

## TRANSITIONAL JUSTICE: RECONCILING DOMESTIC AMNESTY WITH THE UNIVERSAL JURISDICTION OF FOREIGN STATES\*

### Abstract

*From the perspective of State sovereignty, it may be argued that a State should be allowed to decide freely how to deal with crimes committed on its territory, including by granting amnesties. However, under the principle of universal jurisdiction, all States have the power to prosecute perpetrators of international crimes regardless of the place where they were committed and regardless of the nationality of the victims or the perpetrators and, as a consequence, domestic amnesties may not be invoked as a bar to the universal jurisdiction of foreign courts over perpetrators of international crimes. One State cannot dictate how other States should react to those crimes. This article argues that although criminal prosecutions under the principle of universal jurisdiction are desirable and should be encouraged, considerations of peace and democratic transition in the territorial State have to be carefully calculated and that, therefore, criminal prosecutions by foreign prosecutors may need to be differed in favour of amnesty processes in the affected States. Guidelines to be followed in this balancing exercise are provided.*

**Key words:** *Transitional Justice; Amnesty, International Crimes, Universal Jurisdiction*

### 1. Introduction

While many considered amnesty an over-studied phenomenon in the 1980's, it has recently taken on renewed importance. The trend toward increased extraterritorial prosecutions under the principle of universal jurisdiction suggests that, in the years ahead, numerous states may need to determine whether to accord such legislation extraterritorial validity.<sup>1</sup> The term amnesty refers to an act of forgiveness that a sovereign State grants to individuals who have committed criminal acts.<sup>2</sup> It eliminates the criminal nature of the conduct,<sup>3</sup> which is deemed not to have constituted an offence and any criminal proceeding that may have been instituted is extinguished.<sup>4</sup> From the perspective of State sovereignty, it may be argued that a State should be allowed to decide freely how to deal with crimes committed on its territory, including by granting amnesties.<sup>5</sup> As the Special Court for Sierra Leone once observed '[T]he grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power'.<sup>6</sup> When an amnesty law is passed over such crimes as genocide, crimes against humanity and war crimes over which all States have universal jurisdiction, however, sovereignties may 'overlap'.<sup>7</sup> Two or more

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<sup>1</sup> WW Burke-White 'Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation' (2001) 42 *Harvard International Law Journal* 467-533, at 467-468.

<sup>2</sup> NN Jurdi *The International Criminal Court and National Courts: A Contentious Relationship* (Surrey: Ashgate, 2011), at 73.

<sup>3</sup> The above definition excludes from the definition of amnesty, executive (presidential) pardons, which remit the penalty but do not expunge the conviction. CC Joyner 'Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability' (1998) *Denver Journal of International Law and Policy* 591-624, at 612 and UN ESC 'Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights: Preliminary Report by Mr Louis Joinet, Special Rapporteur' UN Doc E/CN.4/Sub.2/1985/16 (21 June 1985), at 4.

<sup>4</sup> Joyner, *op.cit.*, at 612; UN ESC, *op.cit.*, at 3 and PTK Rakate *The Duty to Prosecute and the Status of Amnesties Granted for Gross and Systematic Human Rights Violations in International Law: Towards a Balanced Approach Model* (LLD-thesis: UNISA, 2004), at 22.

<sup>5</sup> J Stigen *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff Publishers, 2008), at 419 and A O'Shea *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002) at 96.

<sup>6</sup> *Prosecutor v Kallon and Kamara Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos SCSL-2004-15-AR72(E); SCSL-2004-16-AR72(E)* (13 March 2004) para 75. See also A Cassese 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2-17, at 11 and R Cryer et al *An Introduction to International Criminal Law and Procedure* 2<sup>nd</sup> ed (Cambridge: Cambridge University Press, 2010), at 43.

<sup>7</sup> Cryer et al, *op.cit.*, at 43.

States may want to act, one by granting amnesty, the other(s) by exercising universal jurisdiction over the perpetrators of the crimes.<sup>8</sup>

From a legal point of view, foreign States are entitled to disregard amnesty laws passed by one State in case of international crimes because these are crimes of international concern and, accordingly, the interest to suppress them extends beyond the State directly involved.<sup>9</sup> Thus, a national amnesty law may not prevent other States from dispensing justice in the event that the alleged offender leaves the territory of the State where he benefits from amnesty.<sup>10</sup> As the SCSL once said ‘a state has no right to bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember’.<sup>11</sup> Indeed, if a State would purport to promulgate an amnesty law with extra-territorial effect, this would rather constitute an infringement of the sovereign jurisdiction of the foreign States which have an interest in prosecuting the amnestied offenders.<sup>12</sup> This position is in line with the current trend of international law which is moving away from a system where the sovereignty of individual States is the dominant element to one where the common good of the international community as a whole is more central.<sup>13</sup>

From a practical point of view, however, a difficulty may arise when foreign States want to exercise universal jurisdiction and bring perpetrators of international crimes to justice while an amnesty law has been passed in the country where the crimes were committed and the prevailing political situation in that country is that any foreign interference is likely to destabilise a transition in the affected State from a civil war or from an authoritarian or minority regime to democracy or majority rule. This article argues that in these situations prosecutors in foreign States may be required to exercise restraints in order to allow the territorial State to move forward. The article suggests a number of guidelines which prosecutors in foreign States, acting under the principle of universal jurisdiction, should take into

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<sup>8</sup> R Boed ‘The Effect of a Domestic Amnesty on the Ability on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations’ (2000) 33(2) *Cornell International Law Journal* 297-329, at 325.

<sup>9</sup> C Enache-Brown and A Fried ‘Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law’ (1998) 43 *McGill Law Journal* 613-633, at 621 and KC Randall ‘Universal Jurisdiction under International Law’ (1988) 66 *Texas Law Review* 785-788, at 815.

<sup>10</sup> O’Shea, *op.cit.*, at 307; M Pensky ‘Amnesty on Trial: impunity, accountability, and the norms of international law’ (2008) *Ethics and Global Politics* 1-40, at 14; J Dugard ‘Possible Conflicts with Truth Commissions’ in Cassese A, Gaeta P and Jones JR *The Rome Statute of the International Criminal Court: A Commentary Vol I* (Oxford: Oxford University Press, 2002), at 699; AA Lamprecht *International Law in the Post-1994 South African Constitutions: Terminology and Application* (LLM-dissertation: UNISA, 2001), at 339; Stigen, *op.cit.*, at 419; AS Lee ‘Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations’ (1999) 39 *Virginia Journal of International Law* 425-466, at 439-440; G Meintjes and JE Mendez ‘Reconciling Amnesties with Universal Jurisdiction’ (2000) 2 *International Law Forum du Droit International* 76-97, at 85 and D Robinson ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14(3) *European Journal of International Law* 481-505, at 503-504.

<sup>11</sup> *The Prosecutor v Kallon and Kamara Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos SCSL-2004-15-AR72 (E); SCSL-2004-16-AR72(E)* (13 March 2004) para 67. See also para 88: “[...] whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes”.

<sup>12</sup> O’Shea, *op.cit.*, at 308. This argument was relied on by the French *Cour de Cassation* in the 2002 case of *Ely Ould Dah* (*Ely Ould Dah case Cour de Cassation Bulletin Criminel n° 195* (23 October 2002). Accessible at <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007070167&dateTexte> [10 April 2014]). The case concerned allegations of torture committed in a Mauritanian prison back in 1990 and 1991 by Captain Ould Dah against a number of black Mauritanians who were suspected of conspiracy to overthrow the Arab-dominated government. Before the court, Mr Ould Dah argued that the action was not admissible in French courts because his actions had been the subject of an amnesty law in 1993 in his home State, where the alleged crimes had taken place. The French *Cour de Cassation*, in October 2002, rejected this argument, holding that: “the exercise of universal jurisdiction by a French court entails the application of French law, even in the instances of a foreign amnesty law” (*Bulletin criminel n° 195* 725). Translation by Rakate *op.cit.*, at 163. The original paragraph reads as follows: “*Qu’en effet, l’exercice par une juridiction française de la compétence universelle emporte la compétence de la loi française, même en présence d’une loi étrangère portant amnistie*”.

<sup>13</sup> C Mitchell *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law* (Geneva: Graduate Institute of International and Development Studies, 2009), at 21.

account when deciding whether or not to institute a prosecution in relation to a person who has benefited from an amnesty law in his home State.

## 2. Policy Arguments in Favour of Foreign Amnesties

Experience has shown that criminal justice is not always the only consideration in peace-making and building of democratic institutions. Under certain extreme circumstances, it may be necessary to sacrifice the pursuit of justice for other social and political imperatives. For example, rebel groups or entrenched oppressive regimes may be reluctant to cease hostilities or relinquish power if they know that they will face prosecution thereafter.<sup>14</sup> During such politically sensitive times, the international community's interest in bringing the perpetrators of serious violations of human rights to book should be reconciled with the equally compelling needs of the territorial State which is trying to move on from the past towards peace, democracy and stability.<sup>15</sup> Despite the strong message that foreign courts would send to the rest of the world that perpetrators of international crimes would no longer escape accountability, respecting a national amnesty might, under the circumstances, best serve the interests of the affected populations.<sup>16</sup> If pursuing justice in international or foreign courts may cause more bloodshed and suffering in the affected State, the quest for justice may yield to the quest for peace.

In fact, this reality is recognised in the Rome Statute of the International Criminal Court (Rome Statute).<sup>17</sup> Although no express provision for amnesty is made in the Rome Statute, the fact that provision was made that the Security Council may determine that intervention by the ICC may jeopardize peace and security,<sup>18</sup> indicates that States Parties contemplated the possibility that criminal justice may imperil peace and security. Furthermore, under article 53 of the Rome Statute, the ICC Prosecutor has discretion not to initiate an investigation or prosecution if, having regard to the interests of victims, he determines that an investigation would not serve the interests of justice. This gives the ICC Prosecutor a measure of prosecutorial discretion which allows him to take cognizance of the prevailing political situation in a particular State and to exercise that discretion in favour of differing to an amnesty process of a particular State.<sup>19</sup>

It is important to note, however, that the above provisions of the Rome Statute that allow the Security Council and the ICC Prosecutor to defer in favour of national amnesties are delaying mechanisms only, not means to achieve a permanent recognition of domestic amnesties in international law. What these articles say is that if a choice has to be made between peace and criminal justice, peace may be given

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<sup>14</sup> See also CP Trumbull 'Giving Amnesties a Second Chance' (2007) 25 *Berkeley Journal of International Law* 283-345, at 285. See also WM Reisman 'Legal Responses to Genocide and Other Massive Violations of Human Rights' (1996) 59(4) *Law & Contemporary Problems* 75-80, at 75: "If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms".

<sup>15</sup> Y Naqvi 'Amnesty for war crimes: Defining the Limits of International Recognition' (2003) 85 *International Review of the Red Cross* 583-625, at 586. See also Stigen, *op.cit.*, at 463-464 and Trumbull, *op.cit.*, at 314.

<sup>16</sup> See also Stigen, *op.cit.*, at 463-464.

<sup>17</sup> Rome Statute of the International Criminal Court (1998).

<sup>18</sup> Art 16 (titled "Deferral of investigation or prosecution"): "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". See also Stigen, *op.cit.*, at 427; Robinson, *op.cit.*, at 503 and Naqvi, *op.cit.*, at 592: "This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing or maintaining peace will prevail".

<sup>19</sup> Dugard, *op.cit.*, at 702. See also O'Shea, *op.cit.*, at 317: "A flexible understanding of justice, as employed in article 53 of the Rome Statute, might afford the Prosecutor a broad political decision-making power. This might include the ability to refrain from prosecuting where it would not in his or her view be in the overall interests of the international community or the collective needs of a state". See also HJ Lubbe, *Successive and Additional Measures to the TRC Amnesty Scheme in South Africa: Prosecutions and Presidential Pardons* (Cambridge: Intersentia, 2012), at 32: "Despite the fact that it is silent on amnesty in that it does not recognise amnesty as a defence against prosecution, the provisions that were adopted at the Rome Conference have been held to reflect "creative ambiguity" which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the ICC". See further Robinson, *op.cit.*, at 483 and Rakate *op.cit.*, at 120.

priority.<sup>20</sup> That does not make amnesties for international crimes lawful. It simply means that impunity can be temporarily tolerated where the quest for justice would prolong the agony of the populations in the affected State.<sup>21</sup> But that is only a temporal measure, once the internal situation has improved, the ICC Prosecutor can proceed with investigation and prosecution.<sup>22</sup>

In light of this consideration, it must be clear that although international law permits foreign courts to disregard amnesties passed in other States, a decision by a prosecutor in a foreign State to initiate a prosecution should be taken with some level of political judgement and a degree of flexibility of approach. It would, for example, not be wise for a foreign prosecutor to initiate a prosecution against a member of a foreign rebel group who would be in the foreign country for peace negotiations which are being conducted under the auspices of the government of that country in an attempt to end a protracted and bloody civil war. In a situation such as this, instituting proceedings against the foreign delegate would be irresponsible because that could disrupt the mediation process and cause people living in the State where the crimes occurred to bear extended hostilities. By pursuing this course of action, the prosecutor in the foreign state would be saying: '[W]e are not willing to risk the loss of our own soldiers' to rescue the victims in the war-torn state, but 'we are willing to allow more people in the conflict-ridden state to die in order to preserve the right to seek justice on behalf of mankind'.<sup>23</sup>

Such a position would clearly be a selfish one as it would only be considering the interests of the international community at the expense of the more compelling interests of the people living in the State in transition. That clearly is not desirable. The different situations in which prosecutorial discretion should be exercised in favour of foreign amnesties are immediately discussed below.

### 3. Suggested Guidelines for Foreign Prosecutors

The suggestion that some amnesties may deserve foreign recognition raises the question about drawing a line between 'permissible and impermissible amnesties'.<sup>24</sup> This section suggests situations that should prompt foreign prosecutors to recognise amnesties passed by affected States and factors that should not matter in this regard.

#### 3.1. Situations where restraint should be exercised in favour of amnesties Amnesty for ending a rebellion

One of the responsibilities of a government is to protect its citizens against violence and atrocities.<sup>25</sup> Thus, for many years, amnesties have been used as incentives to quell rebellions by encouraging combatants to leave their organizations and end war.<sup>26</sup>

For example, between 1992 and 1999 Algeria experienced a civil war between government forces and the banned Islamist movement, the *Front Islamiste du Salut* (FIS). The violence started in 1992 after

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<sup>20</sup> O'Shea, *op.cit.*, at 83.

<sup>21</sup> In particular, although article 53 allows the ICC Prosecutor to take cognisance of a national amnesty process (Rakate, *op.cit.*, at 120 and J Gavron 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91-117, at 110), it must be kept in mind that this article only creates discretionary power that the Prosecutor may exercise at will. It does not create any right for the state that granted the amnesty for the accused who benefited from it to challenge a case from being admissible before the ICC.

<sup>22</sup> Gavron, *op.cit.*, at 109: "I disagree with the reasoning that equates requiring the court to defer (post-pone) its jurisdiction for 12 months to requiring it to defer (submit) to a national amnesty. Deferring to a national amnesty implies (since amnesty laws are rarely overturned) a permanent respect for that amnesty. While it is true that the Security Council may renew this provision, it is unlikely to be renewed more than a few times (if at all). In my opinion Article 16 was intended as a delaying mechanism only, to prevent the Court intervening in the resolution of an ongoing conflict by the Security Council. It would be an unwieldy provision to invoke to achieve permanent respect for an amnesty law". For a contrary view, see Lubbe, *op.cit.*, at 32: "Clearly there is a place for (permissible) amnesty in international law today. The Rome Statute can be used as support for this view".

<sup>23</sup> Trumbull, *op.cit.*, at 319.

<sup>24</sup> Dugard, *op.cit.*, at 699.

<sup>25</sup> Stigen, *op.cit.*, at 421.

<sup>26</sup> UN ESC, *op.cit.*, at 11; Rakate *op.cit.*, at 41 and Reisman, *op.cit.*, at 78.

the country's first democratic multi-party elections to elect a Parliament.<sup>27</sup> Preliminary reports from the election indicated that the FIS, an Islamic party that had declared its opposition to democracy, was set to win a majority of seats in Parliament. The military annulled the elections, declared martial law, established a transitional government and banned the FIS from all political participation.<sup>28</sup> A bloody civil war ensued in which between 100,000 and 200,000 people died.<sup>29</sup> In July 1999, in an attempt to bring the rebellion to an end, President Abdelaziz Bouteflika passed the *Civil Concord Law*<sup>30</sup> which granted amnesty to perpetrators of the acts of rebellion against the government on condition that they surrender and hand over their weapons to the government within a specified period.<sup>31</sup> However, since the amnesty provision of this law did not apply to those who had committed acts of murder, rape, grievous bodily injuries resulting in permanent infirmity and those who had used explosives in public places, the amnesty offer was seen as insufficient by most insurgents and only a very few of them surrendered themselves to the government.<sup>32</sup> As a response, a presidential decree of 12 January 2000 extended the amnesty to all combatants, regardless of the nature of the crimes they had committed.<sup>33</sup> Subsequent to the promulgation of this amnesty decree, the vast majority of militants laid down their weapons and Algeria is now a stable State.<sup>34</sup>

This experience of Algeria shows that where insisting on prosecuting the perpetrators of past crimes may prolong the suffering to the local populations and cause more crimes, the State should prioritise the safety of the citizens and forego criminal justice.<sup>35</sup> Insisting on criminal accountability for the crimes committed by the FIS fighters would have prolonged the agony and suffering of innocent civilians. No responsible government can take that option. Criminal justice, as important as it may be, must be secondary to the search for peace.<sup>36</sup> As one commentator has remarked 'the quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow'.<sup>37</sup>

#### **Amnesty for maintaining peace and stability after a fragile democratic transition**

In addition to being used as a means of ending a civil war, amnesties have also been used as a means of ensuring the survival of newly-established democratic civilian governments. This situation occurred in Latin American countries in the period when democracies replaced dictatorships where the successor governments failed to prosecute the members of the security apparatuses for the crimes committed during the past era. The most telling example is the experiences of Argentina in the 1980s. Between 1976 and 1983, Argentina experienced seven years of military dictatorship after a coup deposed President Isabel Peron.<sup>38</sup> When he was democratically elected in 1983, President Raul Alfonsin issued a decree ordering the arrest and prosecution of high-ranking military officers for crimes committed during the so-called 'war against subversion' in the late 1970s and early 1980s.<sup>39</sup> Some five senior former members of the army were prosecuted.<sup>40</sup> However, later larger efforts to prosecute active lower

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<sup>27</sup> Trumbull, *op.cit.*, at 327.

<sup>28</sup> Trumbull, *op.cit.*, at 327.

<sup>29</sup> Algeria-Watch 'Algerian amnesty draws in Islamists', available at [http://www.algeria-watch.org/en/articles/2006/algerian\\_amnesty.htm](http://www.algeria-watch.org/en/articles/2006/algerian_amnesty.htm) (accessed on 28 June 2016)

<sup>30</sup> Art 3 Loi no 99-08 du 29 Rabie El Aouel 1420 Correspondant au 13 juillet 1999 Relative au Rétablissement de la Concorde Civile (Official Journal of the Republic of Algeria No 46 of 13 July 1999).

<sup>31</sup> Art 3. See also Rakate *op.cit.*, at 42-43.

<sup>32</sup> Algeria-Watch 'Algérie: Concorde Civile, Impunité et Droit International', available at <http://www.algeria-watch.de/farticle/kettani.htm> (accessed 28 June 2016).

<sup>33</sup> Articles 1 and 2 Décret Présidentiel no 2000-03 du 4 Chaoual 1420 Correspondant au 10 Janvier 2000 Portant Grace Amnistiante (Official Journal of the Republic of Algeria No of 12 January 2000).

<sup>34</sup> Perspective Monde '19 septembre 1999: Tenue d'un référendum sur la politique d'amnistie en Algérie', available at <http://perspective.usherbrooke.ca/bilan/servlet/BMEve?codeEve=932> (accessed 28 August 2016).

<sup>35</sup> Stigen, *op.cit.*, at 421.

<sup>36</sup> Stigen, *op.cit.*, at 421.

<sup>37</sup> Anonymous 'Human Rights in Peace Negotiations' (1996) 18(2) *Human Rights Quarterly* 249-258, at 258.

<sup>38</sup> O'Shea, *op.cit.*, at 56.

<sup>39</sup> Decree 158/83 of 12 December 1983 (Official Gazette of 15 December 1983). See O'Shea, *op.cit.*, at 57.

<sup>40</sup> N Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78(2) *California Law Review* 449-513, at 459.

and mid-level officers stoked discontent among the soldiers, some of whom started a mutiny against Alfonsín's government.<sup>41</sup> When the rest of the soldiers refused to move against the rebel units, President Alfonsín convinced the parliament to pass the Due Obedience Law (*Ley de Obediencia Debida*),<sup>42</sup> on 4 June 1987, which created an irrebuttable presumption that military officials, with the exception of certain high-level commanders, committed human rights abuses under coercion, and rendered them immune from prosecution on this basis.<sup>43</sup> Although this law did not employ the word 'amnesty' it had the same effect of ensuring that the lower and mid-level soldiers were granted impunity.<sup>44</sup> This experience in Argentina illustrates the dilemma that a new democratic government can face when choosing between justice and its own survival. If the new government insisted on criminal accountability for the crimes committed by security forces during the previous regime, they would have been overthrown. For realists, the choice should be clear: the priority of the new government must be to ensure its further existence. No government can be required to commit political suicide.<sup>45</sup>

### Amnesty for regime change

Achieving a better society may require a process of transition from one type of government to another, which may only be possible with the consent of the officials of the former regime.<sup>46</sup> The granting of amnesty for the crimes committed by the agents of the oppressive government, rather than prosecution, may be the only peaceful means of securing such consent.<sup>47</sup> The threat of prosecution might cause the perpetrators to cling to power, possibly resulting in more bloodshed.<sup>48</sup> The South African Truth and Reconciliation Commission's amnesties feature prominently in this category. Before 1994, South Africa was ruled on the basis of racial discrimination under the Apartheid system of government. The unbanning of the African National Congress (ANC) in 1990, the release from prison of Nelson Mandela and other political prisoners, and the lifting of the state of emergency paved the way for a negotiated peace settlement between the apartheid regime and those who opposed it.<sup>49</sup> The negotiations resulted in the establishment of a date for the country's first democratic elections and for an interim constitution to be enacted.<sup>50</sup> A major obstacle to finalizing the interim constitution and the holding of the elections was the question of accountability of those guilty of gross human rights violations during the years of apartheid.<sup>51</sup> Many of the members of the security forces had committed crimes during the apartheid era and were afraid that without an amnesty clause in the interim constitution, they risked ending their lives in prison. They thus demanded that an amnesty clause be included in the interim constitution. On the other hand, the representatives of the liberation movements believed that there should be accountability for past crimes, along the lines of the Nürnberg trials.<sup>52</sup> This posed a major threat to stability in the country.<sup>53</sup> Many believe that, if not addressed, the issue of amnesty could have impeded the whole transition process and would have ended in bloodshed.<sup>54</sup> Intense political consultations ensued,

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<sup>41</sup> Roht-Arriaza, *op.cit.*, at 459.

<sup>42</sup> Law No 23.521 of 4 June 1987.

<sup>43</sup> DF Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100(8) *Yale Law Journal* 2539-2615, at 2597.

<sup>44</sup> O'Shea, *op.cit.*, at 58.

<sup>45</sup> Orentlicher, *op.cit.*, at 2541. See also at 2548 where the author says that no governments should "press prosecutions to the point of provoking their own collapse". See also and Naqvi, *op.cit.*, at 624.

<sup>46</sup> O'Shea, *op.cit.*, at 24.

<sup>47</sup> J Dugard *International Law: A South African Perspective* 4<sup>th</sup> ed (Cape Town: Juta, 2011), at 192; Rakate, *op.cit.*, at 40-41 and Orentlicher, *op.cit.*, at 2547.

<sup>48</sup> Stigen, *op.cit.*, at 422.

<sup>49</sup> O Bubenzer *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Martinus Nijhoff Publishers, 2009), at 8.

<sup>50</sup> Encyclopædia Britannica 'Truth and Reconciliation Commission, South Africa (TRC)', available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (accessed 18 August 2016).

<sup>51</sup> Bubenzer, *op.cit.*, at 11.

<sup>52</sup> Bubenzer, *op.cit.*, at 12 and Encyclopædia Britannica 'Truth and Reconciliation Commission, South Africa (TRC)', available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (accessed 18 August 2016).

<sup>53</sup> Trumbull, *op.cit.*, at 322 and Rakate *op.cit.*, at 288 & 303.

<sup>54</sup> Trumbull, *op.cit.*, at 322 and Rakate *op.cit.*, at 288 & 303.

resulting in the inclusion of the amnesty clause in the *Interim Constitution*,<sup>55</sup> which was confirmed in the 1996 final *Constitution*,<sup>56</sup> and was given effect by the *Promotion of National Unity and Reconciliation Act* 34 of 1995. Under this Act, the Truth and Reconciliation Commission (TRC)<sup>57</sup> could grant amnesty for any crime committed with a political motive between 1 March 1960 (the month of the so-called ‘Sharpeville massacre’)<sup>58</sup> and 10 May 1994.<sup>59</sup> The Commission received more than 7,000 amnesty applications and granted 1,500 amnesties.<sup>60</sup>

Without an amnesty clause in the 1993 *Interim Constitution* the transition would have failed.<sup>61</sup> The amnesty helped avoid a looming civil war, and the transfer of power was accomplished with little bloodshed.<sup>62</sup> Bishop Desmond Tutu was once quoted as saying that without the amnesty clause in the post-apartheid constitution, the ‘reasonably peaceful transition from repression to democracy would instead have become a bloodbath’.<sup>63</sup> The South African experience thus makes evident the fact that in exceptional cases the granting of amnesties may be the wisest course of action to take. On this note, it is concluded that although foreign courts have a right to disregard foreign amnesty laws in case of gross human rights violations, a decision by foreign prosecutors to initiate prosecutions in the courts of their countries ought to be taken after careful consideration of the political situation in the concerned State and the interests of the victims.<sup>64</sup> It is needless to remind, together with Robinson,<sup>65</sup> that, that in exercising such discretion, prosecutors in the foreign States, should exercise a ‘serious scrutiny’ of the

<sup>55</sup> *The Postamble to the Interim Constitution (National Unity and Reconciliation)* provided that: “In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed”.

<sup>56</sup> Section 22 (Transitional arrangements) of the Constitution: “(I) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading “National Unity and Reconciliation” are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity”.

<sup>57</sup> The Commission consisted of three committees: a committee on human rights violations (sections 12-15), a committee on reparations (sections 23-27) and a committee on amnesty (sections 16-22).

<sup>58</sup> On 21 March 1960, around 69 black protesters were shot dead by police officers. The protesters were demonstrating against pass laws which required black South Africans to carry passbooks with them any time they travelled out of their designated home areas. Although it is acknowledged the protesters were not peaceful and were attacking the police with stones, it is generally accepted that the police response was disproportionate. Today, 21 March is celebrated as a public holiday in honour of human rights and to commemorate the “Sharpeville massacre”. R Nessler ‘The Sharpeville Massacre’, available at <http://robnessler.efoliomn.com/sharpevillemassacre> (accessed 8 April 2016).

<sup>59</sup> 10 May 1994 is the date on which Nelson Mandela was inaugurated as president. This is the date that officially marks the end of Apartheid and the struggle between, on the one hand, the apartheid government and the white right-wing (the Afrikaner Weerstandsbeweging (AWB) and Afrikaner Volksfront) which opposed the elections by violent means and, on the other other hand, black groups such as the Pan Africanist Congress (PAC) and Azanian People’s Liberation Army (APLA), which had continued the “armed struggle” during the negotiation process. Truth and Reconciliation Commission of South Africa “Report” Vol I (29 October 1998). Available at <http://www.justice.gov.za/trc/report/> (accessed 12 June 2016), at 120.

<sup>60</sup> Encyclopædia Britannica ‘Truth and Reconciliation Commission, South Africa (TRC)’, available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (accessed 18 August 2016).

<sup>61</sup> Trumbull, *op.cit.*, at 322, Rakate *op.cit.*, at 288, MP Scharf ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 Cornell International Law Journal 507-527, at 510; O’Shea, *op.cit.*, at 295, J Varushka J *The Truth and Reconciliation Commission: success or failure?* (LLM-dissertation: University of Pretoria, 2008), at 1 and Dugard, *op.cit.*, at 694.

<sup>62</sup> Trumbull, *op.cit.*, at 314 and Scharf, *op.cit.*, at 510.

<sup>63</sup> Trumbull, *op.cit.*, at 322.

<sup>64</sup> In support of this argument see Robinson, *op.cit.*, at 504. Here, the author mentions, as a precedent the fact that “up to the present date, states have declined to initiate prosecutions for crimes against humanity committed under apartheid regime in South Africa, which likely reflects the higher level of international regard for the reconciliation measures adopted in the unique circumstances of South Africa”.

<sup>65</sup> Robinson, *op.cit.*, at 496. See also Stigen, *op.cit.*, at 452.

claims of necessity to ensure that they do ‘not give in to the easy temptation of concluding that an amnesty is unavoidable’. This point is discussed immediately below.

### 3.2. Factors that should not matter

Commentators on international criminal justice have proposed a number of factors which prosecutors in foreign States as well as international tribunals (such as the International Criminal Court-ICC) should take into account when deciding whether or not a domestic amnesty should be accorded extraterritorial recognition. Dugard<sup>66</sup> has suggested that international recognition might be accorded where amnesty has been granted: (1) As part of a truth and reconciliation commission which was established by a democratically elected government or an international organisation; (2) The commission functions in accordance with due process of law requirements; (3) Each person granted amnesty has been obliged to make a full disclosure of his criminal acts as a precondition for amnesty; (4) The crimes were politically motivated. It is submitted that these guidelines have weaknesses. The proposition that the amnesty be granted by a truth commission established by a democratically elected government is solely concerned with ‘how’ the amnesty was granted but ignores the most fundamental question of ‘why’ the amnesty was granted in the first place. In the context of South Africa for example, the amnesties granted to the apartheid criminals were not so much ‘accepted’ by the international community because they were granted by a truth and reconciliation commission, but and solely because such amnesties were required as a precondition for the apartheid regime to hand over the reins of power to the majority black population of the country. Whether or not the TRC functioned in accordance with due process of law requirements and whether or not the beneficiaries of the amnesty process were required to disclose the truth about the apartheid era crimes do not also matter at all. The matter is that without amnesty, there would have been no regime change in South Africa and the confrontation between the apartheid government and the black population would have continued, causing more bloodshed and destruction.<sup>67</sup> The same can be said of the criteria set out in point n<sup>o</sup> 4 above, namely that the crime must have a political character. The issue is not how and under which circumstances the crimes were committed, but why amnesty is needed.<sup>68</sup> Identifying guidelines that include the consideration of the underlying purpose of the amnesty should thus be the proper focus of a study of this kind. Stigen<sup>69</sup> has proposed the following guidelines to assist the ICC Prosecutor in deciding whether or not he should give a chance to a national amnesty process: (1) Were there compelling reasons to grant amnesty? (2) Is the amnesty adopted and implemented democratically and in good faith? (3) Has the amnesty-granting body proceeded in an effective manner? (4) Does the mechanism provide some measure of accountability or compensation? (5) Is amnesty granted to the most responsible perpetrators? (6) Has the amnesty had positive effects and has it been internationally recognised? (7) Do the involved parties perceive the amnesty as fair? Of all the above guidelines, only the first one seems to be appropriate because it emphasises the importance of looking at the reasons that pushed the State to grant amnesty. The guidelines proposed in (2) and (3) above relate to the question of ‘how’ the amnesties were granted instead of ‘why’, as already discussed. The weakness of guideline Number (4) is that it seeks to substitute ‘some’ other ‘measure of accountability’ or ‘compensation’ for criminal punishment. This is clearly not an acceptable guideline because without criminal punishment the international criminal

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<sup>66</sup> Dugard, *op.cit.*, at 700.

<sup>67</sup> Another justification that has been attributed to the post-apartheid amnesty process in South Africa is that it could help to achieve reconciliation between the different groups in South African society. See Truth and Reconciliation Commission of South Africa, *op.cit.*, at para 68-73. However, as reconciliation should occur among the people themselves not the government with the people, some commentators argue that the power to forgive is not that of the governments but of the victims. Only the victims can do that. See Rakate *op.cit.*, at 130: “Forgiveness is essentially a private matter, a person-to-person thing, not a public catharsis as the TRC and politicians would have us believe”. See also Bassiouni 1996 *Law and Contemporary Problems* 19: “But how can governments forgive themselves for crimes they have committed against others? And how can governments forgive crimes committed by some against others? The power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the governments but of the victims”. Thus, it seems that the element of reconciliation cannot be taken seriously to justify the TRC amnesties. The only relevant justification is that the TRC amnesties were a necessary component of the political settlement for the “handing over of the reins of power”. O’Shea, *op.cit.*, at 24.

<sup>68</sup> However, since genocide, crimes against humanity and war crimes are naturally committed in pursuance of a political motive, this criterion would virtually always be met.

<sup>69</sup> Stigen, *op.cit.*, at 452-463.



justice system is deprived of its deterrent function. Disciplinary and administrative sanctions or ordering the perpetrators to compensate victims cannot deter future perpetrators of serious crimes such as genocide, crimes against humanity and war crimes. In order to ensure deterrence for future offenders,<sup>70</sup> States are required to impose not ‘some measure of accountability’ or compensation of victims, but an ‘appropriate punishment’,<sup>71</sup> which, given the serious nature of the human rights violations that constitute international crimes, cannot be something less than criminal punishment.<sup>72</sup>

Regarding the proposition made in point (5) that amnesty should not be recognised if it is granted to the most responsible perpetrators, it is submitted that such a proposition also overlooks the important consideration of the purpose of the amnesty process in the concerned country. As pointed out earlier in this article, amnesties can be granted as part of a process to effect a regime change, to end civil war or to protect a new fragile democratically elected government from a coup by the members of security forces who might have committed crimes during the previous regime. One must be too optimistic to believe that the purposes of these amnesty processes could have been achieved if only the low-level perpetrators had been accorded the benefit of amnesty. A rebellion cannot end without the consent of the high-ranking officers of the rebel movement; a regime change also cannot be effected without the consent of the senior officials. The same may also be true in a country where the military and police apparatus of a previous regime is still intact and poses a real threat to the new government. If the senior officers of the security forces are excluded from the amnesty scheme, the whole process may collapse. Thus, in light of this consideration, the focus should not be so much on who benefited from the amnesty and who is excluded but rather on the genuineness of the overall purpose which underlies the amnesty process.

As for the criteria set out in point (6) that an amnesty should have positive effects and be internationally recognised, it seems that this criterion contains two elements that should be analysed separately: the effect that the amnesty has had and the way the amnesty has been perceived internationally. Regarding the effects of the amnesty Stigen<sup>73</sup> says that if interfering with a national amnesty would ‘set back an improved situation’, such interference ought to be avoided. This argument is true because it underlines the reason why the amnesty was given and the possible negative impact that interference may bring about. However, one may never know if an amnesty process will bring about positive results if that process is not implemented and supported in the first place. If the amnesty has recently been implemented and no tangible progress has been made, for example the rebels have not yet surrendered their arms, the prosecutors in foreign States ought still to assess whether instituting a prosecution does not risk shutting the door of negotiations and cause the rebels to renege to war. Conversely, if the amnesty has been in place for a long time and has had no effect, a decision by the foreign prosecutors to institute a prosecution ought to have any negative impact on the political situation in the country

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<sup>70</sup> *On the relationship between the duty to prosecute gross human rights violations and deterrence for future violations, see RC Slye ‘The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?’ (2003) 43 Virginia Journal of International Law 173-247, at 197; JM Dyke & GW Berkley ‘Redressing Human Rights Abuses’ (1992) 20 Denvil Journal of International Law & Policy 243-251, at 244. See also Roht-Arriaza, op.cit, at 452-453: “To avoid the continuing cycle of repression, the only remedy must be the recognition of an affirmative obligation on governments to investigate and prosecute gross state-attributed human rights abuses”. See also at 461: “With no fear of retribution, each new regime can again succumb to the same repressive behaviour. These problems can only be remedied by placing an affirmative obligation on the state to investigate and prosecute past rights violators”. See further NJ Kriz ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’ (1996) 59 Law and Contemporary Problems 127-152, at 129: “Although a variety of factors may ultimately require limiting prosecution to senior key individuals or certain categories of perpetrators, total impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is 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. In short, criminal prosecution in some form must remain a threat and a reality”.*

<sup>71</sup> Orentlicher, op.cit, at 2600-2601. See also D Cassel ‘Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities’ (1996) 59 Law and Contemporary Problems 215-217, at 210.

<sup>72</sup> Cassel, op.cit, at 217: “It is now clear that nothing less than judicial investigations designed to identify perpetrators, name names, and punish the guilty will suffice”.

<sup>73</sup> Stigen, op.cit, at 460.

where the crimes were committed. The relevant consideration should therefore be the effect that the interference by foreign prosecutors would have in the affected State, not the effect that the amnesty has already had.

With regard to the suggestion that the amnesty should have international recognition, this may be a factor to take into account, not a decisive factor. A foreign prosecutor must make his own assessment of the prevailing situation in the concerned country with a view of determining whether his interference with the amnesty process in that country is or is not in the interests of the affected population. The opinion of the international organisations and foreign States must be only a factor to be taken into account in arriving at an informed decision.

Finally, with respect to criterion Number (7); i.e. whether or not the involved parties perceive the amnesty as fair, the present author submits that this consideration is also just one factor among others that a foreign prosecutor may take into account in determining whether a foreign amnesty law was justified by compelling reasons. If for example rebels are willing to cease hostilities on condition that they be given amnesty but such amnesty is opposed by the victims of the crimes committed during the conflict that alone ought not to be a decisive factor. If there is no other way of ending the conflict except by negotiation, amnesty must be accepted as the price for peace. In other words, the decisive consideration must always be whether there are compelling reasons that require the passing of the amnesty law, not how the victims perceive it.

Ultimately, it is suggested that prosecutors in foreign States should exercise their discretion not to institute a prosecution when the accused person has been granted amnesty in the State where the crime was committed, and; (1) the amnesty was absolutely needed in order: (i) to end a civil war; or (ii) to allow change in government from a minority or oppressive rule to a majority or democratic rule; or (iii) to protect a newly democratically elected government from the threat of a coup by the members of the security forces; and (2) at the time of investigation and prosecution, there are serious reasons to believe that the institution of proceedings in the foreign courts would impede the realisation of the objectives for which the amnesty was implemented.

#### **4. Conclusion**

Under the principle of universal jurisdiction all States have the power to prosecute perpetrators of international crimes regardless of the place where they were committed and regardless of the nationality of the victims or the perpetrators. In accordance with this principle, domestic amnesties may not be invoked as a bar to the universal jurisdiction of foreign courts over perpetrators of international crimes. One State cannot dictate how other States should react to those crimes. This article has suggested, however, that when foreign prosecutors contemplate exercising universal jurisdiction, considerations of peace and democratic transition in the territorial State have to be carefully calculated. Amnesties designed to further the purposes of ending a civil war or necessary for a political transition from minority regime to a majority government, or from a repressive regime to one that promises respect for human rights in the future, it was argued, should be supported by foreign prosecutors by exercising their prosecutorial discretion in favour of not instituting prosecutions in relation to any crime that has been the subject of such amnesties in the affected State. It was further submitted that considerations of ‘how’ the amnesty was granted should not be relevant in arriving at a decision by foreign prosecutors whether to support the amnesty process in the territorial State (by not arresting its officials who are concerned by the amnesty law) or not. The only consideration must be ‘why’ the amnesty was regarded as necessary for the affected country to move forward. It would for example be absurd for a foreign prosecutor to threaten members of the Columbian FARC guerrilla movement with arrest and prosecution under the principle of universal jurisdiction solely on the ground that the amnesty process was not approved by the majority of the Colombian people in the October 2016 consultative

referendum.<sup>74</sup> That would clearly not be in the interests of the people who have been living under the curse of war in the affected territories of Colombia for over 50 years now.

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<sup>74</sup> *The amnesty deal was rejected in a consultative referendum on 2 October 2016. The “no” vote was described by Amnesty International as a “missed opportunity for peace” in Colombia. Amnesty International “Colombia: ‘No’ vote a missed opportunity for peace” (2 October 2016) <https://www.amnesty.org/en/latest/news/2016/10/colombia-no-vote-a-missed-opportunity-for-peace/> [6 December 2016].*