

# PEACE OR JUSTICE? AMNESTIES AND THE INTERNATIONAL CRIMINAL COURT

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*[This paper examines whether amnesties granted by states to perpetrators of serious human rights abuses can preclude the possibility of prosecution before the newly established International Criminal Court. The author considers the general debate between supporters of the use of amnesty and those in favour of criminal prosecutions to address such wrongs. The author also examines the extent to which international law imposes a duty on states to prosecute those who commit human rights violations. With these discussions in mind, the author turns to the text of the Statute of the ICC to determine whether any form of amnesty could preclude prosecution by the ICC. The author concludes that if an amnesty exception exists at all in the Statute of the ICC, it is found in the section that confers discretion upon the ICC Prosecutor to commence an investigation. The author suggests a framework for the ICC Prosecutor to consider in evaluating whether to proceed with an investigation or prosecution of an individual who has received a national amnesty.]*

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## I INTRODUCTION

Are peace and reconciliation compatible with the pursuit of justice? Consider the following scenario: a military regime prepares to relinquish power to a democratic government after years of perpetrating massive human rights abuses against its own people. The successor government recognises a social need to address the legacy of human rights violations committed by the former regime, but must contend with the fact that the main perpetrators still have substantial influence over the military. Furthermore, because the outgoing regime relied extensively on ‘disappearance’<sup>1</sup> to eliminate political opponents and critics, amassing the evidence necessary to conduct successful criminal prosecutions is difficult, if not impossible. Finally, and perhaps most importantly, the society, polarised and still recovering from the atrocities committed, could potentially plunge into a civil war in response to politically charged trials.

A society recovering from a legacy of human rights abuses perpetrated by an authoritarian regime and its opponents, or combatants in an internal conflict, is confronted with the dilemma of how best to come to terms with its horrific past. Simply ignoring the trauma suffered by the members of that society is not an option. As explained by Neil Kritz:

In responding to such trauma, groups and nations tend to function similarly to individuals. Societies shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways. The assumption that individuals or groups who have been victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds of future conflict.<sup>2</sup>

The appropriate response to egregious human rights violations is often thought to be criminal prosecution. Examples from the last century include the trials conducted at Nuremberg following the fall of the Third Reich, and at The Hague and Arusha following the atrocities committed in the former Yugoslavia and Rwanda, respectively. Criminal accountability for the perpetrators of mass abuse may, at first glance, appear to be the most appropriate means of achieving some semblance of justice. However, a fledgling democracy, recently arisen from the ashes of gross human rights violations, must also evaluate the risk of vitiating the stability of the newly democratic or transitional society, and impairing its long-term development.<sup>3</sup> Under such conditions, must the successor government punish those who bear criminal responsibility for the prior regime’s actions, even though such criminal prosecutions may potentially have devastating effects on its society?

Over the last 20 years, numerous states have determined that the societal costs and risks of pursuing traditional criminal prosecutions as the sole means of

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<sup>1</sup> This refers to a crime, the essence of which is the state’s refusal to supply information about the victim’s fate, and a denial of any responsibility.

<sup>2</sup> Neil Kritz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’ (1996) 59 *Law and Contemporary Problems* 127, 127.

<sup>3</sup> David Crocker, ‘Reckoning with Past Wrongs: A Normative Framework’ (1999) 3 *Ethics and International Affairs* 43, 43.

achieving justice, or indeed as part of reckoning with the past, were too great. In recent years, Argentina, Cambodia, Uruguay, Chile, El Salvador, Guatemala, Haiti, South Africa, Algeria and Sierra Leone have granted amnesties for past wrongs as a method for securing peace.<sup>4</sup> In some countries, amnesties have been granted by national public inquiry bodies known as ‘truth commissions’ — bodies which investigate, report upon and acknowledge the history of past abuses.<sup>5</sup> In fact, since 1974 some 17 countries have utilised truth commissions as a means of reckoning with the past.<sup>6</sup> While truth commissions and prosecutions are not necessarily mutually exclusive, in her study of 15 truth commissions over the past 25 years, Priscilla Hayner notes that prosecutions seldom occur after a truth commission, even where the identity of the perpetrators is known.<sup>7</sup> Thus, in the case of many of the transitional societies mentioned above, the power to prosecute was exchanged for truth (as facilitated by truth commissions) and stability during the transition from repression to democracy.<sup>8</sup>

A major development in the enforcement of international criminal law, however, may preclude a state’s decision to choose stability over criminal justice. The International Criminal Court represents the fruition of an international effort to create a permanent forum in which crimes abhorrent to the international community will be prosecuted. The *Rome Statute of the International Criminal Court*<sup>9</sup> makes no explicit mention of amnesties or whether the ICC will respect the decision of a state to forego criminal prosecutions. If the matter is left to the discretion of ICC prosecutors, in what circumstances should the ICC find that it has jurisdiction over a case in which an amnesty is granted? Should it matter whether amnesty has been granted in violation of a state’s international obligations? Should it matter whether a state gives an amnesty without requiring any form of accountability, as opposed to an amnesty in exchange for truth about the crimes committed?

This paper will examine whether amnesties can be used as a defence to prosecution before the ICC. It will first consider the general debate between supporters of the use of amnesties and those who argue in favour of criminal prosecutions. It will then look at the extent to which international law imposes a duty on the state to prosecute the perpetrators of international crimes. Finally, in light of the foregoing, it will examine the text of the *Statute of the ICC* to determine whether any form of amnesty could preclude prosecution by the ICC.

## II THE DEBATE OVER TRANSITIONAL JUSTICE

As noted by Teitel, the debate over transitional criminal justice is characterised by difficult choices:

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<sup>4</sup> An amnesty is generally considered to be an official action which protects an individual from civil and/or criminal liability for past acts.

<sup>5</sup> Louis Henkin et al, *Human Rights* (1999) 631.

<sup>6</sup> John Dugard, ‘Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?’ (1999) 12 *Leiden Journal of International Law* 1001, 1005.

<sup>7</sup> Priscilla Hayner, ‘Fifteen Truth Commissions — 1974 to 1994: A Comparative Study’ (1994) 16 *Human Rights Quarterly* 597, 604.

<sup>8</sup> Ruti Teitel, *Transitional Justice* (2000) 53.

<sup>9</sup> Opened for signature 17 July 1998, 37 ILM 999 (1998) (entered into force 1 July 2002) (*‘Statute of the ICC’*).

Whether to punish or to amnesty? Whether punishment is a backward-looking exercise in retribution or an expression of the renewal of the rule of law? Who properly bears responsibility for past repression? To what extent is responsibility for repression appropriate to the individual, as opposed to the collective, the regime, and even the entire society?<sup>10</sup>

Not surprisingly, many of the arguments in the debate over whether to grant amnesty or to prosecute are diametrically opposed. While proponents of both sides recognise the need for reconciliation within a transitional society in order to achieve democracy, they argue that such reconciliation can only be achieved through their respective approaches.

#### A Arguments for Prosecution

Proponents of criminal prosecutions identify numerous ethical, moral and policy reasons to support their contention that criminal trials must be conducted by transitional societies seeking to address a legacy of human rights abuse.<sup>11</sup> First, perhaps the most important argument in favour of prosecutions is that they are necessary in order to promote a society based upon the rule of law. The consequence of not conducting trials may be a society in which the rule of law is devalued. According to Diane Orentlicher:

If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future? A complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct. This may be tolerable when the law or the crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence and that have been violated on a massive scale.<sup>12</sup>

Thus prosecutions can renew a society's faith in the concept that the rule of law protects the inherent dignity of the individual, and can 'establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable.'<sup>13</sup>

Second, because the rule of law is integral to democracy itself, some proponents of criminal trials argue that prosecutions are necessary to strengthen fragile democracies and popular support for their governments.<sup>14</sup> A failure to prosecute may encourage 'vigilante justice', create feelings of distrust towards the new government and the political system, and encourage cynicism towards the rule of law.<sup>15</sup>

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<sup>10</sup> Teitel, above n 8, 27.

<sup>11</sup> See generally Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537.

<sup>12</sup> *Ibid* 2542.

<sup>13</sup> Kritz, above n 2, 128.

<sup>14</sup> Luc Huyse, 'To Punish or Pardon: A Devil's Choice' in Christopher Joyner and M Cherif Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17–21 September 1997* (1998) 79, 80–1.

<sup>15</sup> *Ibid* 81.

Third, proponents of prosecutions argue that trials can provide a public forum for a judicial confirmation of the facts. Such fact-finding can educate the populace as to the extent of the wrongdoing, and prevent revisionism.<sup>16</sup>

Finally, supporters of criminal trials argue that criminal accountability can provide victims of abuse, and their families, 'with a sense of justice and catharsis — a sense that their grievances have been addressed and can hopefully be put to rest, rather than smouldering in anticipation of the next round of conflict.'<sup>17</sup> One commentator notes that 'society cannot forgive what it cannot punish.'<sup>18</sup> If this is the case, prosecution is necessarily the most appropriate form of transitional justice.

### B *Why Forego Prosecution?*

Those who oppose prosecutions of past crimes in transitional societies argue that prosecution can raise difficult questions of legitimacy;<sup>19</sup> for example, who will be given the authority to judge the members of the outgoing regime?<sup>20</sup> Perhaps more important is that prosecution can threaten the stability of a newly democratic society. Orentlicher notes:

In countries where the military retains substantial power after relinquishing office, efforts to prosecute past violations may provoke rebellions or other confrontations that could weaken the authority of the civilian government. And in countries where security forces have retained modest power relative to an elected government, prosecutions may induce the military to 'close ranks.' In these circumstances, prosecutions could reinforce the military's propensity to challenge democratic institutions.<sup>21</sup>

Furthermore, prosecutions can hinder the national reconciliation process as supporters of the previous regime may be driven into social or political isolation and create 'subcultures hostile to democracy'.<sup>22</sup> In addition, criminal trials may be unrealistic or simply impossible for a transitional society. The state's criminal justice system may not have the capacity or resources to investigate, prosecute and adjudicate the crimes in question. Further, the costs of investigating and prosecuting past human rights violations can be crippling to a developing economy.

Even if the resources exist, the accumulation of evidence to mount successful prosecutions may be highly problematic. As explained by van Zyl, 'political crimes committed by highly skilled operatives trained in the art of concealing their crimes and destroying evidence are difficult to prosecute'.<sup>23</sup> In *Azapo v*

<sup>16</sup> Stephen Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 *Law and Contemporary Problems* 81, 83.

<sup>17</sup> Kritz, above n 2, 128.

<sup>18</sup> Landsman, above n 16, 84.

<sup>19</sup> Kristin Henrard, 'The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law' (1999) 8 *Michigan State University — DCL Journal of International Law* 595, 635.

<sup>20</sup> *Ibid.*

<sup>21</sup> Orentlicher, above n 11, 2545.

<sup>22</sup> Henrard, above n 19, 635.

<sup>23</sup> Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 647, 652.

*President of the Republic of South Africa*<sup>24</sup> — a challenge to the constitutionality of South Africa's amnesty legislation — Mahomed DP explained that the nature of many of the human rights atrocities committed during the apartheid era made criminal prosecutions impossible:

Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. ... Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatizing to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.<sup>25</sup>

Where trials would raise issues of legitimacy, potential destabilisation and practicability, the utility of criminal prosecutions is put into question.

### C *Does International Law Require States to Prosecute?*

Human rights are protected by international law through an array of treaties, as well as by customary international law. Certain violations of international human rights law and international humanitarian law<sup>26</sup> can constitute crimes for which international law imposes individual liability. Is granting amnesty to perpetrators of egregious human rights violations ever an option, or are states subject to an international legal duty to prosecute such crimes? Surely the existence or non-existence of such a duty would have to be taken into account by ICC prosecutors in determining whether to exercise jurisdiction over a case in which an amnesty has been granted. An amnesty that does not violate a state's international legal duties would have a greater likelihood of being accepted by the international community and the ICC than one granted in violation of such duties. A conclusion on the existence and breadth of a duty to prosecute must be drawn from an analysis of both treaty law and customary international law.

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<sup>24</sup> (1996) 4 SA 671.

<sup>25</sup> *Ibid* 683–5.

<sup>26</sup> International human rights law refers to the body of international law which protects the dignity of the individual. This is distinct from international humanitarian law, which refers to the body of international law that governs the conduct of armed conflict and the protection of individuals during war. According to Henkin et al, above n 5, 293:

A body of humanitarian law — including limitations on the use of certain weapons, regulation for the treatment of prisoners of war, the sick and the wounded, and rules safeguarding civilian populations — was established in the Nineteenth Century, was developed and updated after the First World War, and again in recent decades. Humanitarian law is contained largely in a series of Geneva Conventions and Protocols, and is monitored principally by the International Committee of the Red Cross ... Virtually all States are parties to the principal conventions comprising humanitarian law.

1 *Treaty Law*

Key human rights treaties, such as the *International Covenant on Civil and Political Rights*,<sup>27</sup> the *American Convention on Human Rights*<sup>28</sup> and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>29</sup> oblige States Parties ‘to respect and to ensure all individuals within [their] territory and subject to [their] jurisdiction the rights recognised [therein]’ and to provide ‘an effective remedy’.<sup>30</sup> They do not, however, contain a specific duty to prosecute grave human rights violations. Despite the lack of an explicit duty to prosecute, the bodies charged with the task of interpreting these treaties have implied such a duty to exist.<sup>31</sup> For example, both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have interpreted the *ACHR* to require the prosecution of individuals who have violated the rights contained therein.<sup>32</sup> In the *Velásquez Rodríguez Case*<sup>33</sup> the Inter-American Court interpreted article 1(1) of the *ACHR* as imposing a duty on member states to ‘prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.’<sup>34</sup> However, Steven Ratner notes that the decision of the Inter-American Court did not go so far as to state explicitly ‘that prosecution is the exclusive method of acceptable punishment’, and therefore ‘may have left open the possibility of administrative punishment alone’.<sup>35</sup> This apparent leeway

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<sup>27</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (*ICCPR*).

<sup>28</sup> Opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) (*ACHR*).

<sup>29</sup> Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (*European Human Rights Convention*).

<sup>30</sup> See *ICCPR*, above n 27, arts 2(1)–(3), 9(5), 14(6); *ACHR*, above n 28, arts 1(1), 10, 25; *European Human Rights Convention*, above n 29, arts 1, 5(5), 13.

<sup>31</sup> See generally Naomi Roht-Arriaza, ‘Sources in International Treaties of an Obligation to Investigate, Prosecute and Provide Redress’ in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) 24, 28–32.

<sup>32</sup> John Dugard, ‘Reconciliation and Justice: The South African Experience’ (1998) 8 *Transnational Law and Contemporary Problems* 277, 282. See generally Douglass Cassel, ‘Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities’ (1996) 59 *Law and Contemporary Problems* 197.

<sup>33</sup> (1988) 4 Inter-Am Ct HR (ser C). The case was brought by the relatives of a ‘disappeared’ Honduran against the Government of Honduras for violations of the *ACHR*. Art 1(1) states:

The State Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

<sup>34</sup> *Ibid* [166].

<sup>35</sup> Steven Ratner, ‘New Democracies, Old Atrocities: An Inquiry in International Law’ (1999) 87 *Georgetown Law Journal* 707, 722. See also 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, 50–1.

afforded to States Parties by the Court was again confirmed in the recent *Barrios Altos Case*.<sup>36</sup>

The Inter-American Commission, however, has explicitly determined that amnesties granted by Uruguay,<sup>37</sup> Chile,<sup>38</sup> Peru<sup>39</sup> and other countries<sup>40</sup> were incompatible with the rights under the *ACHR*. Furthermore, the UN Human Rights Committee ('HRC'), responsible for monitoring state compliance with the *ICCPR*, has on numerous occasions determined that States Parties have a duty, pursuant to the *ICCPR*, to investigate and prosecute those committing disappearances, summary executions, ill-treatment, and arbitrary arrest and detention.<sup>41</sup> In 1992 the HRC adopted *General Comment No 20(44) (article 7)*, stating that amnesties covering acts of torture 'are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future'.<sup>42</sup>

Beyond the ideals expressed in multilateral treaties and by international human rights bodies, the actual practice of states is equally important in the interpretation of the duties imposed by these international instruments.<sup>43</sup> Recently in Argentina and Chile national courts have invalidated or read down amnesty laws which have prevented the prosecutions of atrocities committed during the military dictatorships of those respective countries.<sup>44</sup> However, the fact remains that many states have granted amnesties, which remain valid, to officials or former officials responsible for gross violations of the rights

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<sup>36</sup> *Chumbipuma Aguirre et al v Peru* (2001) 75 Inter-Am Ct HR (ser C). This case was an unsuccessful attempt by Peru to assert its own amnesty laws for former violators. The Inter-American Court of Human Rights refused to recognise the validity of amnesties as granted by domestic laws, and described them as 'manifestly incompatible' with the *ACHR*'s purpose: at [43].

<sup>37</sup> See Inter-American Commission on Human Rights, *Report No 29/92 (Uruguay)*, OEA/ser.L./VII.82, Doc 25 (2 October 1992).

<sup>38</sup> *Gary Hermosilla et al*, Case 10.843, Inter-Am Comm HR (1988).

<sup>39</sup> See *Barrios Altos Case* (2001) 75 Inter-Am Ct HR (ser C), [41]–[44].

<sup>40</sup> With respect to cases on Argentina and El Salvador see Inter-American Commission on Human Rights, *Report No 24/92 (Argentina)*, OEA/ser.L./V/II.82, Doc 24 (2 October 1992); Inter-American Commission on Human Rights, *Report 26/92 (El Salvador)*, OEA/ser.L./V/II.82 (24 September 1994).

<sup>41</sup> See Henrard, above n 19, 624 and fn 141. In a case involving disappearances in Uruguay, the HRC concluded that the Government of Uruguay should take effective steps to bring to justice any persons found responsible. See *Quinteros v Uruguay*, HRC, Comm No 107/1981, UN GAOR, 38<sup>th</sup> sess, Supp No 40, UN Doc A/38/40 (1983) annex XXII.

<sup>42</sup> HRC, *General Comment No 20(44) (article 7)*, UN Doc CCPR/C/21/Rev1/Add3 (1992) [15].

<sup>43</sup> See Ratner, 'New Democracies', above n 35, 722–5. See also *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 31 (entered into force 27 January 1980) ('*VCLT*').

<sup>44</sup> In Argentina, a federal judge declared the 'Due Obedience' and 'Full Stop' laws to be 'unconstitutional and invalid': see Human Rights Watch, 'Argentine Decision Invalidating Amnesty Welcomed' (2001) <<http://www.hrw.org/press/2001/03/ArgentineAmnesty306.htm>> at 23 September 2002; Human Rights Watch, *Argentina — Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators* (2001) vol 5B, ch IV. In 1999 Chilean courts ruled that 'disappearances' must be considered ongoing crimes and were therefore not subject to the amnesty laws: see Human Rights Watch, 'Re-instatement of Pinochet Charges Hailed' (2001) <<http://www.hrw.org/press/2001/01/pinochetarrest.htm>> at 23 September 2002.

contained within human rights treaties.<sup>45</sup> This suggests that states do not consider themselves bound by the duty to prosecute as advocated by the HRC and the Inter-American Court.<sup>46</sup> Ultimately, while the interpretations of the treaties rendered by these bodies are important, the meaning of the treaty depends as much, if not more, on the actual practice of states.<sup>47</sup>

An explicit duty to prosecute violations of human rights pursuant to a treaty obligation arises only in narrowly defined circumstances under the 1949 *Geneva Conventions*,<sup>48</sup> the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>49</sup> and the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*.<sup>50</sup> The *Geneva Conventions*' memberships include nearly every country in the world. The *Torture Convention* currently has a more restricted membership of 123 parties.<sup>51</sup>

The *Geneva Conventions* contain obligations to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed', any 'grave breaches' of the conventions.<sup>52</sup> The *Geneva Conventions* further impose an obligation to extradite or prosecute<sup>53</sup> an individual charged with 'grave breaches', which include, inter alia, 'wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health.'<sup>54</sup> It should be noted, however, that the duty to prosecute grave breaches only applies to conflicts of an

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<sup>45</sup> Transitional democracies such as 'Argentina, Uruguay, Chile, Brazil, Peru, Guatemala, El Salvador, Honduras, Nicaragua, Haiti, the Ivory Coast, Angola and Togo have all passed broad amnesty laws in the last ten years — or honored amnesties of prior regimes — covering governmental atrocities': Ratner, 'New Democracies', above n 35, 722.

<sup>46</sup> It should be noted that the decisions of the HRC and the Inter-American Commission are not binding on member states.

<sup>47</sup> Ratner, 'New Democracies', above n 35, 725.

<sup>48</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31, arts 49–50 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85, arts 50–51 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, arts 146–147 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

<sup>49</sup> Opened for signature 9 December 1948, 78 UNTS 277, arts 1–3 (entered into force 12 January 1951) ('*Genocide Convention*').

<sup>50</sup> Opened for signature 10 January 1984, 1465 UNTS 85, arts 2, 4, 6 (entered into force 26 June 1987) ('*Torture Convention*').

<sup>51</sup> For the current status of signatories to the *Torture Convention*, see UNTS participant list <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty12.asp>> at 23 September 2002.

<sup>52</sup> *Geneva Convention I*, above n 48, art 49; *Geneva Convention II*, above n 48, art 50; *Geneva Convention IV*, above n 48, art 146.

<sup>53</sup> Scharf points out that the Commentary to the *Geneva Conventions*, 'which is the official history of the negotiations leading to the adoption of these treaties, confirms that the obligation to prosecute grave breaches is "absolute"': see Scharf, 'Letter of the Law', above n 35, 44.

<sup>54</sup> *Geneva Convention I*, above n 48, art 50; *Geneva Convention II*, above n 48, art 51; *Geneva Convention IV*, above n 48, art 147.

international nature (that is, inter-state conflicts).<sup>55</sup> The corollary of this duty is that States Parties to the *Geneva Conventions* can under no circumstances grant amnesty to those who perpetrate 'grave breaches'.

Similarly, the *Genocide Convention* imposes an absolute duty to extradite or prosecute those responsible for genocide.<sup>56</sup> It should be noted that the definition of genocide requires that the enumerated acts be committed with intent to destroy a national, ethnic, racial or religious group through victimising its members.<sup>57</sup> Furthermore, acts committed against members of political groups are not included within the definition of genocide.

The *Torture Convention* imposes a duty on member states to ensure: that torture<sup>58</sup> is a crime within their respective legal systems;<sup>59</sup> that they establish jurisdiction and take custody of perpetrators of torture within their territory;<sup>60</sup> and if the state does not extradite the perpetrator, that it 'submit the case to the competent authorities for the purpose of prosecution.'<sup>61</sup> Unfortunately, the parties to the *Torture Convention* do not include many states that regularly engage in torture.

It is apparent that an explicit duty, imposed by treaty law, to prosecute international crimes is limited in scope. The duty to prosecute applies to the crime of torture for States Parties to the *Torture Convention*, to grave breaches of the *Geneva Conventions* (which necessarily involve international conflict), and genocide as defined by the *Genocide Convention*. With respect to the *Geneva Conventions* and the *Genocide Convention*, however, the duty to prosecute would not be triggered by atrocities committed in transitions from an authoritarian to a democratic regime in a single state unless the crime of genocide was found to have been committed. Therefore, amnesties granted in

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<sup>55</sup> The *Geneva Conventions* only provide basic protections in the event of internal conflicts such as civil wars: see *Geneva Conventions*, above n 48, common art 3. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), which specifically addresses internal conflicts, but does not include a duty to prosecute war crimes committed in the course of such conflicts.

<sup>56</sup> Genocide is defined by art 2 of the *Genocide Convention* as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

<sup>57</sup> See generally Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997) 27–36.

<sup>58</sup> According to the *Torture Convention*, above n 50, art 1(1), the definition of 'torture' includes intentional acts which inflict severe mental or physical pain and suffering on a person inflicted by or with the acquiescence of a public official or person acting in an official capacity.

<sup>59</sup> *Ibid* art 4(1).

<sup>60</sup> *Ibid* art 5.

<sup>61</sup> *Ibid* art 7(1).

contravention of these conventions are inappropriate and ‘would be subject to challenge in a variety of domestic and international fora’,<sup>62</sup> including the ICC.

## 2 Custom

International obligations on states derive not only from treaty law, but from customary law as well.<sup>63</sup> Whether customary international law imposes a duty on states to prosecute gross human rights violations must be inferred from the common practice of states.<sup>64</sup> Crimes that exist as a matter of customary international law are known as crimes against humanity.<sup>65</sup>

If a duty for states to prosecute crimes against humanity exists, the ability of a successor regime to grant amnesties to the members of the previous regime is significantly limited. Support for the existence of such a duty can be found in academic writing,<sup>66</sup> General Assembly resolutions,<sup>67</sup> international conventions,<sup>68</sup>

<sup>62</sup> Scharf, ‘Letter of the Law’, above n 35, 60.

<sup>63</sup> Customary international law is one of the fundamental sources of international law identified in the *Statute of the ICC*, above n 9, art 38.

<sup>64</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3, 45.

<sup>65</sup> According to the *Statute of the ICC*, above n 9, art 7(1), crimes against humanity must be ‘committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack’. The scope of recognised crimes includes murder, extermination, enslavement, deportation or forcible transfer of a population, torture, etc.

<sup>66</sup> See, eg, M Cherif Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’ (1996) 59 *Law and Contemporary Problems* 9, 17–18; Orentlicher, above n 11, 2549; Roht-Arriaza, above n 31, 50–6. Bassiouni argues that certain international crimes, such as crimes against humanity, have risen to the level of *jus cogens* (peremptory norms of international law): M Cherif Bassiouni, ‘The Need for International Accountability’ in M Cherif Bassiouni (ed), *International Criminal Law* (2<sup>nd</sup> ed, 1998) vol 3, 3, 13–15. The implication of *jus cogens* status is that the international duty not to perpetrate crimes against humanity is non-derogable. According to Bassiouni, a crime recognised as *jus cogens* carries with it the duty to prosecute or extradite: at 13.

<sup>67</sup> See *Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, GA Res 3074, UN GAOR, 28<sup>th</sup> sess, Supp No 30A 78, UN Doc A/9030/Add.1 (1973). Paragraph 8 states that ‘States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity.’ See also the *Declaration on Territorial Asylum*, GA Res 2312, UN GAOR, 22<sup>nd</sup> sess, Supp No 16, 81, UN Doc A/6716 (1967).

<sup>68</sup> For example, see the *Allied Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, enacted 20 December 1945, 3 *Official Gazette Control Council for Germany* (1946), 50–5, cited in M Cherif Bassiouni (ed), *International Criminal Law* (1<sup>st</sup> ed, 1987) vol 3, 129. Art II(5) provided that national amnesties for crimes against peace, war crimes, and crimes against humanity could not bar prosecutions by the military tribunals established by the Allies. See also the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, opened for signature 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970); UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted 25 June 1993, UN Doc A/CONF.157/24 (1993). Part II [60] calls on states to prosecute those responsible for grave human rights violations and to abrogate legislation leading to impunity for such crimes.

and the decisions of international tribunals.<sup>69</sup> Despite such support, it is clear that neither the requisite state practice nor *opinio juris* exists to establish the duty to prosecute crimes against humanity as a customary norm.<sup>70</sup> The practice of states is fraught with examples of amnesties being granted to perpetrators of crimes against humanity. While some states have been successful in prosecuting members of old regimes for serious human rights abuses, this practice cannot be regarded as consistent.<sup>71</sup> Furthermore, as explained by one commentator:

the reaction of the ... international community suggests some acceptance of this practice in the case of transitional governments dealing with past abuses. Although governments and international organizations have condemned authoritarian states for failing to punish human rights abusers, they have, with the exception of those bodies responsible for interpreting treaties above, generally refrained from condemning those states for failure to prosecute past abuses once they adopt democratic systems of governance.<sup>72</sup>

On the other hand, recent UN initiatives in both Sierra Leone and East Timor that preclude the possibility of amnesty for crimes such as crimes against humanity, war crimes and torture, provide further evidence of an emerging principle of international law prohibiting amnesty for international crimes. Still, while such a principle may be developing, it has not yet crystallised into a rule of law.<sup>73</sup> Therefore, except in cases where a failure to prosecute violates a treaty obligation (that is, genocide, grave breaches of the *Geneva Conventions*, or torture in violation of the *Torture Convention*), the granting of amnesties to perpetrators of egregious human rights violations is most likely not precluded by international law.

#### D Truth Commissions and Amnesty: *A Compromise between Peace and Justice?*

Criminal prosecutions are, without question, an important and effective way of securing accountability for past wrongs. However, the arguments considered above suggest that there are at least three circumstances in which forgoing prosecutions could be morally justified. The first is where the military or other security forces remain loyal to or are under the control of the previous regime.

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<sup>69</sup> For example, the Inter-American Commission has held that amnesties for crimes against humanity are impermissible under the *ACHR*: see Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, Report No 5/94 OEA/SerL/V/II.85 (June 1994) 69–77. The trial chamber of the International Criminal Tribunal for the Former Yugoslavia has held that amnesties for torture are null and void and will not receive foreign recognition: see *Prosecutor v Furundzija (Trial Chamber Judgment)*, Case No IT-95-17/I-T (10 December 1998) [151]–[157].

<sup>70</sup> Michael Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 32 *Cornell International Law Journal* 507, 519–20; Ratner, 'New Democracies', above n 35, 726–7.

<sup>71</sup> Ratner, 'New Democracies', above n 35, 727.

<sup>72</sup> *Ibid.*

<sup>73</sup> Scharf, 'Letter of the Law', above n 35, 61; Ratner, 'New Democracies', above n 35, 727. Dugard also notes a general trend towards prohibiting amnesty for international crimes: Dugard, above n 6, 1004. For a review of the opposite position, see Amnesty International, *The International Criminal Court. Making the Right Choices – Part III: Ensuring Effective State Cooperation* (1997) 50–4.

Prosecutions of members of the former regime can legitimately be avoided where they could foreseeably lead to a coup d'état, a continuation of hostilities and human rights abuses, the killing of civilians or political opponents, or serious damage to the country's economy or infrastructure.<sup>74</sup> According to van Zyl:

in many circumstances militaries do present substantial and genuine threats to established democratic governments and to society as a whole. It would be irresponsible to demand the prosecution of perpetrators if this would lead to the loss of hundreds of lives or result in significant damage to a country's economy or infrastructure. In such cases successor governments may, for principled reasons, elect not to prosecute so as to avoid a widespread loss of life or massive social and economic disruption.<sup>75</sup>

Second, criminal prosecutions can legitimately be foregone where it would be impossible to achieve convictions because evidence is unavailable. Such is the case where witnesses are dead or missing, documents have been destroyed, or the crimes themselves have been perpetrated under a shadow of secrecy.

Third, a state may choose not to prosecute where the criminal justice system is effectively inoperative because of strong institutional loyalty to the old regime. This may be due to a lack of judges, prosecutors, and defence lawyers; scarcity of competent or adequate police and investigatory resources; or the system simply may not be able to grant fair, impartial trials because of the large number of perpetrators.<sup>76</sup>

However, even in these circumstances, blanket amnesties — generally granted by the members of the regime to themselves while in power, or by members of the successor government without any sort of accountability for the crimes committed — can rarely be justified. Amnesty coupled with total immunity from any sort of accountability is, in the words of Kritz,

immoral, injurious to victims, and in violation of international legal norms. It can be expected not only to encourage new rounds of mass abuses in the country in question but also to embolden the instigators of crimes against humanity elsewhere.<sup>77</sup>

According to John Dugard, '[u]nconditional amnesty for atrocious crimes is ... no longer generally accepted by the international community.'<sup>78</sup> While that may generally be the case, unconditional amnesties are still being granted. For example, in Algeria, since the cancellation of the 1992 parliamentary elections, more than 100 000 lives have been lost and countless other serious human rights abuses have been perpetrated in the conflict between Algerian security forces and militant groups.<sup>79</sup> On 10 January 2000 President Bouteflika of Algeria issued a decree granting a 'pardon with the force of amnesty' (*grâce*

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<sup>74</sup> Paul van Zyl, 'Justice without Punishment: Guaranteeing Human Rights in Transitional Societies' in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), *Looking Back/Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) 42, 43.

<sup>75</sup> *Ibid* 43.

<sup>76</sup> *Ibid* 44–6.

<sup>77</sup> Kritz, above n 2, 129.

<sup>78</sup> Dugard, above n 6, 1015.

<sup>79</sup> Iván Martín, 'Whither Algeria?' (2002) 15(46) *Nación Árabe* 47.

*amnistiante*) to 'persons belonging to organizations which voluntarily and spontaneously decide to put an end to acts of violence, which put themselves entirely at the disposal of the state and whose names appear in the annex to [this] decree'.<sup>80</sup> The annex referred to the Armée Islamique du Salut, one of the main militant groups in the conflict. In effect, this decree exempted all persons covered from having to make any declaration of the acts that they had committed, protected them from imprisonment or other sanction, and granted a blanket amnesty for crimes committed during the conflict regardless of their nature.<sup>81</sup>

If one accepts the proposition that unconditional amnesties are morally unjustifiable and legally problematic, but simultaneously recognises that in certain cases political constraints make criminal prosecutions impossible, the question then becomes whether there exists a viable alternative. According to Dugard, the evolution of international law has effectively left transitional societies with a choice between prosecution or amnesty accompanied by a truth commission.<sup>82</sup>

Truth commissions seek to establish an official reckoning and accounting of the abuses that have been committed.<sup>83</sup> As explained by Kritz and Stuebner, while criminal trials and truth commissions need not be mutually exclusive, the latter can contribute many of the same benefits as the former:

what a truth commission contributes is a meaningful acknowledgment of what happened, in a formal manner and by a body that is perceived as official in representing the state and society, and that is perceived domestically and internationally as legitimate and impartial. Such a procedure is not intended to substitute for prosecutions. It rarely affords those implicated by its investigations the same kinds of due process protections, for example, that they would be afforded at trial. But it can serve many of the same functions to the extent that it, for example: provides the mandate and authority for an official investigation of past abuses and an official clarification of the facts; it permits a cathartic public airing of the evil and pain which has been inflicted; and it provides a forum for victims and their relatives to tell their story and have it made part of the official record, thereby providing a degree of societal acknowledgment of their loss.<sup>84</sup>

According to Hayner, a truth commission can have any or all of five primary functions:

to discover, clarify, and formally acknowledge past abuses; to respond to the specific needs of victims; to contribute to justice and accountability; to outline institutional responsibility and recommend reforms; and to promote reconciliation and reduce conflict over the past.<sup>85</sup>

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<sup>80</sup> President Abd al-Aziz Bouteflika, cited in Human Rights Watch, *Algeria: Human Rights Developments* (2001) <<http://www.hrw.org/wr2k1/mideast/algeria.html>> at 23 September 2002.

<sup>81</sup> *Ibid.*

<sup>82</sup> Dugard, above n 6, 1005.

<sup>83</sup> Neil Kritz and William Stuebner, 'A Truth and Reconciliation Commission for Bosnia and Herzegovina: Why, How, and When?' (Paper presented at the Victimology Symposium, Sarajevo, 9–11 May 1998) 3.

<sup>84</sup> *Ibid.* 3–4.

<sup>85</sup> Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocities* (2001) 24.

While amnesties need not be a part of the truth commission's explicit function, they can be an important part of the truth commission process, as reflected in the South African model. In the early 1990s, after more than 40 years of perpetrating severe human rights violations against the black population, South Africa's apartheid Government entered into negotiations with the African National Congress ('ANC')<sup>86</sup> regarding the transition to a democratically elected government. However, the former Government and the members of its security forces were unwilling to expose themselves to arrest, prosecution and imprisonment for carrying out apartheid policies.<sup>87</sup> The issue of amnesty constituted the final hurdle in achieving a democratic government. Paul van Zyl explains:

only a few months before the scheduled elections, generals in command of the South African police delivered a veiled warning to the ANC that they would not support or safeguard the electoral process if it led to the establishment of a government that intended to prosecute and imprison members of the police force.

The ANC faced a massive dilemma. Without an amnesty agreement, the negotiations would collapse and the mass mobilization and politics of confrontation would return. The ANC also concluded that hostility and opposition from the security forces would have made it impossible to hold successful elections. Dullah Omar, a key ANC negotiator and current Minister of Justice, stated publicly that 'without an amnesty agreement there would have been no elections.'<sup>88</sup>

In 1995 the South African Parliament passed legislation which created a Truth and Reconciliation Commission ('TRC'). The objectives of the *Promotion of National Unity and Reconciliation Act 1995* (South Africa) ('*Reconciliation Act*') include: to investigate and hold hearings on the causes, nature and extent of human rights abuses committed during the era of apartheid; to grant amnesties to those who complied with the requirements of the *Reconciliation Act*; to establish the fate of victims of human rights abuses; to allow victims to relate their accounts of what occurred; and finally, to compile a comprehensive report of the findings of the TRC.<sup>89</sup> Specifically, the *Reconciliation Act* empowers the TRC to investigate and report on the nature of the human rights abuses that occurred and the identity of the perpetrators.<sup>90</sup>

The TRC is constituted by several committees, including a Committee on Amnesty. According to the *Reconciliation Act*, a person who wished to apply for an amnesty must have done so within 12 months of the date of the Act's proclamation. In consideration of these applications, the Committee will grant an amnesty in respect of an act, omission or offence where it is satisfied that:

- (a) the application complies with the requirements of the Act;
- (b) the act, omission or offence to which the application relates has a political motive; and

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<sup>86</sup> The ANC was the party expected to win the first democratic election.

<sup>87</sup> Van Zyl, 'Dilemmas of Transitional Justice', above n 23, 650.

<sup>88</sup> Ibid.

<sup>89</sup> *Reconciliation Act* art 3(1).

<sup>90</sup> Ibid art 4(a).

- (c) the applicant has made a full disclosure of all relevant facts.<sup>91</sup>

The *Reconciliation Act* contains strict criteria for determining what constitutes an ‘act associated with a political objective.’<sup>92</sup> These criteria include, inter alia, the motive of the offender, the context in which the act took place, the gravity of the act, the objective of the act, the relationship between the act 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’.<sup>93</sup> These criteria therefore exclude acts committed for personal gain or out of malice. A person who has been granted amnesty cannot be held criminally or civilly liable for the act, omission or offence for which they were granted amnesty. However, a person who does not seek amnesty pursuant to the provisions of the *Reconciliation Act* faces the possibility of prosecution for politically motivated human rights abuses carried out during the apartheid era.

The South African model demonstrates that amnesties can be an immensely useful tool. Without them, dictators or rebels may be unwilling to cede power or call off violence. Furthermore, without the promise of amnesty, members of the old regime may refuse to cooperate with a truth commission, thereby jeopardising its ability to give a full and detailed account of the atrocities which occurred and identify the individuals and institutions responsible. While it may be considered an injustice to grant amnesties to murderers and torturers, it would be an even greater injustice for a successor regime to insist on prosecutions in situations which would result in further loss of life, and a new outburst of atrocities. If amnesties are the only way by which a truth commission can ascertain the truth behind systematic human rights abuses and identify the perpetrators, a truth commission can serve as a compromise between peace and justice. The question then becomes whether the ICC would recognise and respect such a compromise as legitimate.

### III THE INTERNATIONAL CRIMINAL COURT

#### A *The Statute of the ICC*

In June 1998 representatives from more than 160 governments met at a conference in Rome for the purpose of creating a permanent International Criminal Court. A month of what has been called ‘the most complex multilateral negotiations ever undertaken’<sup>94</sup> resulted in the adoption of the *Statute of the ICC*, which sets out the Court’s functions, powers and jurisdiction.

The *Statute of the ICC* contains many of the advancements achieved in international criminal law in recent years, and the ICC will have jurisdiction over ‘the most serious crimes of concern to the international community’.<sup>95</sup> Specifically, according to article 5, it will have jurisdiction over the crime of

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<sup>91</sup> Ibid art 20(1).

<sup>92</sup> Ibid art 20(3).

<sup>93</sup> Ibid art 20(3)(f).

<sup>94</sup> Sharon Williams, ‘Article 17: Issues of Admissibility’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 383, 392.

<sup>95</sup> *Statute of the ICC*, above n 9, art 5(1).

genocide,<sup>96</sup> crimes against humanity,<sup>97</sup> war crimes,<sup>98</sup> and the crime of aggression.<sup>99</sup> The drafters of the *Statute of the ICC* have defined the scope of these crimes broadly. For example, in contrast to the statutes of a number of ad hoc international criminal tribunals, the *Statute of the ICC* does not require the prosecution of crimes against humanity to be contingent on the existence of a connection between such crimes and armed conflict.<sup>100</sup> The definition of war crimes has been expanded to include ‘rape, sexual slavery ... or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.’<sup>101</sup> The idea of ‘command responsibility’ was broadened to include civilian as well as military leaders.<sup>102</sup> Finally, the *Statute of the ICC* holds public officials accountable for criminal actions, regardless of whether such individuals were acting as the head of state at the time the crimes were committed.<sup>103</sup>

### B *The Statute of the ICC and Amnesties*

Despite its thoroughness in detailing the types of crimes over which the ICC will have jurisdiction, there is no provision in the *Statute of the ICC* specifically referring to whether the ICC will respect amnesties for such crimes. However, during the negotiation phases of the *Statute of the ICC*, various discussions were held on amnesties, the status of truth commissions, and the need to ensure smooth transitions from authoritarian to democratic regimes.<sup>104</sup>

Does such an omission necessarily mean that amnesties will have no bearing on whether the ICC takes jurisdiction over a particular case? There are two views on the issue. The first is that the omission was deliberate.<sup>105</sup> This position

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<sup>96</sup> Genocide, according to art 6, refers to acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

<sup>97</sup> Under art 7, such crimes include murder, torture and rape, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

<sup>98</sup> Such crimes, according to art 8, include grave breaches of the *Geneva Conventions*, and other serious violations of laws and customs applicable in international and non-international armed conflict.

<sup>99</sup> A provision that defines the crime of aggression, and the nature of the ICC’s jurisdiction with respect to the crime, is yet to be adopted in accordance with arts 121 and 123: *Statute of the ICC*, above n 9, art 5(2). See art 5 of the *Draft Statute*, below n 122, for three suggested formats for framing a crime of aggression provision.

<sup>100</sup> Such a nexus was required by art 5 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* annexed to *UN Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committee in the Former Yugoslavia*, SC Res 827, UN SCOR, 48<sup>th</sup> sess, 3127<sup>th</sup> mtg, UN Doc SCRes/827 (1993). See *Prosecutor v Tadic (Decision on the Defence Motion on Jurisdiction) (Trial Chamber)*, Case No IT-94-1-T (10 August 1995). See also *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Appeals Chamber)*, Case No IT-94-1 (2 October 1995) [141], which stated that the Security Council defined crimes against humanity more narrowly in art 5 than was required by customary international law.

<sup>101</sup> *Statute of the ICC*, above n 9, art 8(2)(b)(xxii).

<sup>102</sup> *Ibid* art 28.

<sup>103</sup> *Ibid* art 27.

<sup>104</sup> Hafner et al, ‘A Response to the American View as Presented by Ruth Wedgwood’ (1999) 10 *European Journal of International Law* 108, 109.

<sup>105</sup> See *ibid* 109–13.

finds support in the fact that the ICC commits itself to combating impunity.<sup>106</sup> Furthermore, as noted above, states are obligated to prosecute alleged perpetrators of genocide and serious violations of international humanitarian law. It would therefore be inconsistent, according to this view, for the ICC to respect amnesties granted by individual states.

An alternative view is that a number of the provisions in the *Statute of the ICC* were left broad enough to allow for an amnesty exception. According to Michael Scharf:

During the Rome Statute negotiations, the United States and a few other delegations expressed concern that the International Criminal Court would hamper efforts to halt human rights violations and restore peace and democracy in places like Haiti and South Africa.

According to Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, the issue was not definitively resolved during the Diplomatic Conference. Rather the provisions that were adopted reflect ‘creative ambiguity’ which could potentially allow the prosecutor and judges of the International Criminal Court to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.<sup>107</sup>

In order to determine whether an amnesty exception to the Court’s jurisdiction exists, a careful analysis of its relevant provisions must be conducted.

### C The Preamble and Article 1

The preamble of the *Statute of the ICC* appears to leave little room for an amnesty exception. It states in part:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured ...

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ...

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.<sup>108</sup>

The wording of the preamble seems to suggest that an obligation on the part of the ICC to respect amnesties granted by individual states would run counter to the basic objectives of the *Statute of the ICC*. This position is buttressed by the ICC’s commitment to combating impunity for the perpetrators of serious international crimes. As noted by Scharf, the wording of the preamble is highly significant when it comes to interpreting the *Statute of the ICC* because it indicates the treaty’s object and purpose.<sup>109</sup> According to the general rule of

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<sup>106</sup> See *Statute of the ICC*, above n 9, preamble [5].

<sup>107</sup> Scharf, ‘Amnesty Exception’, above n 70, 521–2. References to the ‘Rome Statute’ are references to the *Statute of the ICC*.

<sup>108</sup> *Statute of the ICC*, above n 9, preamble [4]–[6], [10].

<sup>109</sup> Scharf, ‘Amnesty Exception’, above n 70, 522.

treaty interpretation contained in the *VCLT*, ‘a treaty shall be interpreted ... 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.’<sup>110</sup>

At the same time, however, it is critical to note that the jurisdiction of the ICC is not superior to that of its States Parties, but ‘complementary to national criminal jurisdictions.’<sup>111</sup> The principle of complementarity is again repeated in article 1. The fact that the drafters of the *Statute of the ICC* opted to grant the Court complementary jurisdiction rather than superior jurisdiction in itself suggests that, in certain circumstances, a decision by a state to forego prosecutions and grant amnesties may be respected by the Court.

The extent to which the ICC would be able to infringe on the sovereignty of states was the source of considerable debate during the preparatory stages of the *Statute of the ICC*.<sup>112</sup> While some states wanted to limit the Court’s jurisdiction to those situations where a state was unable to prosecute perpetrators of international crimes within the Court’s jurisdiction, other states expressed serious concerns about the possibility of states conducting sham investigations or trials in order to protect perpetrators. The extent to which the jurisdiction of the ICC would be complementary to that of national jurisdictions was set out in other parts of the *Statute of the ICC*, namely articles 17 and 20. Therefore, the preamble does not definitively address the issue of amnesty exceptions to the Court’s jurisdiction. A conclusion on the matter can only be reached by turning to other provisions of the *Statute of the ICC*.

#### D Jurisdiction

The ICC has the power to exercise jurisdiction over ‘persons for the most serious crimes of international concern’.<sup>113</sup> The Court’s jurisdiction is prospective and therefore only applies to crimes committed from the date the *Statute of the ICC* entered into force.<sup>114</sup>

The ICC can only exercise jurisdiction where one of the following states is a party to the *Statute of the ICC*, or has accepted the jurisdiction of the ICC through a declaration:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.<sup>115</sup>

<sup>110</sup> *VCLT*, above n 43, art 31(1).

<sup>111</sup> *Statute of the ICC*, above n 9, preamble [10].

<sup>112</sup> See *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50<sup>th</sup> sess, Supp No 22, UN Doc A/50/22 (1995) [29]–[51]; *Report of the Preparatory Committee on the Establishment of an International Criminal Court (Proceedings of the Preparatory Committee during March–April and August 1996)*, vol I, UN GAOR, 51<sup>st</sup> sess, Supp No 22, UN Doc A/51/22 (1996) [153]–[178] (*‘PrepCom Report’*).

<sup>113</sup> *Statute of the ICC*, above n 9, art 1.

<sup>114</sup> *Ibid* art 11(1). However, according to art 11(2), the ICC may only exercise its jurisdiction in respect of a state that becomes a party to the *Statute of the ICC* for crimes committed after the state became a party, unless it declares otherwise under art 12(3).

<sup>115</sup> *Ibid* art 12(2).

Article 13 states that the ICC can exercise jurisdiction over a crime if one of three conditions is met: (i) the crime is referred to the ICC Prosecutor by a State Party; (ii) the crime is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the *Charter of the United Nations*; or (iii) the Prosecutor has initiated an investigation of the crime.

After receiving information about the crime, the Prosecutor has the responsibility of analysing the seriousness of the information received.<sup>116</sup> 'If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation', he or she must seek the approval of the ICC's Pre-Trial Chamber for authorisation.<sup>117</sup> The Pre-Trial Chamber must also then determine, after examining the request and the supporting material, whether there is a reasonable basis upon which to proceed with the investigation, and whether the case appears to fall within the jurisdiction of the Court.<sup>118</sup> If the Pre-Trial Chamber makes affirmative determinations with respect to these issues, it will authorise the commencement of an investigation.<sup>119</sup>

Challenges to the admissibility of a case on the grounds referred to in article 17 (discussed below), or challenges to the jurisdiction of the Court, can be made pursuant to article 19(2), which permits challenges to be put forth by:

- (a) An accused or a person for whom a warrant of arrest or summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.

#### E *Article 17: Issues of Admissibility*

The principle of complementarity mentioned in the preamble and article 1 is given form primarily in article 17.<sup>120</sup> According to subsections (1)(a) and (b), the

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<sup>116</sup> Ibid art 15(2).

<sup>117</sup> Ibid art 15(3).

<sup>118</sup> Ibid art 15(4).

<sup>119</sup> Ibid.

<sup>120</sup> Art 17 states:

- 1 Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling* or *unable* genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the *unwillingness* or *inability* of the State genuinely to prosecute;
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.
- 2 In order to determine *unwillingness* in a particular case, the Court shall consider, having regard to the principles of due process recognised by international law, whether one or more of the following exist, as applicable:

ICC may hear a case which is or has been investigated by a State Party only where ‘the State is unwilling or unable genuinely to carry out the investigation or prosecution’.<sup>121</sup> But what exactly is an ‘investigation’? Does the term include investigations conducted by a truth commission, or must the state police be somehow involved? More importantly, must the investigation be conducted with criminal prosecution as its ultimate goal?

It is interesting to note that the *Draft Statute*<sup>122</sup> sent to the Rome Conference by the Preparatory Committee contained a proposal to deal with amnesties. A footnote accompanying the text of what ultimately became article 17(1)(c) stated that the article

should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecutions and possibly also pardons and amnesties. A number of delegations expressed the view that article 18 ... did not adequately address these situations for purposes of complementarity. It was agreed that these questions should be revisited in light of further revisions to article 18 to determine whether the reference to article 18 was sufficient.<sup>123</sup>

Furthermore, at the Rome Conference, the US circulated a ‘nonpaper paper’ proposing that a decision by a democratic regime to grant an amnesty should be a consideration in determining the admissibility of a case before the ICC.<sup>124</sup>

In fact, the issue of national amnesty precluding a prosecution before the ICC was a source of debate among the delegations participating in the Preparatory Committee,<sup>125</sup> as well as at the Rome Conference.<sup>126</sup> Ultimately, no reference to

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- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
  - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person to justice;
  - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
- 3 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)

<sup>121</sup> Ibid.

<sup>122</sup> Preparatory Committee on the Establishment of an International Criminal Court, *Report to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (Addendum), Part One: Draft Statute for the International Criminal Court*, UN Doc A/CONF.183/2/Add.1 (1998) (‘*Draft Statute*’).

<sup>123</sup> Ibid 41 (art 15) and fn 42. Here, art 18 refers to the current text of art 20 in the *Statute of the ICC*, above n 9.

<sup>124</sup> Ruth Wedgwood, ‘The International Criminal Court: An American View’ (1999) 10 *European Journal of International Law* 92, 96.

<sup>125</sup> Williams, above n 94, 389.

<sup>126</sup> John Holmes, ‘The Principle of Complementarity’ in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (1999) 41, 52.

amnesties was included in the text of article 17. Despite this omission, is there room for a state or a defendant to argue before the ICC that the principle of complementarity in article 17 precludes the court from exercising its jurisdiction where an amnesty is granted?

Where a state grants amnesties to perpetrators of international crimes because of the lack of that state's judicial, prosecutorial, or police resources, it is difficult to argue that the ICC should respect the state's decision.<sup>127</sup> Article 17(3) contemplates states in unstable situations, such as 'Somalia, [which is] lacking a central government,' or states that are in 'chaos due to a civil war or natural disasters, or any other event which leads to public disorder'.<sup>128</sup> Considering that one of the primary purposes of the ICC is to bring an end to impunity for the perpetrators of international crimes,<sup>129</sup> it seems highly unlikely that the ICC would decline jurisdiction where an amnesty is granted due to such circumstances.

Does a state's decision to forego criminal prosecutions in favour of a non-prosecutorial truth commission process leading to amnesty constitute an 'unwillingness genuinely to carry out an investigation or prosecution'? The standard for determining 'unwillingness' in a particular case involves, according to article 17(2)(c), an evaluation of whether the 'proceedings' are 'inconsistent with an intent to bring the person concerned to justice'. This wording suggests that the ICC is able to exercise jurisdiction over crimes where the objective of the investigation mounted by the state is not to prosecute, but to reveal the truth. It must be remembered that the principle of complementarity referred to in the preamble and article 1 concerns the relationship between the ICC and 'national criminal jurisdictions.' There can be little doubt that the investigations and trials contemplated by article 17 are criminal investigations and trials. According to John Holmes, who assisted the Chairman of the Preparatory Committee of the *Statute of the ICC*:

It is clear that the Statute's provisions on complementarity are intended to refer to criminal investigations. Thus, where no such [criminal] investigation occurred, the court would be free to act. A truth commission and the amnesties it provides may not meet the test of a criminal investigation, since the simple telling of the truth to a non-judicial body may convey an individual immunity from national prosecution.<sup>130</sup>

It seems that irrespective of whether a state grants amnesties pursuant to the rigorous demands of a South African-style truth commission system, or whether the amnesties are granted or imposed by the outgoing regime, article 17 would

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<sup>127</sup> In fact, according to Holmes, 'the majority of participating delegations [in the Preparatory Committee] accepted the approach set out in the ILC Draft Statute that the Court should have jurisdiction in cases where national trial procedures "may not be available or may be ineffective". With respect to inability, the view was universal and this aspect was included in the draft article': *ibid* 47 (citations omitted). The inclusion of the concept of 'unwillingness' proved to be quite controversial. See also Williams, above n 94, 385-9.

<sup>128</sup> Mahnoush Arsanjani, 'Reflections on the Jurisdiction and Trigger Mechanisms of the International Criminal Court', in Herman von Hebel, Johan Lammers and Jolien Schukking (eds), *Reflections on the International Criminal Court* (1999) 57, 70.

<sup>129</sup> *Statute of the ICC*, above n 9, preamble [5].

<sup>130</sup> Holmes, above n 126, 77.

offer no protection to defendants enjoying such amnesties. According to article 17(1)(c), the ICC can exercise its jurisdiction over cases where the accused person has already been tried by a domestic legal system only where the exceptions to the *ne bis in idem* rule contained in article 20 are triggered. The implications of the exceptions to this principle will be explored in the next section.

#### F *Article 20: Ne bis in idem*

The principle of *ne bis in idem* corresponds to the common law principle of ‘double jeopardy’ — no one should be tried twice for the same offence.<sup>131</sup> Article 20 of the *Statute of the ICC* states:

- 1 Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
- 2 No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.
- 3 No person who has been tried by another court for conduct also proscribed under Article 6, 7, or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
  - (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
  - (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

It is interesting to note that during the preliminary work on the *Statute of the ICC*, a proposal was made to address amnesties specifically, as well as paroles and pardons, and to allow the ICC to try a person who had undergone such proceedings where the proceedings were designed to protect the accused from international criminal prosecution.<sup>132</sup> In fact, this proposal was the most controversial part of the negotiations of the *ne bis in idem* provision,<sup>133</sup> and was met with fierce opposition at the Rome Conference. According to Holmes, ‘[s]ome delegations continued to argue that the Statute should not permit the Court to intercede in the administrative (parole) or political decision making

<sup>131</sup> Immi Tallgren, ‘Article 20, Ne bis in idem’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 419, 420.

<sup>132</sup> The proposal, numbered art 42(2)(b) read:

A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this statute only if: (b) the proceedings — including clemency, parole, pardon, amnesty and other similar relief — were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

See ‘Appendix A: Max Planck Institute for Foreign and International Criminal Law (MPI), Draft Statute for an International Criminal Court, Suggested Modifications to the 1994 ILC Draft (Siracusa Draft) Prepared by a Committee of Experts’ <<http://www.iuscrim.mpg.de/forsch/straf/referate/sach/hispint/siracusa.pdf>> at 23 September 2002. See also *PrepCom Report*, above n 112, [174].

<sup>133</sup> Holmes, above n 126, 58–9.

process (pardons, amnesties) of a State.<sup>134</sup> Ultimately, the proposal was abandoned. This fact could lead to the conclusion that states that participated at the Rome Conference acknowledged that the principle of *ne bis in idem* applies to amnesty proceedings; in other words, a person who has received an amnesty has been ‘tried ... by another court’. This then raises the issue of whether a truth commission process constituted a ‘proceeding [in another] court’.<sup>135</sup>

These issues are likely to be decided by the ICC in the negative. Bassiouni explains that the purpose of the right of *ne bis in idem* is to prevent the state from repeatedly *prosecuting* a person for offences arising out of the same incident until a conviction is obtained.<sup>136</sup> The right of *ne bis in idem* therefore necessarily and exclusively arises where a person has already been subjected to criminal prosecution.

Furthermore, the focus of the negotiations of the *Statute of the ICC* was ‘exclusively on national courts. The wording encompasses all civilian and military courts, be they permanent or ad hoc.’<sup>137</sup> The omission of any reference to amnesties in article 20 appears to have been deliberate. Therefore it appears unlikely that a defendant before the ICC who has received an amnesty, even pursuant to the rigorous tests of a South African style truth commission, could rely on the *ne bis in idem* principle to deprive the Court of jurisdiction.

#### G *Article 16: The Chapter VII Power of the UN Security Council*

Chapter VII of the *Charter of the UN* establishes the framework by which the UN Security Council can respond through coercive measures, including armed intervention, to situations which constitute, in its opinion, ‘any threat to the peace, breach of the peace, or act of aggression’.<sup>138</sup> Article 16 of the *Statute of the ICC* authorises the Security Council to halt a prosecution for a period of 12 months by means of a resolution adopted under Chapter VII. The Security Council thus has the power to force the ICC to respect the grant of a national amnesty in situations where peace and justice conflict with one another, and where ICC proceedings would be detrimental to the maintenance of international peace and security.

#### H *Article 53: Initiation of an Investigation*

As noted earlier, the ICC can only exercise jurisdiction over a crime listed in article 5 where a complaint has been made to the Prosecutor by a state, the Security Council, or where the Prosecutor initiates an investigation unilaterally. However, unless the Security Council has made a request to the ICC to halt a prosecution pursuant to article 16, the decision as to whether or not an investigation into the complaint will occur lies within the discretion of the

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<sup>134</sup> Ibid 60.

<sup>135</sup> *Statute of the ICC*, above n 9, art 20(3).

<sup>136</sup> M Cherif Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’ (1993) 3 *Duke Journal of Comparative and International Law* 235, 288.

<sup>137</sup> Tallgren, above n 131, 427.

<sup>138</sup> *Charter of the UN* arts 39, 41, 42.

Prosecutor.<sup>139</sup> This discretion is to be exercised in accordance with article 53, which provides that a Prosecutor, in considering whether to launch an investigation despite the grant of amnesty, must consider three factors before proceeding with an investigation.<sup>140</sup> If the Prosecutor determines that the alleged crime is within the jurisdiction of the Court, and, as argued in this paper, the complementarity regime contained in articles 17 and 20 does not contemplate most types of amnesties, the Prosecutor is left to consider whether the investigation would ‘not serve the interests of justice.’<sup>141</sup> It is submitted that if an amnesty exception exists at all in the *Statute of the ICC*, its primary embodiment is to be found in article 53(c). The term ‘justice’ is not defined by the *Statute of the ICC*. However, unlike articles 17 and 20, ‘justice’ as it appears in article 53 does not seem to connote ‘criminal justice’ and would allow the Prosecutor to take non-punitive factors into account.

According to Bassiouni, justice, at the very least, means a ‘comprehensive exposé of what happened, how, why, and what the sources of responsibility are.’<sup>142</sup> There is an argument to be made that in certain circumstances, the ICC Prosecutor should measure a state’s grant of amnesty according to this lesser standard of justice, upon request by the state itself. The following is a suggested framework for an ICC Prosecutor to consider in evaluating whether to proceed with an investigation or prosecution of an individual who has received a national amnesty.

#### 1 *Did the State Have Legitimate Reasons for Granting the Amnesty?*

It seems reasonable to assume that the ICC would choose to decline jurisdiction where prosecution is likely to have destabilising effects on the state which has granted the amnesty, or where prosecution would be futile. The latter refers to situations where bona fide investigations of the crime(s) took place, but prosecutions would have little chance of resulting in convictions. A factor the Prosecutor could consider in such circumstances is the unavailability of evidence as caused by: (i) missing, dead, or otherwise unavailable witnesses; (ii) physical evidence having been destroyed; or (iii) the crimes themselves having been perpetrated in such a manner that no evidence of the crime was created.

<sup>139</sup> However, according to art 53(3) of the *Statute of the ICC*, above n 9, this decision can be reviewed by the Pre-Trial Chamber.

<sup>140</sup> *Statute of the ICC*, above n 9, art 53 states:

- 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:
  - (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
  - (b) the case is or would be admissible under Article 17;
  - (c) taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

<sup>141</sup> *Ibid* art 53(1)(c).

<sup>142</sup> Bassiouni, ‘Searching for Peace’, above n 66, 24.

The more difficult issue is determining the types of situations in which criminal prosecutions would jeopardise civil order within the state. Two recent UN initiatives in Sierra Leone and East Timor to address serious past human rights abuses preclude the possibility of amnesties for serious international crimes, such as crimes against humanity and torture. The fact that amnesties were not permitted in these cases may suggest that only in the most volatile and precarious situations can states legitimately grant amnesties to those who have committed atrocities. These cases will be considered in turn.

(a) *Sierra Leone*

In January 2002 leaders of the Revolutionary United Front ('RUF') and Sierra Leonean President Tejan Kabbah gathered together in Freetown to declare a formal conclusion to a decade-long civil war between RUF and Government forces, in which tens of thousands of civilians were killed, maimed or tortured. This formal recognition was preceded by the 1999 *Lomé Agreement*,<sup>143</sup> whereby the rebels and the Government agreed to end hostilities and form a government of national unity. However, the fighting and the atrocities continued until March 2001, when the UN Mission in Sierra Leone ('UNAMISL') began to deploy peacefully into rebel-held territory.

Pursuant to article IX of the *Lomé Agreement*, the Government of Sierra Leone was to grant 'absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.' According to the Minister of Justice of Sierra Leone, Solomon Berewa, without such a sweeping amnesty provision the RUF would have refused to sign the agreement and to end the hostilities.<sup>144</sup> However, the *Lomé Agreement* also contemplated the establishment of a truth and reconciliation commission to address the issue of impunity and to report on the nature of the abuses perpetrated during the hostilities. Thus, according to Berewa,

in the Lomé Agreement the only means of accountability provided was through the Truth and Reconciliation Commission. It was then thought that with peace at hand, the wounds of the war would be healed through reconciliation. In other words it was recognised that truth was as good as, or at least, an adequate substitute for justice.<sup>145</sup>

In the following year, the *Truth and Reconciliation Commission Act 2000* (Sierra Leone) ('*TRC Act*') was enacted. It states that the Sierra Leonean TRC's purpose is

to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone,

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<sup>143</sup> *Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, opened for signature 7 July 1999, entered into force 7 July 1999 <<http://www.sierra-leone.org/lomeaccord.html>> at 23 September 2002.

<sup>144</sup> The Hon Solomon Berewa, Attorney-General and Minister of Justice of Sierra Leone, *Addressing Impunity Using Divergent Approaches: The Truth and Reconciliation Commission and the Special Court* (2002) <<http://www.sierra-leone.org/trcbook-solomonberewa.html>> at 23 September 2002.

<sup>145</sup> *Ibid.*

from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.<sup>146</sup>

The TRC, which commenced its work in July 2002,<sup>147</sup> has the power to investigate and report on the causes, nature and extent of the abuses perpetrated by the combatants to the conflict, and to allow victims to tell their stories.<sup>148</sup> The TRC can also gather information from various sources,<sup>149</sup> including government agencies, and require any individual to give statements under oath.<sup>150</sup> Failure to comply with the orders of the TRC can be treated as contempt of court and lead to criminal prosecution in the High Court of Sierra Leone.<sup>151</sup>

On 14 August 2000 the UN Security Council adopted *Resolution 1315*,<sup>152</sup> which requested the Secretary-General 'to negotiate an agreement with the Government of Sierra Leone to create an independent special court', the subject matter jurisdiction of which 'should include notably crimes against humanity, war crimes and other serious violations of international humanitarian law'.<sup>153</sup>

An agreement between the Government of Sierra Leone and the UN resulted in the creation of a Special Court for Sierra Leone.<sup>154</sup> The Court has the jurisdiction to

prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.<sup>155</sup>

The Special Court will have concurrent jurisdiction with the courts of Sierra Leone, but will enjoy primacy in any case where the Special Court instructs a national court of Sierra Leone to defer to its competence.<sup>156</sup> The Court will have the power to prosecute alleged perpetrators of crimes against humanity,<sup>157</sup> war crimes,<sup>158</sup> and other international humanitarian crimes, such as conscripting or enlisting children under the age of 15 years into armed forces.<sup>159</sup>

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<sup>146</sup> *TRC Act* art 6(1).

<sup>147</sup> See Rachel Harvey, 'Sierra Leone TRC to Begin Work' (2002) BBC News <[http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_2106000/2106390.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_2106000/2106390.stm)> at 23 September 2002.

<sup>148</sup> *TRC Act* art 6(2).

<sup>149</sup> *Ibid* art 8(1)(a).

<sup>150</sup> *Ibid* art 8(1)(e).

<sup>151</sup> *Ibid* arts 8(2), 9(2).

<sup>152</sup> SC Res 1315, UN SCOR, 55<sup>th</sup> sess, 4186<sup>th</sup> mtg, UN Doc S/Res/1315 (2000) 2.

<sup>153</sup> *Ibid*.

<sup>154</sup> See *Statute of the Special Court for Sierra Leone 2002* (Sierra Leone) ('*Statute of the Special Court*').

<sup>155</sup> *Ibid* art 1(1).

<sup>156</sup> *Ibid* art 8.

<sup>157</sup> *Ibid* art 2.

<sup>158</sup> *Ibid* art 3.

<sup>159</sup> *Ibid* art 4.

Where does this leave the status of amnesties granted to participants in the hostilities in the *Lomé Agreement*? Article 10 of *Statute of the Special Court* states that the amnesty will not be a bar to prosecutions of the crimes over which the Court has jurisdiction. In fact, in a report of the UN Secretary-General on the establishment of the Special Court, it is explained that:

While recognising that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity, or other serious violations of international humanitarian law.

At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in Article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.<sup>160</sup>

This reservation is referred to in a preambular paragraph of *Resolution 1315*<sup>161</sup> and is given effect in the *Statute of the Special Court*. Thus the amnesty provided for in the *Lomé Agreement* applies only to crimes under Sierra Leone law before 7 July 1999, and not crimes under international law.

(b) *East Timor*

East Timor, a Portuguese colony since the 16<sup>th</sup> century, declared independence through local elections in 1975.<sup>162</sup> Less than a month later it was invaded and occupied by Indonesia.<sup>163</sup> In 1999, after decades of violence and unrest, Indonesia allowed the people of East Timor to vote on whether they preferred to have limited self-rule within the State of Indonesia, or whether they wished to have complete independence. The August 1999 vote revealed that 78.5 per cent of the East Timorese were in favour of independence.<sup>164</sup> This result spawned a wave of massive human rights abuses perpetrated against the East Timorese by pro-integration militias supported by the Indonesian military, including systematic murder, rape, torture and 'disappearance'.<sup>165</sup>

The UN Transitional Administration in East Timor ('UNTAET') passed a regulation in July 2001 establishing a Truth Commission to investigate and report on politically motivated human rights violations committed by all parties

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<sup>160</sup> *Report of Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc S/2000/915 (2000) [22]–[23].

<sup>161</sup> *Resolution 1315*, above n 152, 1.

<sup>162</sup> Roger Clark, 'East Timor, Indonesia, and the International Community' (2000) 14 *Temple International and Comparative Law Journal* 75, 79–80.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> Barbara Cochrane Alexander, 'East Timor: Will There Be Justice?' (2000) 8 *Human Rights Brief* 5, 5.

within East Timor between 1974 and 1999.<sup>166</sup> The powers of the Commission, as set out in UNTAET *Regulation 2001/10*, are broad and include the power to compel individuals to appear before the Commission to answer questions,<sup>167</sup> to request information from authorities within East Timor,<sup>168</sup> to investigate and inquire into any matter,<sup>169</sup> and to refer matters to the judicial authorities.<sup>170</sup>

In order to meet its objectives of reconciliation and reception, the Commission has the power to grant amnesties if certain conditions are met by perpetrators and if the domestic authorities decide not to initiate criminal prosecutions.<sup>171</sup> However, in no case will amnesties be given to those accused of committing a 'serious criminal offence' including genocide, war crimes, crimes against humanity and torture.<sup>172</sup> Such cases are exclusively within the jurisdiction of special judicial panels of the District Court in Dili<sup>173</sup> and within the prosecutorial discretion of East Timor's Deputy General Prosecutor for Serious Crimes.<sup>174</sup>

(c) *Conclusions from the Sierra Leonean and East Timorese Experiences*

The case studies of Sierra Leone and East Timor suggest that few situations will be of such extreme volatility that the international community will accept the decision of a state to grant amnesties to perpetrators of serious international crimes. In neither East Timor nor Sierra Leone did the international community, as represented by the UN, permit amnesty to be given to perpetrators of gross human rights violations. Not even in the case of Sierra Leone where, according to the Minister of Justice, the atrocities would not have come to an end without the promise of amnesty, were amnesties permitted for those who had committed crimes under international law. It could be argued that these case studies demonstrate an emerging unwillingness on the part of the international community to tolerate amnesties for serious international crimes under any circumstances. On the other hand, perhaps this unwillingness only extends to situations in which UN peacekeepers are involved in bringing order to a state, or where the UN has had a hand in creating institutions, such as truth commissions and courts, to address past human rights abuses.

In any case, there may exist circumstances in which the risks posed to the state by criminal prosecutions are so serious that amnesties are justifiable. With

<sup>166</sup> UNTAET, *Regulation No 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*, UNTAET/REG/2001/10 (2001) ('UNTAET Reg 2001/10').

<sup>167</sup> *Ibid* s 14.1(c).

<sup>168</sup> *Ibid* s 14.1(g).

<sup>169</sup> *Ibid* s 13.1.

<sup>170</sup> *Ibid* s 3.1(e).

<sup>171</sup> *Ibid* ss 22–4, 32.

<sup>172</sup> *Ibid* ss 1(m), 32.1; UNTAET, *Regulation No 2000/11 on the Organization of Courts in East Timor*, UNTAET/REG/2000/11 (2000) s 10.1; UNTAET, *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15 (2000) ss 1.3, 4–9 ('UNTAET Reg 2000/15'). Schedule I of the UNTAET Reg 2001/10 states that 'in no circumstances will a serious criminal offence be dealt with in a Community Reconciliation Process'.

<sup>173</sup> See UNTAET Reg 2000/15 s 1.1.

<sup>174</sup> See UNTAET *Regulation No 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET/REG/2000/16 (2000) s 14.

the case studies of Sierra Leone and East Timor in mind, the Prosecutor of the ICC should consider whether there is evidence of a substantial likelihood that prosecutions would lead to a 'grave and imminent peril' for the state.<sup>175</sup> Paul van Zyl argues that instability may take the form of:

- (i) a refusal to allow a transition to democracy;
- (ii) a return to military rule or a *coup d'état*;
- (iii) an outbreak or resumption of hostilities;
- (iv) the killing of civilians or political opponents;
- (v) significant damage to the country's economy and infrastructure.<sup>176</sup>

Both case studies, but particularly that of Sierra Leone, suggest that the threat criminal prosecutions pose to the state must be of the most serious nature in order for amnesties to be acceptable.

## 2 *Was the Amnesty Granted in a Manner Consistent with International Law?*

Even if a state had legitimate reasons for granting an amnesty, the 'interests of justice' should require that the amnesty was granted in a manner consistent with international law. The most significant factor that should be considered here is whether the crime for which the amnesty was granted is one for which the state concerned is obliged to prosecute under a treaty, such as the *Torture Convention*. Other factors might relate to the amnesty itself. For an amnesty to comply with the demands of international law, Robert Weiner has suggested the following conditions:

- 1 that amnesty not preclude an individual investigation and adjudication of the facts in each case;
- 2 that it not prejudice the victim's opportunity to seek and obtain reparations from the state, even if it does foreclose civil liability for the individual guilty parties;
- 3 that it not preclude and should be offset by public acknowledgment and publication of the relevant facts, including the identities of perpetrators;
- 4 that it not be available to persons who have not submitted to the personal jurisdiction of the relevant authorities; and
- 5 that those seeking amnesty must affirmatively petition, and that they participate in the investigation of the facts by making a full disclosure of their role in the acts and omissions for which amnesty is sought.<sup>177</sup>

<sup>175</sup> The term 'grave and imminent peril' comes from the 'state of necessity' doctrine, set out in art 33 of the International Law Commission, *Draft Articles on State Responsibility: Report of the International Law Commission on the Work of its Thirty-Second Session*, UN GAOR, 35<sup>th</sup> sess, Supp No 10, UN Doc A/35/10 (1980). The doctrine permits a state to justify the breach of an international legal obligation under certain conditions, including the existence of a grave and imminent peril. It is highly unlikely that a state's failure to prosecute a crime which it is compelled to prosecute pursuant to a treaty will be excused by this doctrine: see generally Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 *Yale Human Rights and Development Law Journal* 1.

<sup>176</sup> Van Zyl, 'Justice without Punishment', above n 74, 43.

<sup>177</sup> Robert Weiner, 'Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties' (1995) 26 *St Mary's Law Journal* 857, 871.

These criteria are important in that they go to the basic rights of the victims and the fundamental purpose of the truth commission; that is, to identify the facts surrounding and leading to past abuses, revealing the identities of those responsible for such abuses, and requiring those responsible to acknowledge the acts they have committed. Without such conditions, it is doubtful that a truth commission process can make a meaningful contribution to the healing and reconciliation of any transitional society.

### 3 *Did the Truth Commission Process Meet Minimum Standards of Justice?*

As noted earlier, according to Dugard, international law has effectively left transitional societies with a choice between prosecution and amnesty accompanied by a truth commission. Therefore, the Prosecutor should consider whether the truth commission process meets the minimum standard of justice described by Bassiouni.<sup>178</sup>

Dugard has suggested a list of minimum requirements for a truth commission to meet this standard:

- 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 who refuse to make a full disclosure of their crimes.<sup>179</sup>

Dugard's criteria are important to consider as they ensure the legitimacy of the commission and transparency of its proceedings. The requirement of a comprehensive report further ensures that the truth commission process focuses

<sup>178</sup> See Bassiouni, 'Searching for Peace', above n 66, 24.

<sup>179</sup> Dugard, above n 6, 1012. Dugard notes at fn 47 that there are serious attempts to prepare guidelines for the operation of truth commissions. See Commission of Human Rights: Sub-Commission on the Prevention of Discrimination and Protection of Ethnic Minorities, *Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (1997); Kritz, above n 2, 141-4; see generally Priscilla Hayner, 'International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal' (1996) 59 *Law and Contemporary Problems* 173.

on the identification of abuses that occurred and recommendations for the prevention of further abuse. Criteria such as these would allow the Prosecutor to consider the potential impacts criminal prosecution would have on a transitional society that has granted amnesties, while still requiring that that society enjoys a minimal standard of justice. Such an approach clearly rules out the possibility of the ICC recognising self-granted or blanket amnesties, and only leaves room for recognition of amnesties granted pursuant to a truth commission process in situations where criminal prosecutions of perpetrators of serious human rights atrocities would result in grave and imminent peril for the state.

#### IV CONCLUSIONS

The ICC will have jurisdiction over the ‘most serious crimes of international concern’, namely war crimes, genocide, crimes against humanity, and the crime of aggression. Its jurisdiction will be complementary to that of national courts; it will serve to combat impunity for the perpetrators of international crimes who are not adequately prosecuted, or not prosecuted at all, by domestic courts. But in certain circumstances, a state may be forced to grant amnesties to perpetrators of international crimes in order to secure peace. Otherwise, the members of an oppressive regime may be reluctant to surrender their weapons or control over security forces. This was certainly the case in South Africa, where a peaceful transition to a democratic government would have been impossible without the promise of amnesty for those who had committed politically motivated crimes. However, the experiences of Sierra Leone and East Timor suggest that only in situations where criminal prosecutions pose grave and imminent peril to a state will amnesties for international crimes be tolerated.

Clearly there are moral and ethical considerations militating against prosecutions where they would likely lead to political instability and further loss of life. Further, a duty imposed on states to prosecute international crimes arises only in a limited number of cases: genocide, ‘grave breaches’ of the *Geneva Conventions*, and torture (for those states which are members of the *Torture Convention*). The currently limited scope of the duty to prosecute international crimes leaves open the possibility for states to trade amnesty for peace.

However, international law no longer allows for blanket amnesties immunising perpetrators of crimes against any sort of accountability. Legitimate amnesties are those which are granted by truth commissions with the power to investigate crimes, identify perpetrators, and demand truth in exchange for amnesty.

Although the drafters of the *Statute of the ICC* appear to have deliberately omitted any mention of amnesties from the text, the ICC will not be forced to take jurisdiction over cases in which an amnesty has been granted. Any potential ‘amnesty exception’ to the Court’s jurisdiction exists in articles 16 and 53 of the *Statute of the ICC*. Article 16 allows the UN Security Council to halt a prosecution for 12 months in cases where there is a ‘threat to the peace, breach of the peace, or act of aggression’. This ‘exception’, however, is contingent upon a Security Council resolution under Chapter VII of the *Charter of the UN*. Pursuant to article 53, the ICC’s Prosecutor will also have discretion to forego prosecution in cases where ‘an investigation would not serve the interests of

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justice'. It has been suggested in this paper that ICC Prosecutors should consider whether: (i) the state had legitimate reasons for granting the amnesty; (ii) the amnesty was granted in a manner consistent with international law; and (iii) the amnesty was granted by a truth commission process that meets certain basic standards of due process. By this method, an amnesty may be able to meet at least the very minimum standards of justice, whilst striving to maintain a balance with the promotion and protection of peace.