personality and the treatment by a state of its own nationals is subject to minimum standards rather than comprehensive regulation by international law. It therefore does not follow that rules on state responsibility towards individuals will reflect the relations of equality as between states implicit in the notion of full reparation.

Neither do the relations between states generally embrace the characteristic of mutual injury. Since a state represents its people, an injury to its people is an injury to itself and reparation from the state to the people may also constitute an injury to the people of that state in so far as the state's financial capabilities are significantly diminished by such reparations.

Indeed, a state that has violated human rights may find itself liable for reparations simultaneously to the injured individuals and to the states party to the human rights treaties or the states having the right of diplomatic protection over certain individuals.

Accordingly, far from laying down a firm principle of *restitio in integrum* in the provision of reparations to individuals for human rights violations, human rights treaties and, by extension, customary

international law, leave states a margin of appreciation[50] in the extent to which the right to an effective remedy may be limited.

It is submitted that in the present context, the answer to the question of the nature and extent of reparations will differ according to whether one is addressing a state's obligations during a period of normal liberal democracy or a period of democratic transition, exceptional in the historical evolution of the state. These two dimensions differ considerably for the purposes of legal discourse on reparations. In ordinary circumstances, reparations serve as a means of achieving justice as between the parties and maintaining the rule of law within the society. In periods of radical political transformation they serve wider purposes for all the victims of the society as a whole and all the victims of past oppression. As Professor Teitel puts it:

> Law's overriding function is to advance the transition in such times. Law does so when it recognises the state's own wrongdoing, restores victims, and vindicates the legal system.[51]

The normal dynamics of the democratic legal system may not facilitate the advance of transition. There are some significant differences between periods of transition and periods of normal liberal democracy. In periods of transition, the emerging government or government emerging from conflict may still be struggling for a firm grip on the pillars of power that enable the maintenance of stability and the rule of law. In the transition to democracy, the road may be difficult or impossible if the leaders of the old regime retain the possibility of holding or recapturing the reigns of power, and will face definite incarceration if they co-operate. Similarly, in periods of transition from conflict, the opponents may be in a position to prolong or reignite the conflict. Moreover, in such periods, the number of victims of past wrongs and, consequently, potential claimants will often exceed substantially the normal work load of the courts in ordinary times of liberal democracy. From one perspective, the entire society was a victim.

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[50] See *Handyside* judgment of 7 December 1976, Series A no. 24; *Ireland v. United Kingdom*, Series A no. 25; *Sunday Time* case, Series A no. 30; *Powell and Rayner* case, Series A no. 172; *Margareta and Roger Andersson v. Sweden* 25 February 1992, Series A no. 226, especially Judge Lagergren (dissenting).

[51] Ruti Teitel, *Transitional Justice*, 2000, at 129.

In periods of societal transformation a substantial proportion of the many victims of the former dispensation may not have been able to realistically institute proceedings in the prevailing context, and may be time-barred. Other victims may be able to institute civil proceedings without falling foul of the limitation period simply because they suffered injury shortly before or during the transition to democracy. Consequently, there may be an unwarrantable inequality in the treatment of the victims according to the time of their injury.

Public policy considerations therefore imply that transitional justice involves novel and tailor-made solutions to the problem of reparations. In one respect a stricter approach is required. The attribution of wrongfulness to the state, the inhibitions of the victim during oppressive times and the link between peaceful co-existence and reparations, all militate against close adherence to time limits. On the other hand the form of reparations and the mechanisms of distribution require at one time a more flexible and a more refined model.

Such flexibility and refinement may require contravention of the related international legal right of access to justice, which forms an essential component of the narrower concept of an effective remedy. There is considerable force in the proposition that the right of access to justice should be unfettered by transitional flux. A state may forgo its own right to punish the perpetrators of human rights violations on behalf of the society, but can it legitimately deprive the individual of his or her right to have private rights and obligations determined through the ordinary mechanisms for seeking justice? After all, this right to access justice is the right of the individual and not that of the state.

The right of access to justice is expressed in human rights treaties in the interrelated provisions for the right to a hearing and the right to an effective remedy. This does not necessarily entail access to courts. Thus, article 7 of the African Charter on Human and Peoples' Rights of 1981 provides that 'every individual shall have the right to have his cause heard'. This is said to comprise 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'. However, the right is a right to 'an appeal' rather than a right 'to appeal' to the competent national organs. The emphasis is therefore on the ability to appeal to an organ as opposed to the ability to appeal to any organ that is competent.

In the context of the European Convention on Human Rights, the right in article 6(1) to have 'in the determination of his civil rights and

obligations ... a fair and public hearing' has been interpreted to imply the right of access to court. This right is also confirmed as a constitutional right in the domestic laws of states.[52] However, that right has also been held to be subject to reasonable limitation. In *Lithgow and Others v. The United Kingdom* the court noted that:

> The right of access to courts secured by Article 6(1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals'.[53]

Thus, in *Ashingdane v. United Kingdom*[54] a restriction to cases of bad faith and negligence in respect of the right of mental patients to access court was held to be justified by the legitimate aim of avoiding a situation where those in charge of their care were subjected to unnecessary litigation.

The case of *Fayed v. United Kingdom*[55] more directly addresses the possibility of limitation of the right of access to court to cater for immunity in the interests of public policy. Ongoing hostilities between the Executive Director of Lonrho P.L.C. and the Fayed brothers in relation to the latter's takeover of House of Fraser culminated in the Secretary of State for Trade and Industry of the United Kingdom government requesting an investigation. There were allegations that the takeover was effected through statements of dishonesty. The appointed inspectors confirmed the truth of the allegations and their report was widely published. The Fayed brothers claimed before the European Commission and the Court that their right of access to court had been denied by virtue of the Inspectors' immunity from defamation proceedings. The European Court of Human Rights held that this limitation on the right of access to court was justifiable. It pursued the legitimate aim of securing the public interest in safeguarding the

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[52] See *Vernon Lee Bounds, etc., et al., v. Robert (Bobby) Smith et al.* 430 US 817, 52 L Ed 2d 72, 97 S Ct 1491 (SC); *Raymond v. Honey* [1983] AC 1 (HL); *R. v. Lord Chancellor, Ex parte Witham* [1998] QB 575.

[53] *Lithgow and Others v. The United Kingdom*, judgment of 8 July 1986, Series A, 102, at 71, para. 194 (1986) 8 EHRR 329), citing *Ashingdane v. The United Kingdom*, judgment of 28 May 1985, Series A, no. 93, at 24-25, para. 57; see note 54 *infra*.

[54] *Ashingdane v. United Kingdom* (1985) 7 EHRR 528.

[55] *Fayed v. United Kingdom* (1994) 18 EHRR 393.

interests of parties concerned in the affairs of public companies and in ensuring the soundness and credibility of the company law structures.

In circumstances of radical transformation to democracy or emergence from all-consuming conflict, the role of law in facilitating the transition may require a reasonable limitation on the right of access to court providing that this is proportional to the legitimate aim pursued. To be proportional the rights of victims must be preserved to the greatest possible extent, within the constraints of what is required for a successful social transformation. One may suggest the existence of certain basic minimum standards in this regard.[56] First, there must be a thorough investigation into past human rights violations. Secondly, serious international crimes should generally be excluded from the scope of the limitation. Thirdly, some mechanism must be provided for providing adequate reparations to the victims of human rights violations. Fourthly, this mechanism must provide for a hearing for the victims so that they may have the extent of their losses determined by an impartial forum. Finally, the mechanism must be widely publicized.

4. *Evaluating Some Existing Precedents on Amnesty for Civil Liability*

An amnesty that is unconditional, extinguishes civil liability and is not accompanied by any mechanism for the reparation of victims cannot satisfy the state's obligation to provide reparation. So, El Salvador's amnesty decree no. 805 of 27 October 1987 provided for 'Full and absolute amnesty'. Similarly, amnesty decree no. 486 of 20 March 1993[57] covered 'all civil responsibilities'[58] and expressed itself to be 'a broad, absolute and unconditional amnesty'.[59] Those persons who are eligible need only present themselves to a judge, who will issue a document, or in the event that a process begins can have the matter dismissed. Thus, the truth is buried in oblivion and the law provides for no independent means to compensate the victims or their families.

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[56] See chapter 12 *supra*, and annex 1.

[57] See Law on General Amnesty for the Consolidation of Peace, Decree N. 486 of 20 March 1993: reproduced in Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Prior Regimes*, Vol. III, *Laws, Rulings and Reports*, at 546.

[58] Article 4(3): ibid.

[59] Article 1: ibid.

This law had been preceded by the Mexico Peace Agreements[60] that had provided for the establishment of a Commission on Truth.[61] The mandate of the Commission on Truth was, however, limited to serious acts of violence and had no specific connection to acts for which amnesty had been or would be granted. Its report did not unveil the truth in relation to all acts that might be subject to amnesty and offered illustrations rather than a complete and comprehensive picture of all human rights violations.

The Supreme Court of Justice refused to entertain a challenge to the constitutionality of the amnesty law on the basis that being an amnesty it was purely political in nature and therefore not subject to judicial control in accordance with the doctrine of separation of powers.[62] In contrast the Inter-American Commission held El Salvador to be in breach of its international obligations in passing its amnesty law of 1987 by legally eliminating 'the possibility of an effective investigation ... as well as proper compensation for victims and their next-of-kin by reason of the civil liability for the crimes committed'.[63]

Chile's Decree Law 2191 of 10 March 1978 was an amnesty that was confined to criminal liability.[64] It did not expressly or by implication exclude the possibility of civil proceedings. Chile's new democratic government, while failing to revoke the amnesty law, set in motion a process of investigation of past human rights violations through the establishment of a truth commission (*Comision Nacional de Verdad y Reconciliacion*). It also passed a law to establish the National Corporation for Reparation and Rehabilitation.[65] This would administer for the families of victims a lifelong pension of no less than the average income of the family in Chile, free health care services, educational benefits and an exemption from military service for victims' children. In so far as the law secured peaceful transition and reconciliation it

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[60] See also chapter 3 *supra*, at 61-2.

[61] UN Doc. S/25500 (1 April 1993).

[62] See Proceedings No. 10-93 (20 May 1993): reproduced in Kritz, note 57 *supra*, at 549.

[63] *Masacre Las Hojas v. El Salvador*, Case 10.287, Report No. 26/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993).

[64] See Americas Watch, *Human Rights and the "Politics of Agreements": Chile during President Aylwin's First Year* (Human Rights Watch, 1991), 40-4, 50-2: reprinted in Kritz, note note 3 *supra*, vol. II, Country Studies, 499 at 500; see also chapter 3 *supra*, at 58-61.

[65] Law No. 19,123 of 31 January 1992: reproduced in Kritz, note 57 *supra*, at 685.

could therefore be somehow reconciled with a genuine wish on the part of the government to reconcile the nation and respect human rights. It was a far cry from the broad amnesty adopted in El Salvador.

This notwithstanding, it is doubtful whether the measures taken by the government were sufficient to fulfil its obligation to investigate human rights violations and provide reparations to the victims of such violations. Civil action remained a theoretical option as long as there was no thorough investigation of human rights violations. As with the El Salvadorian truth commission, the Chilean model had a mandate which was restricted to a class of violations of human rights. Its analysis was confined to serious violations, to be understood as 'situations of those persons who disappeared after arrest, who were executed, or were tortured to death' [sic]. Acts of torture not leading to death and serious assaults were consequently not included in the Report of the National Commission of Truth and Reconciliation (Rettig Report).[66] In addition, there was no specific connection between those violations investigated and reported on and those covered by the amnesty law.

The position is less clear when one is dealing with a civil amnesty offered in return for the truth and accompanied by a means for providing reparation to the victims. This is the case with South Africa's amnesty law.[67] Although the law extinguishes civil as well as criminal liability, this is only achieved once the amnesty applicant has given full disclosure of the facts surrounding the wrong for which amnesty is being applied. Further the Amnesty Committee can make recommendations to the Reparations Committee and this Committee can pursuant to those recommendations or on its independent initiative recommend measures of reparation for the victim.

It has been increasingly understood in the context of civil conflicts that providing the victims of wrongs and their families with a full picture of the truth plays an important role in securing rights. There is a need to know what happened and the whereabouts of the remains of friends and family. Without this knowledge it is harder for individuals to move forward with their lives and reconcile themselves to their losses. While amnesty forces victims to forgo the, sometimes theoretical, right to full compensation, this is in exchange for the truth as the first step in reparation for a wider group of individual victims.

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[66] 9 February 1991: see Kritz, note 57 *supra*, at 105.

[67] See further chapter 3 *supra*, at 42-7; chapter 4 *supra*, at 86; chapter 6 *supra*, at 151-9; chapter 11 *infra*, at 295-301.

While the truth will not alone constitute adequate reparation, it provides a cogent reason for affording the state more latitude in what it is required to do to ensure the victim's reparation.

In evaluating the legality of the South African amnesty law in terms of international law, one is confined to the application of customary law since the offences in question occurred before the entry into force of relevant human rights treaties for South Africa. The concept of a continuing violation of the right to judicial protection, recognized by all human rights bodies[68] and applied by the Inter-American Commission of Human Rights in the context of amnesty,[69] is inapplicable to the treaties to which South Africa is a party. Unlike the American Convention that provides for an independent right of judicial protection, not only for violations of the convention but also for violations of the laws of the state,[70] the right to judicial protection in terms of the ICCPR and the African Charter specifically relate to violations of the provisions of the treaties in question.

It is possible to affirm the legality of this form of amnesty when accompanied by mechanisms for reparation, even though the right of access to court may be restricted. The issue of the constitutionality of the South African amnesty for civil liability came before both the Cape Provincial Division[71] and the Constitutional Court of South Africa.[72] While the former confined its judgment to the proper interpretation of the word amnesty in the constitution, the latter examined the rationale for extending amnesty to civil liability. Including civil liability within the scope of amnesty was explained as a necessary incentive to obtain the truth from the perpetrator. Mahomed DP, noted that:

> Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests. There is nothing in the language of the epilogue [to the constitution] which persuades me that what the makers of the Constitution intended to do was to encourage

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[68] See *De Becker* 2 YECHR 214 (1958-59) (Eur. Commission on Human Rights); *Sequeira v. Uruguay*, *supra*. (Human Rights Committee); *Massiotti v. Uruguay*, Communication No. 25/1978 (Human Rights Committee).

[69] See *Consuelo v. Argentina*, note 33 *supra*, at 16.

[70] See article 25.

[71] *Azanian Peoples' Organization (AZAPO) and Others v. Truth and Reconciliation Commission and Others* 1996 (4) SA 562.

[72] *Azanian Peoples' Organization (AZAPO) and Others v. President of the Republic of South Africa and Others* 1996 (4) SA 671.

> wrongdoers to reveal the truth by providing amnesty against criminal prosecution in respect of their acts but simultaneously to discourage them from revealing that truth by keeping intact the threat that such revelations might be visited with what might in many cases be very substantial claims for damages.[73]

Given that the truth may be viewed as being in itself a form of satisfaction for victims and guarantee of non-repetition, as well as the foundation of rehabilitation, it is easy to accept this justification for limiting access to the courts. Providing the state is prepared to shoulder the burden for providing more substantial forms of reparations to the victims, closing off the courts to the potential substantial civil claims would seem to be proportional to the legitimate aim pursued. Particularly in the social circumstances prevailing in South Africa, and having regard to the three year period of prescription applied to civil matters, it is doubtful whether many victims' families could have successfully obtained the truth or any form of reparation through civil litigation against the perpetrators.

The South African amnesty law goes further than restricting civil proceedings against the perpetrator because it prevents the state from being vicariously liable for acts or omissions to which amnesty has been applied.[74] This limitation on the right of access to the courts cannot be justified on grounds of the importance of revealing the truth since the perpetrator's incentive to obtain amnesty remains in most cases unaffected by the state's liability. This aspect created more difficulty for the Constitutional Court. Mahomed DP and Didcott J disagreed on whether the fact that many could not instigate proceedings due to prescription could form part of the justification for including the state within the immunity. While Mahomed placed weight on the efficient use of resources, Didcott J preferred to rely, with some expressed hesitation, on the need to close the book on the past:

> so that the catharsis thus engendered may divert the energies of the nation from a preoccupation with anguish and rancour to a future directed towards the goal which both the postscript to the Constitution and the preamble to the statute have set by declaring in turn that,

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[73] Ibid., at 693E-F.

[74] See also chapter 4 *supra*, at 92-3.

> '...the pursuit of national unity, well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society'.

From the perspective of international law, which was not analysed on this point, the provision of meaningful reparations equally to the large number of victims of a state of former oppression, in which successful civil litigation was difficult, is a reasonable limitation on the right of access to court. The state has a margin of appreciation in the required extent of the limitation and determination of the nature and means of reparations, providing the reparations constitute a meaningful substitute for civil litigation in the context of transition.

Another contentious aspect of the potential scope of the South African amnesty law, which was not at all canvassed by the South African judiciary, is the applicability of the amnesty provision to civil liability for serious crimes against international law. In terms of the general framework of flexibility provided by the human rights customary and treaty regime, it is nonetheless necessary not only that the limitation of the right of access to court pursues a legitimate aim, but also that it is proportional to that objective. This requirement necessitates keeping the restrictions on justice within the narrowest possible bounds and would generally not countenance amnesty from civil liability for serious crimes against international law. This is a special category of offence that goes beyond the relationship between the state and the individual and constitutes the paramount concern of the international community as a whole. Thus, the Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity effectively exclude serious crimes under international law from the permissible bounds of amnesty.[75]

The number of cases involving such serious international crimes would not, in the South African context, have had any substantial effect on the state's ability to implement a program of meaningful reparations for the many victims of past oppression. It is therefore submitted that in so far as the South African amnesty permits amnesty from civil liability for serious crimes against international law, that amnesty is inconsistent with the state's international obligations.

In other respects, as long as meaningful reparations are provided to victims of the human rights violations for which amnesty has been granted, the South African amnesty for civil liability does not

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[75] Principle 25 (a): see note 43 *supra*.

contravene the right to reparations in terms of international law. Given that reparations in these circumstances are a replacement for civil damages, to be meaningful they must go as far towards reinstating the rights that are infringed as the desire for equal redress for the victims of the past oppression will allow. As the Truth and Reconciliation Commission has itself noted:

> 'reparation is essential to counterbalance amnesty. The granting of amnesty denies victims the right to institute civil claims against perpetrators. The government should thus accept responsibility for reparation.'[76]

In terms of the South African Promotion of National Unity and Reconciliation Act,[77] a Committee on Reparation and Rehabilitation (hereinafter referred to as the Reparations Committee) was established to make recommendations as to reparation for victims.[78] Where amnesty is granted in terms of the Act and the Amnesty Committee is of the opinion that there was a victim, it is directed to refer the matter to the Reparations Committee.[79]

Reparation is defined as 'any form of compensation, ex *gratia* payment, restitution rehabilitation or recognition'.[80] The Reparations Committee has divided reparation into urgent interim reparation and final reparation.[81] Urgent reparation was to be provided to victims in urgent need. It consisted of '[i]nformation about and/or referral to appropriate services (government, non-government and/or private sector), depending on type of need' and '[f]inancial assistance in order to access and/or pay for services deemed necessary to meet specifically identified urgent needs'.[82] Payment was based on a sliding scale ranging from R2,000 (approx. $250) for the applicant to R5,705 (approx. $700) for applicant and his or her five or more dependents.[83]

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[76] *Truth and Reconciliation Commission of South Africa Report*, 1998, vol. 5, at 170.

[77] Act 34 of 1995.

[78] Ibid., section 23.

[79] Ibid., section 22.

[80] Section 1(1) (xiv)

[81] See *Truth and Reconciliation Commission of South Africa Report*, 1998, vol. 5, at 180-95.

[82] Ibid., at 181.

[83] *Idem*; Dependants would include parents (or those who acted /act in place of a parent), spouse (according to customary, common, religious or indigenous

In terms of the recommendations for final reparation, this is divided into individual reparation grants, symbolic reparation and legal and administrative interventions and community rehabilitation. Individual reparation grants are said to consist of a 'monetary package ... based on a benchmark amount of R21,700 [$2,500], which was the median annual household income in South Africa in 1997'.[84]

Included in the category of symbolic reparation and legal and administrative interventions are the issuing of death certificates; exhumations; reburials and ceremonies; headstones and tombstones; declarations of death; expunging of criminal records; expediting outstanding legal matters related to the violations; community interventions; renaming of streets and facilities; memorials and monuments; culturally appropriate ceremonies; renaming of public facilities and a day of remembrance.[85] Community rehabilitation is centered around facilitating mental health services, education and housing for communities particularly affected by gross violations of human rights.[86]

It is further recommended that to help implementation, a national implementing body should be established and housed in the President's Office so as to have access to all the relevant ministries.[87]

Unfortunately, the negotiations at Kempton Park, Johannesburg, and the resulting constitutional provisions did not resolve the reparations issue and no legal text formally gives expression to the recommendations of the Truth and Reconciliation Commission. These recommendations have so far hardly been implemented and there have even been signs that the government may backtrack on the individual financial grants.[88] The international legality of the South African amnesty process hinges on the proper formulation and implementation of its reparations policy. The intractable link between amnesty and reparation therefore prevents any definitive finding on the legality of all aspects of the South African process. For the moment, a clear area of

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law), children (either in or out of wedlock or adopted) or someone the victim has or had a customary or legal duty to support: ibid., at 176.

[84] Ibid., at 184.

[85] Ibid., at 188-90.

[86] Ibid., at 191-4.

[87] Ibid., at 194.

[88] See Jenkins, note 31 *supra*.

difficulty lies in the Committee on Amnesty's interpretation of the amnesty legislation to cover serious crimes against international law.[89]

The state has a margin of, but not an absolute, discretion in the determination of measures of reparation that satisfy a mechanism allowing for the legitimate limitation on the rights of access to court. An international tribunal would have to assess whether the extent of the measures is proportional to the legitimate aim pursued. This would appear to be the position in terms of customary or treaty law.

5. *Dovetailing the Normative Restrictions on Amnesty for Criminal and Civil Liability*

Like two parallel streams running into the mouth of a river, criminal and civil proceedings together serve to feed into the fountain of justice. One represents its public collective and the other its private individual face. When amnesty obstructs both streams, then the streams break up and take a different course and the fountain takes on the new character of transitional justice, a less forceful but equally purposeful fountain. As nature miraculously feeds the smaller, slower and less coherent rivulets into the mouth of the same river, transitional norms feed modified mechanisms into the fountain of transitional justice, giving the whole a new form of coherence. This coherence is conceived as an accommodation of international principles with national needs and a common exclusion of serious crimes against international law from the purview of both faces of amnesty, criminal and civil.

The exclusion of serious crimes under international law from the scope of amnesty thus emerges as the core restriction on alternative arrangements for transitional justice. Since these crimes constitute an affront to the conscience of mankind, the world community has an inherent interest in their suppression. State sovereignty's prerogative over the criminal activities on its territory crumbles in the face of an increasingly inter-connected world with developing mechanisms to ensure justice against the international offender.

The skeleton form of a set of principles on the limitation of municipal amnesty has begun to emerge. Yet, it is in the nature of transitional justice that it has a complex character that may need to change according to the individual circumstances prevailing within the

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[89] Consider the potential use of the concept of proportionality in excluding serious international crimes from the political offence category subject to amnesty: see chapter 11 *infra*. at 301-7.

state in transitional flux. This makes the pursuit of clear principles, although desirable, difficult. In the following chapter, I will attempt to reconcile the developments in municipal transitional amnesty with the context of the global yearning for justice.

CHAPTER 11

RECONCILING MUNICIPAL AMNESTY WITH GLOBAL JUSTICE: THE NEED FOR A PROTOCOL TO THE ROME STATUTE

1. Introduction

The body of this work reveals the existence of a carefully developed, yet uneasily defined, framework for combating the impunity enjoyed by those who commit international offences. In the fifth chapter the importance of viewing the amnesty problem from the global perspective was emphasised.[1] It was pointed out that this was not the priority of the national government in transition.[2] It may have serious political constraints to the prosecution of international crimes, an inability to freely determine the priorities of transitional justice owing to inequality of bargaining power and an altogether insular outlook on the requirements of international justice and the promotion of peace. On the other hand, elements of necessity push transitional societies into adopting quickly devised mechanisms for facilitating democratic transition and national peace. It is easy to sympathise with the leaders of a nation in this predicament. Similar considerations may apply in societies in transition from conflicts not involving a change in government.

The negotiators of these mechanisms often give little thought to their compatibility with the international regime at the early political stages of transition. It is left to the politicians and judicial organs of the emerging dispensation to justify the completed political package in terms of international needs to the world and its people. Somehow, the requirements of national peace and reconciliation in particular conflicts and the radical solutions adopted need to be reconciled with the long-term requirements of international peace and justice.

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[1] See chapter 5, *supra*, at 95-6.

[2] See ibid., at 132.

2. The South African Model

In previous chapters I have explained the history of amnesty in South Africa, the structure of the amnesty process and the treatment of the legality of amnesty by the South African courts.[3] The South African example possesses unique features meriting serious consideration and which invite a more refined approach to amnesty than has hitherto been adopted by international institutions. The circumstances giving rise to the need for amnesty provide a useful illustration of the need for a reconciliation of the needs of a transitional society with those of the international rule of law.

The non-whites of South Africa suffered one of the longest periods of oppression by one government in 20th century history.[4] This subjugation of the inhabitants began much earlier in a historical period dating from the first settlement in 1652. The first leader of the new nation, the great Nobel Peace Laureate Nelson Mandela, spent one of the longest periods of incarceration of any political opposition leader of the century.[5] Yet, the ANC leadership chose negotiation over bloodshed and, accepted amnesty for their former oppressors rather than punishment. Five years after the passing of the Act giving effect to this amnesty, the people still continue to build their nation hand in hand with their former oppressors. Rarely has the world witnessed a nobler or more humble gesture from a people.

This was nevertheless a matter of qualified choice. The alternatives were too risky to contemplate. Power had been won through negotiation. When everyone except the most stubborn establishment figures came to realise the futility of persisting with apartheid, the hand of friendship was offered by none other than the leader of the autocrats, the Nobel Peace Laureate and then President, FW de Klerk. After a remarkable announcement in Parliament in 1990,[6] the ANC was unbanned and Mandela, among others, released on 11 February 1990. This began a new era of negotiations for democratic reform.

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[3] See chapter 3 *supra*, at 42-7; chapter 4 *supra*, at 86; chapter 6 *supra*, at 151-9; chapter 10 *supra*, at 287-9.

[4] See James Barber, *South Africa in the Twentieth Century: a political history in search of a new nation state*, 1999.

[5] 27 years, which is more than half of the period of the total duration of *apartheid*.

[6] See *Hansard*, 2nd February 1990.

In 1993, in Kempton Park, the parties negotiated the establishment of a new coalition Government of National Unity in which the former enemies would temporarily share the reigns of power. The new draft interim Constitution contained no reference to amnesty, but a separate post-amble or epilogue was formulated from separate negotiations to address the contentious issue of past wrongs. It was in this context of co-operative change that the interim Constitution's amnesty clause was drafted.[7] It grew out of a political settlement of the interests of the outgoing and incoming governments, rather than from a reflective understanding of the global dynamics of law and peace. Yet, in the context it was difficult to imagine how the new government could take a high-handed attitude with their former oppressors.

In one sense this is little different from other situations where amnesties have taken effect after the reins of power have been handed over voluntarily or the former regime has retained the capacity to destabilize the peace process. Even the fact that certain Latin American examples involved amnesties installed by the former dispensation before leaving power does not sufficiently differentiate their justification from that in South Africa. These were former military rulers, who could have pursued a sustained civil war were it not for the grace of the incoming civilian governments in permitting the retention of these amnesties.[8]

The South African model of amnesty, however, differed significantly from these others in its accommodation of the underlying values of international human rights law.[9] It did this firstly by refusing to sacrifice the truth about the past and insisting on full disclosure of all the facts relevant to the commission of the offence, before the perpetrator could benefit from the clause. Secondly, it formed part of the integrated Truth and Reconciliation Commission, which consisted not only of a Committee on Amnesty to hear amnesty applications but also of two other committees that would convey the message that the rights of victims would not be forgotten.[10] These were a Committee on Human Rights Violations that would allow the victims to tell their stories and a Committee on Reparations and Rehabilitation that would

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[7] See Constitution of the Republic of South Africa Act 200 of 1993.

[8] See Diane Orentlicher, 'Settling Accounts: the Duty to Prosecute Human Rights Violations of a Prior Regime' 100 *Yale L J* 2537, at 2545.

[9] See also chapter 10 *supra*.

[10] See Promotion of National Unity and Reconciliation Act 34 of 1995.

look into means of addressing the question of reparation for the victims and their emotional as well as economic rehabilitation.[11]

Despite earlier General Assembly resolutions and the adoption in 1973 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, the international community has generally been supportive of South Africa's transitional process. It has not, thus far, made extensive demands for the trial of the apartheid criminals.

However, after the country's first democratic elections Amnesty International called on the government to bring to justice human rights violators.[12] There have been reservations about the amnesty process expressed by some elements of South African society,[13] including the family members of famous activists, the best known of these in international circles being Steve Biko.[14] No international tribunal or body has yet had the opportunity to pass judgement on this matter. In this respect, possible avenues of petition would be to the African Commission on Human and Peoples' Rights[15] and the Committee against Torture.[16] If and when South Africa ratifies the Protocol to the African Charter and it enters into force, the African Court on Human and Peoples' Rights may become a possible forum for recourse. The Human Rights Committee, governed by the Protocol to the International Covenant on Civil and Political Rights, could also serve this purpose.[17] However, South Africa only became subject to the jurisdiction of the African Commission in July 1996. Accordingly, the jurisdiction of these bodies would not cover the period of apartheid,

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[11] See chapter 10 *supra*.

[12] See *Amnesty International Report*, 1995, at 266.

[13] See Centre for the Study of Violence and Reconciliation, *Survivors' Perceptions of the Truth and Reconciliation Commission and Suggestions for the Final Report*, 1998.

[14] See *Azanian Peoples' Organization (AZAPO) and Others v. President of the Republic of South Africa* 1996 (4) SA 671; *Azanian Peoples' Organization (AZAPO) and Others v. Truth and Reconciliation Commission and Others* 1996 (4) SA 562.

[15] South Africa accepted the jurisdiction of the African Commission when it ratified the African Charter in July 1996.

[16] It accepted the jurisdiction of the Committee against Torture by making a declaration accepting its jurisdiction in terms of article 25 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment of 1984.

[17] South Africa has not signed or ratified this treaty.

or the entry into force of the interim Constitution or its implementing legislation, although they could consider continuing violations.[18]

The decisions of the Cape Provincial Division of the South African High Court and the Constitutional Court[19] hardly serve as strong indicators of the possible reaction of an international tribunal or other forum.[20] For one, being municipal courts they were principally concerned with the proper interpretation of the South African Constitution. Apart from that, the analysis of international law carried out by these courts was far from adequate.[21] These courts have been criticized for failing to address sufficiently the applicability of international humanitarian law,[22] the relevance of customary international law,[23] the existence and scope of an obligation to prosecute crimes against humanity,[24] and the relevance of international human rights treaties and jurisprudence.[25] With respect to relevant jurisprudence no reference was made to the decisions of the Inter-American Commission in regard to the amnesty laws[26] in Argentina,[27]

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[18] See further chapter 10 *supra*, at 274. This is, however, probably inapplicable here since the relevant provisions of these treaties are, it is submitted, not capable of independent violation.

[19] See note 14 *supra*.

[20] See chapter 3 *supra*, at 55.

[21] See note 20 *supra*; and see John Dugard, 'Is the Truth and Reconciliation Commission Process Compatible with International Law? An Unanswered Question.' (1997) 13 *SAJHR* 258.

[22] See Andreas O'Shea, 'Should Amnesty be Granted to Individuals Who are Guilty of Grave Breaches of Humanitarian Law?' (1997) *Human Rights and Constitutional Law Journal of Southern Africa* 17.

[23] See Dugard, note 21 *supra*; Catherine Jenkins, 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa' (2000) 16 *SAJHR* 415.

[24] See Ziyad Motala, 'The Constitutional Court's Approach to International Law and its Method of Interpretation in the "Amnesty Decision": Intellectual Honesty or Political Expediency?' (1996) 21 *SAYIL* 29.

[25] See Andreas O'Shea 'International Law and the Bill of Rights', in Butterworths *Bill of Rights Compendium*, 1999

[26] There was further pending litigation with respect to Chile's amnesty law: *Juan Meneses et al v. Chile* Cases 11.228, 11.229, 11.231 and 11.182, Report No.34/96, 15 October 1996 (1999) 6 IHRR 89.

[27] *Consuelo v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993).

El Salvador,[28] and Uruguay.[29] Nor was reference made to the Inter-American Court decision in the *Velasquez Rodriguez* case,[30] where it was held that there was an obligation on the state to investigate and punish human rights violations. Finally, no reference was made to the decisions and reports of the Human Rights Committee on the question of amnesty.[31] To the extent that international law was referred to both courts placed undue reliance on and misunderstood the meaning and effect of the reference to amnesty in article 6(5) of the Protocol II to the Geneva Conventions of 1949.[32]

It is submitted that the outcome of these decisions in upholding the constitutional validity of the Promotion of National Unity and Reconciliation Act of 1995 was correct. Also, in my judgement, there was nothing in the Act or its constitutional mandate that was clearly inconsistent with South Africa's international obligations.[33] The Genocide Convention probably has no application to events that occurred in South Africa. The evidence, as disclosed in the Truth and Reconciliation Report and amnesty decisions, does not appear to reveal any acts involving an intention to destroy in part or in whole any racial group.[34] South Africa was not a party to the Convention against Torture during apartheid and therefore, in line with the decision of the Committee against Torture in *O.R. et al v. Argentina*, the Convention is inapplicable.[35] Similar reasoning applies to the International Covenant

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[28] *Masacre Las Hojas v. El Salvador*, Case 10.287, Report No. 26/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc.14 at 83 (1993).

[29] *Rodriguez v Uruguay*, Communication No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988(1994)

[30] Judgment of 29 July, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4 (1989) 28 ILM 291

[31] See *Human Rights Committee, Comments on El Salvador*, UN Doc CCPR/C/79/Add.34 (1994); litigation was also under way in relation to Peru's amnesty law: see *Human Rights Committee, Comments on Peru*, UN Doc CCPR/C/79/Add.67 (1996).

[32] See *AZAPO v. Truth Commission*, note 14 *supra*, at 575A-B; *AZAPO v. President of the Republic of South Africa*, note 14 *supra*, at 690A-B; for an explanation of the flaw in this approach see O'Shea, 'Should Amnesty be Granted to those who are Guilty of Grave Breaches of Humanitarian Law', note 22 *supra*, at 18.

[33] See further chapter 10 *supra*, at 268-90.

[34] See *Truth and Reconciliation Commission of South Africa Report*, 1998.

[35] See *O.R., M.M. and M.S. v. Argentina Communication* Nos. 1, 2 and 3/1998, 23 December 1989, UNGAOR XLV Sess. (1990), at par. 111-2.

on Civil and Political Rights of 1966.[36] Likewise, it is submitted, a customary obligation to punish torturers could not apply to events occurring before the obligation had ripened. With respect to crimes against humanity, although the concept has developed to embrace acts and omissions committed in time of peace, there was during apartheid insufficient state practice to support an obligation to prosecute these acts in peacetime.[37] It has been argued that a general customary obligation to prosecute serious crimes under international law has only recently emerged.[38] As to international humanitarian law, there is some basis for arguing its application.[39] However, I will argue in the next section that grave breaches of the Geneva Conventions and other extremely serious violations of human dignity are capable of exclusion from the amnesty provisions of the South African Act.[40] In so far as there is a broad-based customary obligation to ensure reparation to the victims of human rights violations, it is still too early to judge whether this has been complied with.[41]

Accordingly, the consistency of the amnesty process as a whole with international law would have to await the application of the Act by the three Committees created in terms of its provisions and any action or legislation put into effect in order to implement their recommendations.[42] These committees could proceed on the basis that it had been settled by the Constitutional Court that the Act was not unconstitutional, and that the epilogue and the Act were not *per se* inconsistent with international law. Nevertheless, one might have expected that the Committee on Amnesty and the Committee on Reparations would consider the application of international law in the concrete application and interpretation of the Act in individual cases. Sadly, only the Committee on Reparations has given credence to international law in the performance of its task.[43] It remains to be seen whether the Truth Commission will adequately address the issues of

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[36] See further chapter 10 *supra*., at 274-5.
[37] See chapter 9 *supra*, at 245-51.
[38] See chapter 9 *supra*.
[39] See O'Shea, note 22 *supra*.
[40] See *infra*, at 304-5.
[41] See chapter 10, *supra*, at 291.
[42] *Idem*.
[43] Ibid., at 334, footnote 26.

international law in the pending amnesty section of the Truth and Reconciliation Report.[44]

3. Accommodating International Requirements in the Amnesty Jurisprudence through the Concept of the Political Offence

There has been on one side a perceptible growth in the use of amnesty laws in the context of transition,[45] and on the other an increasingly sophisticated criminal justice system to cater for a progressively inter-connected world.[46] These independent developments came into direct conflict in the Latin-American experience.[47] The South African apparatus has given hope that these two divergent developments might not in fact be irreconcilable.[48] In significant ways, this recent mechanism is potentially both more human rights oriented and more sensitive to the needs and rights of victims than its predecessors.[49] More particularly, it has the effect and further potential of being brought into line with the minimum requirements of international law.

The national needs and international standards may be brought closer together by the development of national amnesty jurisprudence alive to the demands of the global conscience, and by the simultaneous refinement of international criminal procedure in a manner that is sensitive to the needs of transitional societies. The latter objective can be achieved by the international community specifically addressing its collective mind to the development of binding principles designed to reconcile global justice with transitional peacemongering.[50]

The former objective can be achieved through the creative development of amnesty jurisprudence by state organs. It is generally at the early stages of the transition process that the peace is most fragile. For this very reason details of definition might be steered away from to avoid a sticking point in the negotiations. From the perspective of the leaders they each have their own reasons for wanting a successful

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[44] One can expect the hearings to be completed in the first half of 2001, and one can perhaps expect the amnesty section of the report to come out towards the end of 2001.

[45] See chapter 3, *supra*.

[46] See chapters 5, 6, 7, 8, 9 and 10 *supra*, and pages 307-15 *et seq.*, *infra*.

[47] See chapters 6 and 10 *supra*.

[48] See *supra*.

[49] *Supra*.; see also chapter 10 *supra*.

[50] See chapter 12 *infra*.

outcome in the negotiations, and provided their own position is secure and they can sell the outcome of negotiations to their constituencies, they may not always seek to lift unturned stones in awkward corners. The initial amnesty promise might therefore take the form of varying degrees of certainty and definition. It often consists of a liberally drafted clause open to some degree of subsequent interpretation.

In the South African context, one can see how the amnesty began in the form of a simple clause in the epilogue to the Constitution.[51] It was left to the parliament to go into the finer details when passing amnesty legislation,[52] and, by implication, gave the Amnesty Committee and the courts a mandate to interpret and develop the substance and meaning of its provisions.[53] The Truth and Reconciliation Commission could then reflect upon the progress in a manner that would benefit not only the present transition, but also other transitional societies in other parts of the world. At each step, the significance and meaning of amnesty for perpetrators and victims alike could be refined and developed in line with the international community's expectations for peace and justice. In addition, at each step the peace becomes less fragile, the future survival of democracy more certain.

It is the link between offences and the conflict, as being the essence of amnesty, which, it is submitted, holds the key to the creative reconciliation of the amnesty process with the international regime at a national level. This link may be expressed in terms of the concept of the political offence, which is sufficiently central to the notion of amnesty and adequately flexible in meaning to serve as a useful basis for such attempts at reconciliation by the national judicial structures.

Judges and amnesty adjudicators need not feel as if they are gaping into a jurisprudentially black hole. The concept of the political offence has occupied the minds of the world's judiciary since the inception of the concept of political asylum and the political offence exception to extradition.[54] It is of course true that in each of these areas the concept is employed in relation to the right of asylum and the duty of extradition respectively. However, there is enough commonality in the purpose served by the concept of the political offence to warrant a search for inspiration from the case law in these other areas. For one,

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[51] Constitution of the Republic of South Africa Act 200 of 1993.

[52] Promotion of National Unity and Reconciliation Act 34 of 1995.

[53] Ibid., section 19-20.

[54] Probably closely linked to the glamorization of liberation movements following the French Revolution.

the term is used to establish the connection between the offence and a political conflict. Importantly, the restrictive refinement of the concept of the political offence in terms of asylum and extradition law has served the purpose, inter alia, of preserving respect for the requirements of international public order.

Yet, the long history of judicial determinations has led to differing and sometimes confusing approaches to the question, culminating in no adequate or universally accepted definition of the term.[55] Van den Wijngaert observed in her distinguished doctoral thesis that,

> Most definitions of the term 'political offence' are tautologous rather than explanatory since they refer mostly to the political 'motivation' or the political 'context' of the act without, however, defining the element 'political' itself ... It is probably impossible to give a non-tautological definition of the term 'political crime' because it does not have an independent legal content; rather it is to be considered as a label which, as soon as a number of criteria are fulfilled, may be attached to every crime ... Thus the term 'political offence' is probably undefinable. To conclude with Sir H. Lauterpacht:
>
> > 'Up to the present day all attempts to formulate a satisfactory conception of the term have failed, and the reason of the thing will, probably forever, exclude the possibility of finding a satisfactory definition'[56]

This notwithstanding, the jurisprudence on asylum and extradition offers some assistance in what should not, from a functional perspective and for the sake of international public order, be included within the definition of the term 'political offence'. In this regard, in the context of asylum, the Convention Relating to the Status of Refugees of 1951 excludes from the definition of the term refugee, which would include the political offender:[57]

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[55] See Christine Van den Wijngaert, *The Political Offence Exception to Extradition: The delicate problem of balancing the rights of the Individual and the International Public Order*, 1980, at 2; see also ibid., chapter III.

[56] Ibid., at 95-6.

[57] A refugee is defined in article 1A2, as amended, as a person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or *political opinion*, is outside the country of his nationality and is unable or, owing to such fear is unwilling to return to it.' [my emphasis].

> any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has been guilty of acts contrary to the purposes and principles of the United Nations.[58]

Likewise, in the context of extradition, treaties on serious international crimes exclude serious international crimes from the definition of 'political offence'. The Convention on the Prevention and Punishment of the Crime of Genocide provides that:

> Genocide and other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.[59]

The International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 similarly excludes the crime of apartheid from the definition of 'political offence' for the purposes of extradition.[60] A number of courts have also interpreted the concept of the political offence in a manner that could exclude the most serious international crimes.[61]

In terms of the South Africa's Promotion of National Unity and Reconciliation Act, for an act, omission or offence to be eligible for amnesty it must be 'associated with a political objective'.[62] In other words, it must be an offence of a political nature or a 'political offence'. The political nature of the offences covered by the amnesty provisions is also implicit in the further requirement that the act, omission or offence be 'committed in the course of the conflicts of the past'.[63] Other amnesty provisions are less explicit in the requirement that the offence be political, but this can be implied in the very notion that amnesty is

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[58] See article 1F.
[59] See article VII.
[60] See article 11.
[61] See Van den Wijngaert, note 56 *supra*.
[62] Section 20(1)(b).
[63] *Idem*.

granted for offences committed as part and parcel of the conflict preceding transition.

The South African Act defines an 'act associated with a political objective' by reference to the capacity in which the offender was acting.[64] It further sets out a number of criteria that the Amnesty Committee may employ in determining whether an act, omission or offence is indeed associated with a political objective in terms of the Act.[65] These criteria provide the basis for restricting the meaning of the phrase in a manner that excludes the most serious crimes against international law. These criteria include motive, context, legal and factual nature of the act, its object, whether it was committed pursuant to instruction, and proportionality.

Specific reference is made to the 'legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence'.[66] This may be viewed as, inter alia, a direction to exclude the most serious international offences from the definition of an act associated with a political objective. The Act affords a legal technique for doing so in the criteria of proportionality. Thus, in determining whether the act, omission or offence is associated with a political objective, the Committee is directed to have regard to:

> the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act omission or offence to the objective pursued.[67]

Proportionality has played an important role in the approach of the Swiss courts in the assessment of the political nature of an offence. Article 10 of the Swiss Extradition Act 1892 allows extradition even where the offender alleges a political motive, if the act in question was 'principalement' (principally) a common, as opposed to a political, crime. In the *Ktir* case, the Swiss Federal Tribunal held that the murder of a rebel for treason against the Algerian government was not a

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[64] See section 20(2) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[65] See chapter 3, *supra*, at 45-6.

[66] Section 20(3)(c) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

[67] Section 20(3)(f) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

political offence because there were alternative means of achieving the political purpose in question.[68]

In the *Della Savia* case the Swiss Federal Tribunal held that acts of violence would not be proportional to their political purpose if they,

> result in gratuitous acts of violence which - because of their seriousness and their dangerousness - are repugnant to any civilized conscience, and amount to acts of indiscriminate and gratuitous terrorism.[69]

The theory of proportionality provides a useful key to defining the political offence so as to exclude the most serious crimes against international law. Unfortunately, although the question of proportionality formed part of the analysis of the Committee on Amnesty, it was not employed with reference to the standards imposed by the international legal system. Indeed, the decisions of the Committee are in most cases practically devoid of legal reasoning. For instance, in the matter of *Benzien*[70] the applicant admitted to torturing victims, who would be handcuffed and made to lie face down. Benzien would then sit on the small of the victim's back, and a wet bag would be placed over the victim's head and tightened around the neck as an effective means of forcing him to talk. The Committee's written reasons are shockingly brief and give no indication that the question of proportionality or the international prohibition on torture were given any consideration. Accordingly, the Committee's reasons read as follows:

> On a consideration of all the evidence, the Committee has come to the conclusion that the offences for which the applicant seeks amnesty were committed during and arose out of the conflicts of the past between the State and Liberation Movement.
>
> Benzien is GRANTED amnesty for:
> 2. Although there was no evidence of ill treatment and assault on Anwar Dramat or Alan Mamba, we are of the view that he should be given amnesty for assault with intent to do grievous bodily harm on

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[68] *Ktir*, 17 May, 1961, 87 A.T.F. I, 134 (cited by Van den Wijngaert, note 55 *supra*, at 129).

[69] See *Della Savia*, 26 November, 1969, 95 A.T.F., I, 470; slightly modified version of translation by Van den Wijngaert: see note 55 *supra*, at 129.

[70] Jeffrey Theodore Benzien, AC/99/0027 (Amnesty Committee).

them and on Tony Yengeni, Gary Kruser, Peter Jacobs, Ashley Forbes and Niclo Pedro.

The South African Committee on Amnesty clearly missed out on a golden opportunity to develop a jurisprudence that would define the concept of the political offence in a manner that reconciles the amnesty process with the minimum standards of international criminal law.

4. International Effects of Municipal Amnesty

One way of reconciling national amnesties with international requirements from the municipal perspective is for the national authorities to define the amnesty in a manner that is consistent with international norms. I have attempted to show how the concept of the political offence may be useful in this regard. The municipal authorities may also knowingly or unwittingly partially accommodate or refrain from entering into open confrontation with the international criminal process by confining the effects of its amnesty law to its own territory.[71]

In one sense all national amnesty laws necessarily confine their effects to the territory of the conflict to which they relate. So, for example, in *Stopforth v. Minister of Justice*, a South African Court confirmed that the amnesty legislation would not apply to an attack on UNTAG in the former South West Africa (now Namibia) because this act was not related to the conflicts of the past in South Africa.[72] Similarly, most laws would not claim to extend the consequences of the amnesty itself beyond the state's own borders. Although, the amnesty may contravene the state's own obligation to prosecute the offender, it will not purport to prevent other jurisdictions, foreign or international, from dispensing justice in the event that the alleged offender leaves the territory of the state where he benefits from amnesty. Thus, Chile's amnesty law did not claim or get protection for Augusto Pinochet beyond Chilean territory[73] and the South African amnesty's protection

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[71] This will of course continue to have wider implications in terms of encouraging amnesty in other parts of the world in other conflicts. It is for this reason that any accommodation of amnesties must be carefully framed.

[72] *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others*, 2000 (1) SA 113 (SCA).

[73] *R. v Bartle and the Commissioner of Police for the Metropolis - Ex Parte Pinochet* (1999) 38 ILM 581.

from criminal and civil 'liability'[74] should be interpreted to mean 'liability' before South African courts.

Even where a state did promulgate an amnesty that in terms of its law of that state would have effect beyond the borders of the state, this may constitute an infringement of the sovereign jurisdiction of other states. It would also have no practical effect in other jurisdictions. This is because the state would have no means of enforcing the law and foreign courts and international tribunals would decide under their own jurisdictional rules whether they chose to recognize the effects of the foreign amnesty law.

One consequence of the confinement of the effects of municipal amnesty within the territory of the state is that the law itself has no impact on any international obligations that the state may have entered into to surrender alleged criminals to a foreign or international jurisdiction. As a matter of internal law it will depend on the proper interpretation of the relevant amnesty law as to whether the state is barred from extraditing an amnestied individual in terms of its law. For instance, if one examines Argentina's amnesty law of September 1983,[75] article 5 sets out its effects and provides that:

> No one can be interrogated, investigated, summoned to appear or enjoined in an [sic.] manner because of imputations or suspicions of having committed the crimes or participated in the actions referred to in Article 1 of this Law ...

This would appear clearly to exclude the possibility of extradition proceedings being instigated against the offender for such crimes. This clause is tantamount to immunizing the recipient of amnesty from all 'proceedings' relating to the offence. In contrast, South Africa's amnesty law of 1995 exempts the recipient from all 'liability'.[76] If one confines the meaning of liability to that in South Africa, then the amnesty does not cover extradition proceedings. In so far as there is any ambiguity in the meaning of the term, then it should be given a reasonable interpretation that is consistent with international law in

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[74] See Promotion of National Unity and Reconciliation Act No. 34 of 1995, section 20 (7).

[75] Law of National Pacification, Law No. 22.924 of 22 September 1983: reproduced in Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, vol III, *Laws and Rulings*, at 477.

[76] Section 20 (7).

terms of section 233 of the South African constitution.[77] That liability should not include liability before a foreign jurisdiction and should therefore not embrace extradition proceedings is not an unreasonable interpretation. The applicant for amnesty cannot reasonably expect the government to promise any more than it can give, which is immunity before its own courts. There can be no legitimate expectation that the state would further violate its international obligations or that it would jeopardize its international relations.

In terms of international law, the requirement to extradite amnestied individuals will firstly depend on whether the obligation to extradite applies to the offences in question. Most extradition agreements exempt political offences from their field of application.[78] In this respect there may be a degree of divergence between the use of the concept of political offence in the context of extradition and that of amnesty. The meaning of the term in extradition agreements will be defined in the context of the agreement applying the rules of international law on the interpretation of treaties; while the use of the term in the context of amnesty will depend on the interpretation of specific municipal legislation. As already noted,[79] the political offence exception will frequently not benefit the perpetrator of international crimes. Some extradition treaties expressly exclude categories of international crimes from the scope of the political offence exception.[80] Nevertheless, it will often be the case that the beneficiary of amnesty may take advantage of the political offence exception.

The obligation to surrender those indicted to appear before the future International Criminal Court[81] or the existing ad hoc tribunals[82] does not exempt political offenders, in so far as the perpetrators of the most serious crimes against international law can be properly considered as such. Therefore, the worst offenders may, in the absence of international recognition of amnesties, find themselves subject to

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[77] See Constitution of the Republic of South Africa, Act No. 108 of 1996.

[78] See e.g. the Agreement between the government of the Republic of South Africa and the government of the Kingdom of Lesotho regarding Extradition of 20 June 1995, article 3; and the Treaty on Extradition between the Republic of South Africa and Australia of 13 December 1995, article 3(1)(a).

[79] See *supra*, at 306.

[80] See note 78.

[81] See the Statute of the International Criminal Court (1998) 37 *ILM* 999, article 89.

[82] See *R. v. Bartle and the Commissioner of Police for the Metropolis - Ex Parte Pinochet* (1998) 37 ILM 1302; note 73 *supra*.

international prosecution, or even foreign prosecution, [83] notwithstanding amnesty; but of course subject to foreign or international jurisdiction over the offence.

5. International Recognition of Municipal Amnesty

A. The case for recognition

The benefits of amnesty in terms of national reconciliation and a mechanism for discovering the truth might be partially compromised by a persisting obligation to surrender or extradite an amnestied individual to criminal jurisdiction abroad. First, it may be politically difficult for a state to extradite an individual to whom it has just given amnesty. Secondly, prospective amnesty applicants may be reluctant to exchange the truth for national immunity if they are still open to, and may even by that action open themselves to, international prosecution.

These are strong arguments in favour of some mechanism for facilitating the international recognition of amnesties. Thus, Professor Dugard has urged the desirability of the adoption of international standards for municipal truth commissions that would accommodate amnesties even for torture and crimes against humanity.[84] At first blush, this may seem a fairly radical proposal, given that these constitute two of the most serious categories of international crimes. Yet, from the perspective of a society in transition, it is often the case that these constitute a significant component of the overall picture of human rights violations. To leave the door open for the international prosecution of these crimes may empty much of the benefit of an amnesty process. In an extreme scenario, the oppressive leaders of an undemocratic elite may deliberately hold back peaceful transition to democracy through fear of international justice.

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[83] For the implications in South Africa of the Pinochet proceedings on the extradition of Augusto Pinochet to Spain, see Neil Boister and Richard Burchill, 'The Implications of the Pinochet Decision for the Extradition or Prosecution of Former South African Heads of State for Crimes Committed under Apartheid' (1999) 11 *African Journal of International and Comparative Law* 619.

[84] See John Dugard, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (2000) 16 *Leiden Journal of International Law* 1; 'Reconciliation and Justice: The South African Experience', (1998) 8 *Transnational Law and Contemporary Problems* 277.

B. International recognition of amnesties in state practice

In current state practice there is very little evidence of the international recognition of amnesties. In the first place amnesties are by their very nature exceptional measures that do not form the basis of widespread litigation practice. In the case of foreign states, the question of recognition of a foreign amnesty usually simply does not arise. Before the matter can become an issue a state other than that giving amnesty must first take an interest in the offence and then must assert its jurisdiction over that offence. This could arise where the offence involved the territory of more than one state or the nationals of a state other than the territorial state. However, municipal amnesties are often granted in the context of civil conflicts with few extra-territorial aspects to the commission of offences.

Where there is no connection between the offence and a state's territory or its nationals, it is extremely rare for the state to take any interest in the matter.[85] In most cases it would not claim or have the right to exercise jurisdiction, but even in matters covered by universal jurisdiction there is usually little political incentive to become involved. So, South Africa refrained from arresting Mengistu Haile-Mariam for alleged international crimes covered by universal jurisdiction when he went there for medical treatment, despite persistent calls from non-governmental organisations and an indication from Ethiopia that it intended to request his extradition.[86] It is unlikely that Pinochet would have been arrested in England but for Spain's issue of an international warrant of arrest. A notable exception to this general reluctance to prosecute offences of no direct consequence to the interests of the state

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[85] An example is provided by *Director of Public Prosecutions v T* (E. High Ct., 3d Div. Den., Nov. 22, 1994) (Danish Ministry of Foreign Affairs Legal Service, unofficial trans.); referred to by Mary Ellen O'Connell, 'New International Legal Process' (1999) 93 *AJIL* 334, at 341. On the birth of the practice of trying offenders from the former Yugoslavia and Rwanda in national courts see: See Ruth Wedgwood, 'National Courts and the Prosecution of War Crimes', in G. Kirk McDonald and O. Swaak Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, 2000.

[86] See *Amnesty News*, 7 December 1999: 'South Africa: Mengistu -- the opportunity for justice must not be lost'.

is the prosecution of a Croatian national for crimes committed in Croatia by a Danish court.[87]

Even where the scenario arises, the judges would need to find some basis for the recognition of a foreign amnesty in their law. In the Pinochet proceedings[88] involving the request from Spain for the extradition of the former Chilean head of state from the United Kingdom, counsel for Pinochet never conceded that recognition of the Chilean amnesty might form an argument. The English criminal law and law of extradition appear to contain no principle that could be relied on to support such an argument. In contrast, in civil proceedings there is more relevance attached to the recognition of foreign laws with a view to their enforcement in the forum-state. However, while an amnesty may be recognized as having extinguished liability in terms of a foreign law, it is unlikely that a municipal court would accede to the recognition of the amnesty for the purpose of nullifying civil legal liability in terms of the *lex fori*. A foreign amnesty that purported to have such an effect would in all likelihood properly be construed as an infringement of the sovereignty of the forum-state.

Although courts may not give formal recognition to foreign amnesties, judges might nonetheless be influenced by the political decision of a foreign state to grant amnesty. Judges are sometimes influenced by non-legal factors in their decisions.[89] This may be part of a legitimate exercise in the progressive development of the law or an invisible bias prompted by the social and political environment. It has been suggested that the influence of non-legal factors can be attributed to the judges of the House of Lords in their second judgment in the *Pinochet* case.[90] It is claimed that one could be left with the impression that the judges felt the question of prosecution was best left to the territorial state. I have explained elsewhere why I believe this not to be the case.[91] Here I will simply reiterate that the judgments rather lean towards developing the law in a direction that will exclude impunity for crimes against international law. Although the question of amnesty was

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[87] See note 85 *supra*.

[88] See *R. v. Bartle and the Commissioner of Police for the Metropolis - Ex Parte Pinochet* (1998) 37 ILM 1302; note 73 *supra*.

[89] See J.A.G. Griffith, *The Politics of the Judiciary*, 5th ed., 1997.

[90] See John Dugard, 'Dealing With the Crimes of the Past: Is Amnesty Still an Option' (2000) 16 *Leiden Journal of International Law* 1.

[91] See Andreas O'Shea, 'Pinochet and Beyond: the International Implications of Amnesty ' (2000) 16 *SAJHR* 642

of little relevance to the overall issues of the case, the unacceptability of Chile's amnesty to the requirements of global justice was neatly expressed in the following passage of the judgment of Lord Browne-Wilkinson:

> For example, in this case it is alleged that during the Pinochet regime, torture was an official, although unacknowledged, weapon of government and that, when the regime was about to end, it passed legislation designed to afford an amnesty to those who had engaged in institutionalised torture. If these allegations are true, the fact that the local court had jurisdiction to deal with the international crime of torture was nothing to the point so long as the totalitarian regime remained in power: a totalitarian regime will not permit adjudication by its own courts on its own shortcomings. Hence the demand for some international machinery to repress state torture which is not dependent on the local courts where torture was committed.[92]

C. Recognition of amnesties before international criminal tribunals

The Charter of the International Military Tribunal at Nuremberg, understandably in the historical context, incorporated no exception to accommodate national amnesties.[93] Indeed, the Tribunal remarked in the context of sovereign immunity that:

> ... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State... The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law' [my emphasis].[94]

This of course related to international immunity, but in the light of this explanation of the non-applicability of sovereign immunity it was also unlikely that any recognition would have been given to national amnesties, had the issue arisen. The Tribunal firmly established the principle that an individual would not be permitted to escape his

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[92] See note 73 *supra*, at 590.

[93] See *UNTS*, vol 82, 279.

[94] See 'Trial of Major War Criminals before the International Military Tribunal, Nuremberg, 1 November 1945 - 1 October 1946', 42 vols, IMT Secretariat.

international responsibilities by relying on his national status, even in terms of international law.

There would need to be cogent international interests at stake, such as the maintenance of peace and protection of democracy, for an international tribunal to recognize any form of immunity. Since the enemy had been completely vanquished in this case it was doubtful whether the question of peace and reconciliation would have played on the minds of the judges.

The International Criminal Tribunals for Yugoslavia and Rwanda were established in a very different context. Here, the maintenance of peace and national reconciliation became important questions. In the former case the tribunal was established while the situation was still volatile and before peace had been formally established.[95] In the latter case hostilities could re-ignite at any time. The tensions between justice and peace are highlighted by the manner in which the issue of international prosecutions appears to have been played down in the negotiations for peace in the former Yugoslavia and the failure to indict Slobadan Milosevic for the pre-Kosovo genocide.[96]

Nevertheless, the Dayton Peace Accords referred, albeit in vague terms, to the process of international criminal trials,[97] and in both the Yugoslav and Rwanda situations justice was seen as a prerequisite for reconciliation.[98] Accordingly, although amnesty laws have been passed in Croatia and the Republic of Serbia, no express recognition is given to these laws in the law or practice of the international tribunal; likewise with the Rwanda Tribunal. Indeed, in *Prosecutor v. Furundzija*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia expressly rejected[99] the recognition of national amnesty for torture.[100] The text of both founding statutes is silent on this issue.[101] In

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[95] This Tribunal was created by a Security Council resolution in 1993 (Resolution 827 (1993)) and the peace was formerly established by the Dayton Peace Accords in 1995.

[96] See Michael Scharf, 'The Amnesty Exception to the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507, at 511.

[97] See Payach Akhaven, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond' (1996) 18 *HRQ* 259, at 259-85.

[98] See the Preambles to the Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) *ILM* 1192, and the Statute of the International Criminal Tribunal for Rwanda (1994) *ILM* 1602.

[99] Although this statement was *obiter*.

[100] See *Prosecutor v Furundzija* (1999) 38 ILM 317, at 349, para 155; see chapter 7 *supra*, at 186-7.

this light, the rule that a state may not rely on its internal laws to evade its international obligations[102] and the principle of primacy of jurisdiction adopted in the statutes[103] militate against amnesty being employed as an excuse.

In Sierra Leone, although the rebel leader, Foday Sankoh, has been captured, the situation remains volatile.[104] However, the willingness to use the Truth Commission rather than prosecution seems to be largely based on extensive employment of child offenders in the civil war.[105] The constitutive Statute of the proposed Special Court expressly rules out amnesty being a bar to prosecution for serious international crimes, but by implication recognises the possible recognition of amnesty in other cases.[106]

As for the Statute of the International Criminal Court, it does not expressly refer to amnesty but its rules on the exercise of jurisdiction and preamble clearly exclude it as a means of ousting the jurisdiction of the Court.[107]

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[101] Ibid.

[102] See *Aroa Mines* case: the umpire observed that 'By the proper application of the usually accepted rules of international law governing such commissions, controlling courts and defining the diplomatic conduct of nations there could be no question that national laws must yield to the law of nations if there was a conflict': see Ralston, *Venezuelan Arbitrations*, at 344, 362, 365 and 378; see also the *Baron Stjernblad*, in Grant, *Prize Cases*, III, at 22: 'It is quite impossible for a Prize Court administering international law to accept the dictates of any municipal law'.

[103] Article 9(2) of the Statute of the International Tribunal for the Former Yugoslavia; article 8(2) of the Statute of the International Tribunal for Rwanda.

[104] See *UN newservice*, 22 December 2000: 'Security Council extends UN Sierra Leone mission through March 2001' (*www.un.org/News/dh/latest/page2.html*).

[105] See *UN newservice*, 28 December 2000: 'Security Council says Sierra Leone war crimes court should target top leaders only' (*www.un.org/News/dh/latest/page2.html*).

[106] Article 10: see Enclosure to the Report of the Secretary on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915; see chapter 5 *supra*, at 120-1.

[107] See chapter 5 *supra*, at 122-6.

D. Accommodating amnesties within the existing framework

The history of reaching consensus on the establishment of a permanent international criminal court has been a long and arduous one.[108] It is unlikely that the gains of this endeavour will be reversed or substantially modified. It also represents a negotiated expression of the views of the international community on the priorities for global justice. These views were reached with consideration having been given to the needs of national reconciliation and peace.[109] Ideally, therefore, whatever means is employed for reconciling national amnesties with the international criminal process should dovetail with the existing regime for the punishment of international offences.

Professor Dugard follows up on his suggestion that there should be international standards for truth commissions with a specific proposal for accommodating responsibly constructed national amnesties within the framework for international justice. This involves including a section on amnesties in any guidelines that might be drawn up for the exercise of the discretion of the Prosecutor to the International Criminal Court.[110]

The discretion afforded to the Prosecutor is set out in article 53 of the Court's founding document. This provides:

> '(1) The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
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> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'[111]

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[108] See John Dugard, 'Obstacles to the way of an international criminal court' (1997) *56 Cam L J* 329; Andreas O'Shea, 'The Statute of the International Criminal Court' (1999) 116 *SALJ* 243.

[109] See Gerhard Hafner, Kristen Boon, Anne Rubesame and Jonathan Huston, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) *EJIL* 108, at 109.

[110] See Dugard, 'Is Amnesty Still an Option, 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?', note 90 *supra*.

[111] See Statute of the International Criminal Court, note 81 *supra*, subparagraph (a) deals with whether there is a reasonable basis to believe that

Justice is a term that is capable of being used in a very broad manner and its definition has given rise to endless difficulty and controversy in almost every dimension of human discourse. In one sense, the interests of justice, as a fluid notion of the protection of the rights of man, describes the primary objective of law itself. Thus, one often hears reference to social justice. Yet, this elastic use of the term derives from a narrower more refined meaning expressing the reinstatement of right as between a wrongdoer and his victim.[112] This second more precise meaning of the word has no regard to and may be employed in contrast to questions of political expediency and collective social wellbeing.

A flexible understanding of justice, as employed in article 53 of the Rome Statute, might afford the Prosecutor a broad political decision-making power. This might include the ability to refrain from prosecuting where it would not in his or her view be in the overall interests of the international community or the collective needs of a state. Thus, he or she could decide that a municipal amnesty protecting national peace, reconciliation and the efficient use of national resources in a transitional society should be recognized for the purpose of halting a prosecution before the court.

In deciding which use of the term was intended by the negotiators of the Rome Statute one should have regard to the context in which the word is used, as well as the object and purpose of the Statute.[113] First, it should be noted that the interests of justice are to be considered in arriving at the answer to the primary question; that is to say, whether there is no reasonable basis to proceed under the Statute. This phrase points to a more restricted use of the term justice in that one is concerned with the justice of the case, as opposed to a more elastic use of the term. The words 'under the Statute' also specifically direct the Prosecutor to the terms of the Statute itself. The Statute gives relatively clear guidance on the excuses which could prevent the matter from being heard and amnesty is apparently deliberately, though not expressly, excluded. This would tend to suggest that amnesty should

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a crime has been committed and subparagraph (b) addresses the question of admissibility in terms of the Statute.

[112] See O'Shea, 'Amnesty in the Light of the Pinochet Proceedings' note 91 *supra*; see also See D. H. Van Zyl, 'The Significance of the Concepts "Justice" and "Equity" in Law and Legal Thought' (1988) 105 *SALJ* 272, 272-73, citing Cicero, Ulpian and St Thomas Aquinas.

[113] See article 31 of the Vienna Convention on the Law of Treaties.

not by itself constitute a ground for concluding that there was no reasonable basis to proceed 'under the Statute'.

The preamble to the Rome Statute provides some important indicators as to the object of the Statute. First, it seems clear that the Statute attempts to ensure an end to the impunity of perpetrators of serious international crimes. In this respect, the preamble affirms 'that the most serious crimes of concern to the international community as a whole must not go unpunished' and indicates a determination 'to put an end to impunity for the perpetrators of such crimes'.[114] A broad discretion for the Prosecutor to recognize national amnesties and refrain from proceeding with an investigation on that basis fits uneasily within the ethos behind the main objective of the Rome Statute. Second, the plenipotentiaries of the Rome Conference were, according to the preamble, 'Resolved to guarantee lasting respect for the enforcement of international justice'.[115] This raises a serious objection to giving a broad-based discretion to the Prosecutor. While national prosecuting authorities act in the name of, and represent the interests of one government, an international prosecuting authority represents the interests of, a large number of states as an international community. It is difficult to see how an international prosecuting authority could make value judgements on the responsibility of governments and the amnesties that they issue without risking the appearance of bias. This would be one sure way of jeopardizing lasting respect for the enforcement of international justice.

Such respect could also be compromised by the degree of uncertainty over international criminal liability created by a system where the apparently clear rules could be evaded at a stage before the indictment was even issued.

Accordingly, it is my opinion that the proposal of accommodating the recognition of national amnesties within the framework of the Prosecutor's discretion would not be consistent with the spirit of the Rome Statute.

Is there then any means of reconciling necessary and human rights - sensitive amnesties with the developing framework for global justice? The solution should not compromise the underlying imperative of ending the culture of impunity represented by the capacity to negotiate amnesty with a people in a weak bargaining position by virtue of their

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[114] See note 81 *supra*.

[115] *Idem*

hunger for change, peace and democracy. It should also be able to sustain a global and lasting respect for international criminal justice.

The recognition of an amnesty could, it is suggested, fulfil these requirements in a fairly credible manner if the amnesty were negotiated or confirmed in a treaty concluded not only between the parties to the conflict, but also with the legitimate representatives of the international community as a whole. If the international community, being independent observers and less likely to be swayed by pressure or threats than those involved in the conflict, could endorse the amnesty through a special international agreement, then the imperatives of global justice can be preserved. A set of guidelines should set out the conditions under which the international community could consider the prospect of the international recognition of an amnesty and the mechanism for ensuring legitimate representation of the interests of the international community as a whole.

In order to ensure that this exception is perceived as an integral part of the global system of justice that is intended to dovetail with the achievements at Rome, these guidelines would be best incorporated in a Protocol to the Rome Statute. This Protocol could set out not only the conditions for the international recognition of amnesties for serious international crimes as just outlined, but also comprehensive guidelines on how national amnesties fit within the overall framework of international criminal law.

Thus, these guidelines would provide for the conditions for international recognition of amnesties, the circumstances where a state may be exempted from conducting prosecutions within its own territory or extraditing to a foreign state, and, finally, the proper limitations that amnesty should incorporate in the national arena. In the next, concluding, chapter, we shall consider what these proper limits are in the light of the findings in this work, the proper procedure for the exemption from the requirement of prosecution and inter-state extradition, as well as the content of the guidelines on international recognition. In the Appendix a preliminary draft protocol is proposed that reflects the principles outlined in my conclusion. It is hoped that this preliminary draft might form the basis of future studies and negotiations for the development of a framework of clear rules on the limitations to national amnesties.

CHAPTER 12

CONCLUSION:

TOWARDS THE DEVELOPMENT OF PRINCIPLES FOR THE LIMITATION OF MUNICIPAL AMNESTY LAWS

Municipal amnesty laws dealing with specific conflicts frequently result from speedy negotiations or parliamentary debate in the context of sudden pressure to address a festering conflict. The insufficient attention paid by the pioneers of these laws to the international legal framework is exacerbated by the lack of simple, clear and coherent principles that may be followed to ensure international compatibility.[1] These principles may be ascertained from a careful analysis of the complex legal framework. However, it would be more conducive to the national compliance with these international standards if their relationship to amnesty was clarified and expressed in clear, easily understood principles that could be referred to in times of national crisis.

In the previous chapter I examined how the needs served by amnesties could be reconciled with developments in international criminal law. In this chapter I will give concrete expression to this reconciliation by tying the findings of earlier chapters into a set of principles for the limitation of national amnesty laws. These principles have been refined into a preliminary draft convention, which is to be found in the Appendix to this work.

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[1] Roht-Arriaza observed in 1996 that '[d]omestic courts still are unfamiliar with much of the recent international law on investigations and amnesties': see Niomi Roht-Arriaza, 'Combating Impunity: Some Thoughts of the Way Forward' (1996) 59 *Contemporary Law and Problems* 93.

1. *The Proper Limits to Municipal Amnesties*

Consideration of the question of appropriate guidelines on impunity and truth commissions has taken place[2] and some marked progress has already been made in the direction of formulating guidelines on the proper limits to municipal amnesties.[3] In particular, the work commissioned by the UN Sub-Commission on Prevention of Discrimination and the Protection of Minorities has resulted in the UN *Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.[4] Principle 25 imposes restrictions on amnesty. Domestic amnesties are said to be impermissible even as part of peace agreements or to promote national reconciliation, in so far as they cover international crimes. This is excepting when the state has complied with its obligation to investigate the crimes, prosecute and punish the perpetrators, and provide an effective remedy to the victims in terms of principle 18. Neither can an amnesty restrict the right to reparation of the victim, while amnesties may be rejected by potential beneficiaries for crimes related to the exercise of freedom of opinion or where there has not been a fair trial.[5]

These guidelines do not become more specific regarding the serious international crimes subject to exclusion. Nor do they give any further specific guidance on the relationship to reparation except in so far as the nature of the right is addressed elsewhere in the guidelines. These

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[2] See ibid: see further Madeline H. Morris, 'International Guidelines Against Impunity: Facilitating Accountability' (1996) 59 *Contemporary Law and Problems* 29; Niel J. Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', ibid., 127; Prescilla Hayner, 'International Guidelines for the Location and Operation of Truth Commissions: A Preliminary Proposal', ibid., at 173; John Dugard, 'Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *LJIL* 1000.

[3] See Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), annexed to a decision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1997/20/Rev 1 (by Louis Joinet, 2 October 1997); Report on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/2000/62 (Final Report by M. Cherif Bassiouni, 18 January 2000).

[4] See Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), ibid., appendix.

[5] Ibid.

guidelines also fail to resolve the issue of the international recognition of amnesties in appropriate circumstances. One commentator has observed in relation to an earlier, but similar, version[6] that the Draft Principles, 'while an important beginning, need clarification and strengthening especially on issues of amnesty and on the inter - relationships among truth, justice, and reparation'.[7] This view should be supported with the caveat that any set of guidelines must remain sufficiently flexible to cater for the diverse and changing dynamics of conflicts and transition.

The examination of the state's duty to prosecute carried out in chapters 6, 7, 8 and 9 reveals that for an amnesty law to comply with existing international law it should exclude from its scope a category of the most serious crimes against international law. Although the duty will usually consist of a requirement to prosecute in the absence of extradition, extradition is unlikely to occur in the absence of a formal agreement. The state in any event, will, probably not expect to be placed in a position where the offender must be extradited having received amnesty and such offenders will in most cases be covered by the political offence exception. The most serious crimes against international law may be excluded from these extradition arrangements. Accordingly, offences covered by the *aut dedere aut judicare* principle, as well as those simply covered by an obligation to prosecute, should be exempted from the purview of the amnesty law.

In this respect, the following crimes ought to be excluded:[8]

(a) Genocide;
(b) Crimes against humanity;
(c) Aggression;
(d) Torture;
(e) Slavery;
(f) Piracy;
(g) Apartheid;
(h) Summary executions;
(i) Enforced disappearances;
(j) Grave violations of the Geneva Conventions of 1949.

In addition there is that category of offences which, although not covered by a customary duty to prosecute the offenders or a widely

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[6] See U.N. Doc E/CN. 4:sub.2/1996/17 (amended principles)
[7] See Roht-Arriaza, note 1 *supra*.
[8] See article 3 of Draft Protocol, Appendix, *infra*.

ratified treaty requiring the same, should also be excluded by virtue of current developments in international criminal law. In particular offences should be excluded where there is an emerging customary practice requiring such prosecution or because such offences are covered by the jurisdiction of the future International Criminal Court. Here one should include gross violations of human rights not falling under any of the previous categories.[9] In broad terms, therefore, amnesty laws in principle should exclude all serious crimes against international law.

The other side of amnesty is that of civil liability. In chapter 4 it was suggested that if one weighs the justifications of amnesty from civil liability and civil liability itself, in principle the mechanism of civil liability should be preserved if possible by employing the best available alternative to amnesty from civil proceedings.[10] Existing international law, however, as demonstrated in chapter 10, gives the state a margin of discretion in the determination of what is required in terms of reparation to victims of past human rights violations.

Our analysis reveals that amnesty laws in principle should exclude civil liability from their scope. It should only constitute part of the national amnesty process where it is absolutely essential in the interests of truth and reparation.[11] The victim's right to sue the perpetrator should only be curtailed in so far as this is essential for the revelation of the truth about past human rights violations, and where there is no reasonable alternative in all the circumstances. Naturally, the process would then need full disclosure from the perpetrator, if this purpose is to be meaningfully fulfilled through amnesty. The victim's right to sue the state should only be curtailed in the most exceptional circumstances, in which the state would be genuinely unable to fulfil its obligation of reparation to all the victims otherwise.

2. *Exemption from the National Prosecution of International Offenders*

There may be cases where there is no extradition arrangement in force and an international offender has either not been indicted before an international tribunal or is not subject to the jurisdiction of any such tribunal. In such cases, the state may find itself under a duty to

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[9] See article 4 of Draft Protocol, Appendix, *infra*.
[10] See chapter 4 *supra*, at 89-92.
[11] See article 5 of Draft Protocol, Appendix, *infra*.

prosecute the offender in its own courts. There may be cases where the state can convincingly show that national prosecution of offenders who have committed serious international crimes would seriously jeopardize peace or national reconciliation. It should be possible in such cases for an agreement to be reached between the parties to the conflict or former conflict and the legitimate representatives of the international community to exempt the state from its duty to prosecute the offenders.[12] The question of international prosecution will then be left to the International Criminal Court, an ad hoc tribunal or a foreign state.

It is suggested that for these purposes the United Nations Organization should be treated as the legitimate representative of the international community. While there is still much scope for substantial intitutional reform to democratize the United Nations, it would appear appropriate as a representative organization with treaty-making capacity.

It will be suggested below that a supplementary convention is required to regulate these matters. For this process to be possible for the parties to international criminal law treaties containing an obligation to prosecute, the crime in question, the proposed convention would have to serve as an amendment to the provisions of these treaties. An amendment to the Torture Convention will require one third of the state parties to indicate their preference for a review conference to the Secretary-General of the United Nations within four months of notification of a proposed amendment. The Genocide Convention leaves the matter to the General Assembly once it has received a notification from any state party.

Accordingly, a provision could be inserted to the effect that as and when the conditions for amendment of other treaties have been complied with, then the convention will serve as an amendment to the relevant provisions of those other treaties.[13]

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[12] See article 6, 7 and 8 of the Draft Protocol, Appendix, *infra*.

[13] See article 10 of the Draft Protocol, Appendix, *infra*.

3. *Exemption from the Duty to Extradite or Surrender the Recipients of Amnesty*

As a basic principle, the exemption from the duty to prosecute need not necessarily imply a concomitant exemption from the duty to extradite offenders benefiting from national amnesty. Whether this is necessary will depend on the circumstances. Even where a state is permitted to refrain from extraditing the offender to a foreign state, in principle it should only be in the most exceptional circumstances that a state should be exempted from the obligation to surrender to the International Criminal Court. Again, here it could be open to the parties to agree with the international community to such an exemption.[14]

4. *Guidelines on the Exceptional International Recognition of Amnesties for Serious International Crimes.*

To dovetail with the spirit of the Rome Statute that requires an end to impunity, the international recognition of amnesties for crimes covered by the jurisdiction of the court should be exceptional. Accordingly, it is suggested that this be not only achieved through an agreement with the international community, but that a relatively consistent and stringent approach is adopted in the conclusion of such agreements. The international community would have to be convinced that international prosecution or the prospect of it would severely disrupt national peace, reconciliation or the discovery of the truth. Roht-Arriaza has emphasized the important purpose that guidelines would serve in informing international mediators and negotiators in civil conflicts.[15] It is suggested that these actors should not be unduly constrained in the performance of their peace-moulding functions. However, some flexible direction is needed as to when it would be appropriate for a recognition agreement to be reached. It would be just as well for government actors and political opponents to know what is expected of them in terms of an amnesty process in order for it to be eligible for possible exceptional recognition.

Where this guidance is part of an otherwise universally applicable and binding instrument, its general tenor could perhaps be elaborated upon in more detail in a non-binding interpretative handbook. This

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[14] See article 9 of the Draft Protocol, Appendix, *infra*.

[15] See note 1 *supra*, at 99.

would encourage flexibility within the general aim of consistency of approach. Much the same purpose is served, for example, by the UNHCR Handbook as an authoritative guide to the United Nations Convention on the Status of Refugees of 1951 and its 1967 Protocol.[16] This handbook could be especially useful for state actors in terms of giving them direction on the international legal parameters to amnesties, as well as the requirements for a potentially internationally acceptable amnesty.

Professor John Dugard has formulated a set of minimum requirements for truth commissions, which serve as an important inspiration for or component of future guidelines on appropriate circumstances for an exceptional agreement recognizing a national amnesty, whether such guidelines be detailed or general in nature.[17] The Dugard principles would suggest that:

1. The Commission should be established by the legislature or executive of a democratically elected regime;
2. The Commission should be a representative and independent body;
3. The Commission should have a broad mandate to enable it to make a thorough investigation. It should not, for example, be restricted to deaths and disappearances (as with Chile) but should be permitted instead to investigate all forms of gross human rights violations;
4. The Commission should hold public hearings at which victims of human rights abuses are permitted to testify;
5. The perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission;
6. The Commission should be required to submit a comprehensive report and recommendations within a reasonable time;
7. The Commission should be empowered to recommend reparations for victims of gross human rights violations; and
8. Amnesty should be denied to perpetrators of gross human rights abuses who refuse to co-operate with the Commission or refuse to make a full disclosure of their crimes.

The exceptional nature of any agreement to exempt the requirement of prosecution or surrender can be further ensured by an effort on the part

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[16] See the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/&P/4/Eng/Rev 2 (Geneva, January 1992).

[17] See Dugard, note 2 *supra*.

of the international community to facilitate the discovery of the truth through all means other than amnesty. In this regard, Professor Scharf makes a relevant proposal for the establishment of a permanent truth commission supported financially and logistically by the international community as a whole.[18] This suggestion deserves serious consideration, given the difficulties experienced by national ad hoc truth commissions, including most importantly the appearance of bias and lack of resources.

5. *The Future Development of Principles for the Limitation of National Amnesty Laws*

In one sense, it is a shame that the important question of how to reconcile the needs of transitional societies with the newly established framework for global justice was not clearly addressed in the text of the Rome Statute. On the other hand, it was sufficiently controversial to appear, perhaps, a blessing in disguise that the treaty was silent on this specific issue. Had the plenipotentiaries at Rome focused on this issue it could have become an obstacle to the adoption of the treaty, as the crime of aggression proved to be. It, like the issue of aggression, is sufficiently unclear, contentious and difficult that it is best left to a future conference.

The mechanism employed with respect to aggression was to include it within the list of crimes covered by the jurisdiction of the court, but to expressly provide that this jurisdiction would not be operative until a definition of aggression could be agreed upon. A commission would be given the specific task of working on this question. A similar mechanism whereby the Statute would expressly defer the issue of amnesty could have been used but was not. It is now left to the initiative of the state parties to propose the conclusion of a further treaty that would serve either as an authoritative interpretation or an amendment to the provisions of the Rome Statute.

Unfortunately, article 121 of the Statute places a moratorium on amendment until the Statute has been in force for seven years. This is not an insignificant period of time when viewed in the context of the requirement that the Statute must receive 60 ratifications before it can enter into force. It is difficult to predict the time that this would take.

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[18] See Michael P. Scharf, 'The Case for a Permanent International Truth Commission' (1997) 7 *Duke Journal of International and Comparative Law* 375.

The Convention on the Rights of the Child took just nine months to attract the required twenty ratifications, while the International Covenant on Civil and Political Rights needed nine and a half years to receive the necessary twenty-five ratifications. The Rome Statute has already been ratified by twenty-five states at the time of writing. This may give hope for a speedy entry into force but is likely to take at the very least until 2003. It is legally possible for all the contracting parties to agree to the early amendment of the Statute notwithstanding provision to the contrary, but it is unlikely that this will occur.

In the interim, article 11 of the proposed convention employs the existing mechanisms of the Rome Statute to give effect to agreed exemptions from the obligation to surrender perpetrators. By agreeing not to require the surrender of a person and thereby giving the person an implied assurance that he will not be prosecuted before an international instance, the international community is making a statement on which the person will rely. It would not be in the interests of justice for the international community to subsequently prosecute that person before an international tribunal because this would be unjust on the accused. In this way the Prosecutor's discretion not to prosecute where it would not be in the interests of justice[19] can be employed as a means of giving effect to an agreed exemption. This provision and the convention as a whole would further serve to clarify that the Prosecutor does not have a broad-based discretion to recognize municipal amnesties, in the absence of specific factors relating to the justice of the case.[20]

Otherwise, in the absence of an amendment of, or authoritative interpretation of, the Rome Statute, it must be left to the Security Council to give effect to any international agreement on the recognition of a particular amnesty, reached pursuant to the proposed guidelines. The Court's jurisdiction may be blocked for successive periods of twelve months until such time as the Statute is amended.

It is proposed here that, in accordance with the model convention detailed in the Appendix, a convention be concluded. This will set out guidelines on the limitation of national amnesties, as well as provide for a mechanism for the recognition of amnesties not in compliance with normal international limitations. It is proposed that states adopt the convention in the form of a Protocol to the Rome Statute, open to ratification by parties to the Statute. This has three important

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[19] See article 53 (c) of the Statute of the International Criminal Court.

[20] See the discussion in relation to this in chapter 11 *supra*, at 316 *et seq.*

advantages. First of all, it makes the regime for the international recognition of amnesties clearly part and parcel of the international criminal law process. Secondly, it thereby encourages the parties to the Rome Statute to embrace its provisions. Finally, it encourages states to become parties to the Rome Statute which are concerned about the inflexibility of its provisions or which wish to benefit from a regime for the international recognition of amnesty.

This work attempts to refine further in a more comprehensive and coherent fashion the understanding of the proper limitations on national amnesties, as initially developed through the distinguished writings of Bassiouni, Dugard, Kritz, Orentlicher, Roht-Arriaza, Scharf, Teitel and others. This thesis may hopefully, together with other writings, provide some clarity to this vexed question for the relevant actors. Clearly, though, both procedurally and substantively, much work has still to be done by commentators and states to reconcile the persisting and growing practice of amnesty with the fast-moving developments in international criminal law.

APPENDIX

DRAFT PROTOCOL

Drafted between 15th August to 30th September 2000 and between 15th December and 20th December 2000

Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition

Preamble

The State Parties to this agreement,

Mindful of the historical agreement on the establishment of an International Criminal Court and what it demonstrates in terms of the determination of the international community to secure the international rule of law;

Acknowledging the developing framework of international criminal law through treaties and customary international law;

Mindful of the exceptional difficulties sometimes experienced by transitional societies and societies in conflict in restoring sustainable peace and reconciliation;

Acknowledging that in exceptional times of transition it may be necessary to negotiate some form of amnesty for former belligerents;

Insisting that where such exceptional circumstances arise the needs of the victims and the desirability of international law and order must also be accommodated within any amnesty;

Have agreed as follows:

Chapter I

Definitions

Article 1

Amnesty means any law, proclamation or decision granting a person immunity from criminal and/or civil liability or from extradition or surrender to a foreign or international jurisdiction for any act or omission committed in a political context;

International Criminal Court means the Court established in terms of the Statute of the International Criminal Court;

Transition means a change of government from an undemocratic to a democratic regime or moving from a state of intense conflict to a state of peace;

Assembly of State Parties means the Assembly of State Parties in terms of the Statute of the International Criminal Court;

The *United Nations* means the United Nations Organisation;

Serious international crimes include those crimes specified in Article 3, acts of transnational terrorism, crimes in relation to nuclear material and crimes against diplomatic agents.

Chapter II

Application

Article 2

This Convention shall apply to all amnesties except those passed in the implementation of a peace treaty between two or more states, and where the such law has as its principle purpose the resolution of an armed conflict between states and the maintenance of peace between those states.

Chapter III

Prohibitions

Article 3

Subject to the provisions of this Protocol, no amnesty shall include within its scope any of the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression;

(e) Torture;

(f) Slavery;

(G) Piracy;

(h) Apartheid;

(i) Summary executions;

(j) Enforced disappearances.

Article 4

An amnesty shall not include within its scope immunity from prosecution for serious violations of human rights or other serious international crimes other than those listed in Article 3, except in so far as there is, in all the circumstances, otherwise no reasonable prospect of achieving a peaceful transition. This provision is without prejudice to any other international obligations on a state.

Article 5

Amnesty shall not include within its scope immunity from civil liability to victims of such violations before ordinary courts of law, for:

(a). The perpetrator, except in so far as there is, in all the circumstances, no alternative method for eliciting a reasonably full picture of the truth about past human rights violations;

(b) The state, except in so far as there is, in all the circumstances, no alternative method of ensuring that reasonable reparations may be provided to all victims of the past conflict which necessitates the amnesty.

Chapter IV

Exemption from the National Prosecution of International Offenders

Article 6

A state need not prosecute in its own courts any offence listed in Article 3, provided that:

(a) it and/or any other relevant parties to a former or subsisting conflict have concluded an agreement with the United Nations to that effect;

(b) it passes an amnesty law of general application and which is not a blanket amnesty, but requires a potential beneficiary to apply in a specified form; and

(c) the amnesty law is easily accessible for public inspection specifying elligibility and conditions of amnesty.

Article 7

In its consideration of whether to conclude an agreement with a state in terms of Article 6, the United Nations shall have regard in particular to the following factors:

(a) whether peace or transition to democracy would be severely jeopardised in the absence of an amnesty covering the serious international offence or offences for which exemption is sought;

(b) whether the agreement is with a state run by a democratically elected government or the amnesty is proposed in the context of transition to democracy;

(c) whether the proposed amnesty will be accompanied by a requirement of full discosure of the truth in a public hearing by the amnesty applicant;

(d) whether the proposed amnesty will be accompanied by the establishment of any other mechanism for revealing the truth about past human rights violations and providing reparations to the victims;

(e) Whether the state can give a commitment to prosecute those that do not apply for or do not qualify for amnesty;

(f) Any other factor relevant to the maintenance of peace and international security.

Article 8

Any agreement concluded with the United Nations in terms of Articles 6 and 7 may apply prospectively or retrospectively as agreed between the parties in the interests of peaceful transition.

Chapter V

Extradition and Surrender of an Amnestied Individual

Article 9

Where the United Nations has concluded or is negotiating an agreement in terms of Articles 6 to 8, it may further agree to exempt the state from the requirement of extraditing an amnestied individual to another state or surrendering that individual to an international criminal court or tribunal, provided that:

(a) In the case of extradition, all parties to the relevant extradition agreement are also parties to this Protocol, or if they are not, have agreed to comply with the exemption in terms of this Article and the relevant agreement providing for it;

(b) In the case of surrender to an international criminal court or tribunal, the prosecuting authority gives a written assurance

that the individual will not be prosecuted in the event that an agreement has been reached in terms of this Article;

(c) There are substantial reasons for believing that peace or transition to democracy may be severely jeopardised by extradition or surrender to an international court or tribunal, notwithstanding the exemption in terms of Chapter III;

(d) An exemption from the requirement to prosecute, extradite or surrender is consistent with a state's other treaty obligations, except in so far as they have been amended in terms of Article 10;

Article 10

This Protocol shall permit exemption from the requirement to prosecute or extradite in terms of customary international law or any treaty when the conditions set out in this Protocol have been satisfied and to that extent this Protocol shall constitute an amendment to all other international agreements to which the State Parties are party once the other conditions for amendments in those respective agreements have been complied with.

Article 11

In the case of the International Criminal Court, where an agreement has been concluded in terms of Article 8, it shall be accepted that the amnestied individual covered by its terms has an assurance from the international community of states that he will not be prosecuted before the International Criminal Court. In these circumstances an investigation by the Prosecutor's Office shall be deemed not to be in the interests of justice in terms of Article 53 (c) of the Statute of the International Criminal Court.

Chapter VI

Final Provisions

Article 12

Any dispute between two or more States Parties, or between a State Party and another party to negotiations in a transitional society relating

to the interpretation or application of this Protocol, which is not settled through negotiation within three months of their commencement, shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including compulsory referral to the International Court of Justice for a final and binding decision in conformity with the Statute of that Court. The State Parties hereby consent to the jurisdiction of the International Court of Justice.

Article 13

No reservations may be made to this Protocol.

Article 14

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the Statute of the International Criminal Court.
2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the Secretary-General of the United Nations.
3. The Protocol shall enter into force when 25 States have deposited their respective instruments of ratification or accession.

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