

## *Jus Post Bellum* and Amnesties

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Current efforts to develop a robust and practicable conception of *jus post bellum* have rightly focused on the requirement for a determinate set of principles specifying just what a satisfactory account of *jus post bellum* should consist of.<sup>1</sup> *Jus post bellum* principles must be complete, consistent, and implementable. They should be *complete* in the sense that they should adequately capture what justice requires in a post-conflict context. If all and only the preferred *jus post bellum* principles can be satisfactorily implemented, the result would be a just peace. They should be *consistent* in the straightforward sense that adequately

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<sup>1</sup> For recent work relevant for this article see especially Larry May, *After War Ends* (Cambridge 2012); Gary Bass "Jus Post Bellum" *Philosophy and Public Affairs* 32:4 2004; Carsten Stahn, "Jus ad bellum, jus in bello...jus post bellum? Rethinking the Conception of the Law of Armed Force," *European Journal of International Law* (2006) 17:5, 9921-943; Jan Kleffner and Carsten Stahn, *Jus Post Bellum: Toward a Law of Transition from Justice to Peace* (Cambridge 2008); Brian Orend, *The Morality of War* (Broadview Press, 2006); Davida Kellogg, "Jus Post Bellum: The Importance of War Crimes Trials," *Parameters* 32:2002; Kristen Boon and Philip M. Moreman, eds. *Jus Post Bellum*. Special Issue of *Seton Hall Law Review* 38:1233, 2008; Robert E. Williams and Dan Caldwell, "Jus Post Bellum: Just War Theory and the Principles of Just Peace," *International Studies Perspectives* (2006) 7, 309-320; Inger Oesterdahl and Esther van Zadel, "What will Jus Post Bellum Mean? Of New Wine and Old Bottles," *Journal of Conflict and Security Law* 14(2), 2009; A.J. Bellamy, "The Responsibility of Victory: *Jus Post Bellum* and the Just War," *Review of International Studies* 34:2008, 601-625; Jean Cohen, "The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for 'Interim Occupations'" *New York Law School Review* (51) 2006-2007, 497-532.

realizing one principle should not in the normal case undermine the prospects of realizing any others. And they should be *implementable* in the sense that they specify a range of practical measures, policies, institutional innovations and reforms, and enforceable laws that have a realistic chance of success, given what we generally know and can reasonably infer about post-conflict societies in the shorter and longer term.

Regarding the first requirement, that of completeness, what is striking about much current and recent work in *jus post bellum* is that, even in cases where theorists and practitioners begin from very different starting points and assumptions, the “short list” of candidate principles of *jus post bellum* is strongly consistent. Virtually every *jus post bellum* author, for instance, recognizes that a number of negative or prohibitive principles, whether derived from the moral just war tradition or interpreted from existing treaty or customary international law, restrain occupying powers from a range of punitive or exploitive policies regarding the defeated civilian population. Victors may not annex territory nor impose collective punishments; they may not violate the basic rights or legal protections of the civilian population, who enjoy such rights and protections irrespective any other post-conflict circumstance, even (especially) their loss of sovereignty.

But *jus post bellum* is at heart an effort to extend these negative or prohibitive principles, and develop a concrete set of positive obligation regarding what a victor must do to, or for, or with, a defeated population. These obligations typically include the obligation to provide physical security, to contribute

significantly to the reconstruction of crucial elements of the defeated society's physical infrastructure, to aid in the rehabilitation of inefficient or corrupt social institutions such as the judiciary and the political system, and to coordinate restitution (monetary, symbolic, or both) for unjust losses incurred.<sup>2</sup>

Taken as a whole, these positive principles can be taken as expressions of a single though hard to define obligatory posture that *jus post bellum* enjoins a victorious occupying power to adapt toward a defeated population. The victor is obligated to take reasonable measures to encourage and assist the post-conflict development of the democratic rule of law in the defeated society, in which basic human rights, and the institutional structure to support them, are established, guaranteed and enforced. The overarching goal of the correction of serious faults in a state's human rights status obviously links *jus post bellum* to the norms of *jus ad bellum* in virtually all plausible contemporary cases of justified aggression against a sovereign state. It also casts the very idea of *jus post bellum* in a broader normative narrative of the progressive victory of an international human rights culture, established by means of international politics and law if possible, and by force if necessary.

Among these positive *jus post bellum* principles, *jus post bellum* theorists will also generally include a principle of prosecution or retribution: all those who are liable for prosecution for serious international crimes committed during the course of the conflict, and those (defeated) members of the political and military leadership whose grave breaches of international law precipitated the (justified)

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<sup>2</sup> For a helpful overview see Kristen Boon and Philip M. Moremen, Introduction to the special issue on *Jus Post Bellum*, Seton Hall Law Review, SHLR 38:1233, 2008.

military conflict in the first place, must face appropriate legal consequences for their actions. Whether prosecution is justified on retributive, consequentialist, or expressivist grounds, or some combination of all three argumentative strategies, *jus post bellum* principles extend to due post-conflict prosecution, absent which no just peace can be said to exist.

In this way, *jus post bellum* theory encounters a complex problem that is familiar from parallel (and largely overlapping) debates in transitional justice: how to balance the demand for due prosecution with the need for pragmatism and flexibility in dealing with potential spoilers (deposed heads of state and their top political and military cohorts) and with rank and file combatants (often conscripts and in some cases child soldiers) who have committed international crimes in the course of carrying out orders from their leadership. Criminal justice demands the imposition of impartial, transparent, and consistent legal procedure on all those whose acts in the lead-up to conflict and in the course of conflict warrant it. But security and reconciliation goals often argue strongly for granting exceptions to prosecution at the domestic level, and either tacitly or explicitly accepting such exceptions on the part of international actors.

The “peace versus justice” debate familiar from transitional justice experiences is sharpened in the *jus post bellum* context by the complex interaction of different stakeholders in the “*terminatio*” phase of post-conflict, where brokered deals for cessation of hostilities involve multiple calculations and wagers regarding short-term incentives for longer-term behaviors, and the still more complex relation between this short-term phase and the longer-term goals

of a just peace, in which human rights enforcement under a democratic rule of law has to be sufficiently embedded in a nascent political culture that one can speak if not of “stability for the right reasons” then at least stability for good-enough reasons. Is such longer-term stability reconcilable with deliberate omissions of legal justice? Can a complete, consistent, and implementable *jus post bellum* accommodate amnesties for the “big fish” of a justly defeated regime?

Amnesties are extraordinary government measures intended to provide relief to designated persons for acts that would ordinarily be subject to legal scrutiny, specifically investigation and criminal prosecution. In this sense, amnesties are interestingly indeterminate provisions between politics and law. They are, in essence, sovereign acts of states (whose democratic legitimacy varies widely) demonstrating the (usually executive) power to effect significant alternations in the normal application and range of the domestic criminal law, in order to bring about a politically desirable effect.

The objectives of amnesty measures naturally vary. Some are designed as parts of larger transitional justice programs and are largely intended as elements of a program intended to bring about reconciliation however defined. Other amnesties for serious crimes are intended to assist in the negotiated end of hostilities, or the negotiated transition to democratic governance, by offering to waive prosecution to specific persons in return for some pre-determined acts or omissions on their part. The former amnesties are in essence backward-looking, and are justified by overriding interests in long-term peace, forgiveness, and

reconciliation in the context of a domestic situation that has already been firmly established in the past. (In many instances amnesties can be offered for those who have already been tried and convicted of serious crimes). The latter are pragmatic efforts to motivate persons and groups to give up power in return for the assurance that they will not be prosecuted. In this chapter I focus largely on this latter, negotiated amnesty, and in particular in cases where higher-level perpetrators, “big fish” including heads of state, whether still sitting or in the process of losing a domestic or international armed conflict, are given offers of amnesty to motivate them to leave peacefully and to forestall further bloodshed, and to forswear further violence as democratic spoilers following the negotiated end of hostilities.

As “necessary evils” (as Mark Freeman dubs them) meant to incentivize recalcitrant leadership, these negotiation amnesties for high-level perpetrators certainly have much to recommend them. They can be very powerful incentives indeed, especially in combination with other elements of a negotiating package such as offers of protected exile or preservation of assets. They offer relief from the prospects of expensive, protracted, divisive domestic trials, often in situations where a degraded and corrupt judicial system cannot offer realistic prospects for procedurally correct decisions, and where outgoing perpetrators (who often have at least some legal training or aptitude) can and do hijack public trials.

What’s more, amnesty schemes can be useful in more ways than coaxing stubborn autocrats out of power. Amnesties are also used as elements of larger efforts toward demobilization, disarmament and reintegration (DDR) for long-term

internal conflicts, and here the principal beneficiaries are low-level perpetrators. Here, as in higher-level amnesty deals, waiving the prospect of criminal prosecution can be offered in exchange for requirements for low-level perpetrators, including the surrender of arms, registration with a transitional authority, pledges, enrolling in reintegration programs, and so on. In several of these instances – Sierra Leone, Indonesia, Colombia, and many more – what is controversial, again, is not whether amnesty can justifiably be offered in exchange for cooperation to end a long-term conflict, but amnesty for what, and for whom?<sup>3</sup>

Amnesty, then, is among the most legally and politically complex and morally controversial topic in the burgeoning field of post-conflict justice.<sup>4</sup> This chapter cannot hope to do justice to the breadth and depth of this debate. My purpose here is narrower, and focuses specifically on the question of the justifiability and the permissibility of domestic or national amnesties for the “big fish” – the deposed political leadership with their top political and military cohorts – of justly defeated regimes. For this reason my presentation here makes a

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<sup>3</sup> See Mark Freeman, “Amnesties and DDR,” International Center for Transitional Justice Position Paper. <http://ictj.org/sites/default/files/ICTJ-DDR-Amnesties-ResearchBrief-2010-English.pdf>.

<sup>4</sup> For two recent comprehensive analyses of domestic amnesties, including extensive discussions of the status of amnesties under international law, see Mark Freeman, Necessary Evils: Amnesties and the Search for Justice (Cambridge 2011) and Louise Mallinder, Amnesty, Human Rights, and Political Transitions: Bridging the Peace Justice Divide (Hart 2008). See also Andrew Rigby, “Amnesty and International Law,” *Nordic Journal of International Law* no. 74, 2005; Louise Mallinder, “Amnesties and International Criminal Law,” in William Schabas and Nadia Bernaz, editors, The Handbook of International Criminal Law (Routledge 2010); Lisa J. Laplante, “Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes,” *Virginia Journal of International Law* no. 49, 2009.

number of assumptions to bracket and focus its subject matter, in order to deal with an exemplary case in which a newly-formed and fragile government in a defeated state negotiates with a constellation of national and international political and judicial bodies, over the question of whether its domestic amnesty for its outgoing political leadership will be tolerable to the coalition of victorious (and possibly occupying) military forces as well as international bodies such as the U.N. and the International Criminal Court.

For many theorists of post-conflict justice, amnesties are simply not compatible with any acceptable *jus post bellum* settlement.<sup>5</sup> Others are inclined

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<sup>5</sup> See for example Davida Kellogg, "Jus Post Bellum: The Importance of War Crimes Trials," *Parameters* 32 (2002): "[T]he meting out of punishment for crimes against humanity and war crimes, whether in international tribunals or in our own civil courts, courts-martial, or military tribunals, is in fact the natural, logical, and morally indispensable end stage of Just War. If Just War is undertaken to right wrongs done by a group or groups of people to one another – if in fact the only acceptable reason for going to war is, as Michael Walzer and other Just War theorists contend, to do justice – then stopping short of trying and punishing those most responsible for war crimes and crimes against humanity which either led to war or were committed in its prosecution may be likened to declaring 'checkmate' and then declining to take your opponent's king. It makes no strategic sense, since the purpose for which war was undertaken is never achieved. It makes no legal sense, since the criminal activities the war was undertaken to rectify or curtail are allowed to continue unchecked. What is worse, it makes no moral sense, since justice is not done for the victims of atrocities in such an outcome to war." (89) See also Brian Orend, "Jus Post Bellum: A Just War Theory Perspective," in Jan Kleffner and Carsten Stahn, editors, Jus Post Bellum: Toward a Law of Transition from War to Peace (Cambridge 2008): "When the defeated country has been a blatant, rights-violating aggressor, proportionate punishment must be meted out. The leaders of the regime, in particular, should face fair and public international trials for war crimes. Why must there be punishment at all? Why can we not just cancel the aggressor's gains, and then live and let live? Three reasons suggest themselves. First, the obvious – yet powerful – one of deterrence. Punishing past aggression deters future aggression, or at least does so more than if we had no punishment at all. No punishment seems a lax policy which actually invites future aggression. Secondly, proper punishment can be an effective spur to atonement, change and rehabilitation on the part of the



to regard amnesties as necessary evils, intrinsically unjust but justified in cases where such amnesty offers alone might be required for a comprehensively best-possible outcome.<sup>6</sup> Still others tend to minimize the normative damage implied by amnesty policies, and see them as practices which, when accompanied by responsibly designed and implemented accountability procedures, should remain as useful parts of the toolkit of negotiation when trying to move from war to a just peace.<sup>7</sup>

This chapter is part of a larger defense of the second of these interpretive positions, holding that the intrinsic wrongness of amnesties for international crimes ought to rule them out in all cases except where evidence strongly suggests that intelligent, targeted amnesties are the only option available to produce a post-conflict situation in which the rest of the important *jus post bellum* principles have a chance of being realized. Like the first position, then this stance sees amnesties as serious and intrinsic wrongs, which states and international coalitions and organizations have a strong (deontic) obligation to reject. Like the third position, however, it also holds that notwithstanding this obligation, there are

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aggressor. Finally, and most powerfully, failing to punish the aggressor degrades and disrespects the worth, status, and suffering of the victim.” (41)

<sup>6</sup> See for example Larry May, *After War Ends* (Cambridge 2012) and the “principle of retribution,” according to which top political and military leadership are to be extradited to face trial in international courts only up to the point at which “such actions do not jeopardize basic human rights.” (54)

<sup>7</sup> Most notably see Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28:3 (Winter 2003), 5-44: “Preventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses (or so-called spoilers). Amnesty – or simply ignoring past abuses – may be a necessary tool in this bargaining. Once such deals are struck, institutions based on the rule of law become more feasible.” (6)

nevertheless situations when this obligation can be overridden by other factors. Very unlike the third, consequentialist position, however, it argues that these factors must be restricted to just those competing strong obligations (as opposed to considerations of outcomes) which render this obligation defeasible. Such competing obligations, which provide *pro tanto* reasons to reject an acknowledged duty, have to be strong enough that failing to address them would undermine not just one or another of a larger set of normative obligations but the animating force of the norms that underlie such obligations as a whole. This means, in short, that while prosecution for serious violations of international law is part of any reasonable set of *jus post bellum* principles, a reason for waiving prosecution (amnesty) can only be that doing so preserves the chances of comprehensive realizing the set of principles (whatever else it may include) as a whole.

This position then is intended as a middle ground between a strictly deontological defense of prosecutions allowing of no exceptions, and a consistently consequentialist defense of amnesties as justified in just those cases where they generate more favorable outcomes than their measurable costs. As will become clear in the remainder of the chapter, I deal here primarily with the first of these two positions.

Disagreements about amnesty extend from normative questions concerning the *acceptability* or justifiability of amnesty as a *prima facie* injustice, to descriptive legal arguments regarding the *permissibility* of domestic amnesties

for international crimes; that is, whether such amnesties are at all compatible with existing international law.

Disagreements on the *acceptability* of amnesties for *jus post bellum* center appropriately on the varying strength of different normative arguments regarding what responsible agents must do, or may deviate from doing, in pursuit of an uncontroversially desirable outcome. Waiving prosecution will almost certainly mean that people who deserve to be tried and punished will not be. Getting what one deserves is a core deontological claim regarding what justice demands.

Moreover, since amnesties waive both punishment and its prerequisite prosecution, consequentialists can (and do) argue that often the costs and consequences of risky prosecutions of deposed political and military leaders cannot be justified, especially as they climb so high as to threaten the prospects for success of the larger *post bellum* set of goals of which prosecution is of course only one part. They can argue that amnesty policies may offer short-term gains that don't justify their longer-term costs: lingering damage to the rule of law and the establishment of regular legal procedures, or the lost opportunity to incapacitate potential spoilers.

But while no one today argues for the normative acceptability of the blanket amnesties or self-amnesties of the 1970s and 1980s, and while virtually all consequentialist defenses of amnesty policies include serious provisos regarding the various measures that would provide accountability along with amnesty, there are nevertheless quite appealing consequentialist arguments that amnesties, especially of "big fish," can be relatively low-cost and highly effective

parts of the toolkit for negotiating the end to armed conflicts, and that it makes good sense to keep the amnesty option open in situations where the potential costs of high-level prosecutions for post-conflict goals rise prohibitively high while the correlated costs of such amnesties are deemed acceptably low.

Whatever our views regarding the *normative justifiability* of amnesties for perpetrators of serious violations of human rights, the problem of assessing competing views is distinct from the interpretive question of the legal *permissibility* of amnesties; that is, whether such amnesties are in fact compatible with our current understanding of the duties imposed on states under valid international law. Here too the basic question is separable into a number of more concrete questions of legal interpretation. Do domestic amnesties for international crimes (or, more accurately, for persons whose actions would normally warrant legal attention, from investigation, indictment, prosecution and possible conviction) themselves violate any international legal commitment on the part of states? Do states' various obligations under valid treaties and legal custom commit them to refrain from amnesties, and if so, under what circumstances? Can the various sources of international law be read to imply such commitments, even if they do not establish them clearly and expressly?<sup>8</sup>

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<sup>8</sup> The normative question of justifiability and the interpretive legal question of permissibility of course can be answered separately from one another. One might conclude that amnesty policies are so normatively undesirable, whether on deontic or consequentialist grounds, that states ought to repudiate their use even if the law does not definitively establish them as impermissible. Conversely, one can view amnesties as pragmatically useful components of negotiated peace settlements that nevertheless can't be supported due to their incompatibility with states' international legal obligations.

I will spend much of the remainder of this chapter exploring the second, legal question of permissibility. In part, I do this to argue that anti-amnesty arguments seriously over-estimate what current international law has to say about the status of domestic amnesties for international crimes. This argument will naturally have important implications for the normative question as well.

The argument that domestic amnesties for big fish are both normatively unjustifiable and legally impermissible is the foundation of a strong consensus amongst international courts, scholars, and international bodies. Since the “reservation” to the Lomé Accord in 1999 (barring U.N. negotiators from accepting any brokered peace treaty or cease-fire that includes amnesties for international crimes<sup>9</sup>) it has also been the position of the United Nations. I refer to this strong anti-amnesty argument as the *impunity norm*.

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<sup>9</sup> In the now-infamous case of the ‘oral reservation’ to the 1999 Lomé peace accord in Sierra Leone, the United Nations special representative to the negotiations to bring about a peace settlement in that country, when presented with a final document providing blanket amnesty to leaders who had committed numerous war crimes and crimes against humanity (including the rare bird, a peace treaty that granted blanket amnesty by name to the rebel leader Foday Sankoh) quickly penciled in a ‘reservation’ next to his signature namely, that the UN did not regard as valid and would not honor any domestic amnesty for international crimes. The reservation is generally regarded as evidence of the slow but definite evolution of the principled position of the UN on amnesties over the last 10 years: from pragmatic accommodation of amnesties provided they demonstrably contributed to negotiated peace settlements, to a position that regards such amnesties as principled violations of international law that are incompatible with the UN’s core mission. On the UN Security Council’s and the UN Human Rights Commission as (not always vigorous) agents of the anti-amnesty consensus see the UN HRC’s Report of the Human Rights Committee on the Situation in Nigeria, Vol. 1, HN GAOR 51st Session, supplement 40, para. 284 [UN DOC A/51/40 (1996)]. On the Lomé Accord and the reservation see UN DOC S/1999/836; for a detailed interpretation, see Patricia Hayner (2007) Negotiating peace in Sierra Leone: confronting the justice challenge, Expert Report, International Center for Transitional

In the chapter's next section, I will sketch the basic legal and political features of contemporary domestic amnesties, and will offer some background on why, and how, the impunity norm has become so entrenched. I offer a brief reconstruction of the shifting fortunes of domestic amnesties as components of democratic transitions and the consensus view of the specific injustices of amnesties. I then describe what I take to be the current state of the discussion regarding the status of amnesties in relation to international criminal law, and go on to raise a number of serious questions concerning the coherence and accuracy of the impunity norm's current consensus in international law on the role of amnesties and their admissibility in international law.

A concluding section attempts to unearth some of the underlying factors that may help to explain the perennial popularity of domestic amnesties, even in the face of their very evident practical and normative flaws. Amnesties offered by newly formed post-conflict governments have a strong "Westphalian" dimension, I argue. Such offers can bear an important expressive function – the announcement of the recovery of national sovereignty through the sovereign decision regarding when and whether to suspend the normal functioning of the system of domestic criminal law. This expressive function continues to shape and limit the current discussion of the appropriateness and legality of domestic amnesties for serious international crimes in the context of negotiated peace settlements and democratic transitions.

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Justice and Centre for Humanitarian Dialogue, December 2007, accessed 2/2/2008.  
Available online at: <http://www.ictj.org/static/Africa/sierraleone/Hayners1207.eng.pdf>.

This Westphalian dimension of domestic amnesties for international crimes seriously complicates the assessment of the overall effect of such measures for an acceptable *jus post bellum*, since the relation between the expressive function of the domestic amnesty – the assertion of recovered national sovereignty – and the generally cosmopolitan norms that motivate much anti-amnesty legislation and policy in the development of international law are often but not always in open conflict. This suggests a fare more context-sensitive and careful analysis of the overall effect of amnesties and their acceptability from the perspectives not just of law and morality, but from the international relations perspective as well.

Amongst transitional justice practitioners and commentators, the pendulum of pro-amnesty and anti-amnesty arguments has been in constant motion for nearly forty years. As a reaction to the specter of impunity that arose from the blanket self-amnesties in Argentina, Chile, Peru, and elsewhere in the Southern Cone, a consensus amongst legal scholars condemned such amnesties as incompatible with justice, and pragmatically bad bets for societies attempting to confront past atrocities, pacify former adversaries, and entrench a culture of respect for the rule of law.<sup>10</sup>

In the second half of the 1990s, however, this consensus was seriously challenged by transformations in the practice of domestic amnesties. Specifically, the experience of the Amnesty Committee of the South African Truth and

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<sup>10</sup> For a classic statement see M. Cherif Bassiouni, *Crimes Against Humanity in International Law*; Naomi Roht-Arriaza, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,” *California Law Review* no. 78, 1990.

Reconciliation Commission introduced the new notion of amnesties as parts of a larger integrated post-conflict political and legal arrangement in which various accountability mechanisms were meant to take at least some of the sting out of political decisions to refrain from prosecution for serious human rights violations. International responses to the South African TRC and its innovative use of conditional and individualized amnesties as a part of an integrated transitional justice approach included a call to reexamine the justice outcomes and pragmatic effects of domestic amnesties, and many transitional justice commentators began to see reconciliation as an overall social and political goal in which amnesties might not be just tolerable but in many cases even desirable.<sup>11</sup> The rapid rise in popularity of truth commissions placed the amnesty versus prosecution question in a larger transitional justice context, foregrounding the role of victims, the creation of definitive historical and testimonial records of offenses, vetting for the reformulation of domestic security services and the judiciary, reparations and restitution programs, and in general a reconciliatory ideal under whose banner duly conditional amnesties began to seem far more tolerable.

The remarkably swift rise of transitional justice mechanisms in the 1990s and 2000s, then, raised the prospect of acceptable forms of amnesty, especially for lower-level and mid-level perpetrators, even in cases where such perpetrators may have been prosecutable for quite grave human rights offenses and other

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<sup>11</sup> Amongst the massive literature provoked by the South African Truth and Reconciliation Commission see in particular Michael Scharf, "The Letter of the Law: The Scope of International Legal Obligation to Prosecute Human Rights Crimes," *Law and Contemporary Problems* no. 59, 1996.



international crimes. Under the banner of reconciliation, one of the chief legacies of the Nuremberg experience, the ideal of criminal prosecution as the cornerstone of international responses to serious international crimes, lost much of its presumptive validity. And yet this qualified view of tolerable amnesties left largely unsettled whether, and if so in which cases, top-level political and military leadership should be offered amnesties as part of a larger negotiation process to help coax them from power in a way that might minimize or even avoid prolonged armed conflict. Transitional justice debates on amnesties in the 1990s and 2000s largely presumed a consistently domestic context – that is, one in which one sovereign state confronts the proximate past of atrocity, a complex mixture of victimization and complicity, and a range of necessary institutional reforms. But in the wake of the South African experience, it became apparent that adequate responses to massive human rights abuses were difficult-to-impossible to conduct within the traditional confines of a single sovereign state, due to the status of such abuses as international crimes.

Moreover, the backward-looking focus of transitional justice theory and practice on reconciliation, reparations and the status of victims tended to make transitology less interested in the procedures of multilateral international negotiation in the context of armed conflict, in which a number of relevant stakeholders – states, international political and military coalitions, and international bodies such as the United Nations – bargain with recalcitrant political leadership in order to coax them from power while minimizing unnecessary bloodshed. Thus the status of what is after all the primary instance

of a possible unconditional amnesty – one offered to outgoing heads of state, by “incoming” administrations as part of a negotiated end of conflict – remained largely unclarified.

In the meantime, even the acceptance of a limited range of acceptable amnesties in the 1990s has weakened considerably in the first decade of the twenty-first century. The rising profile and global influence of international criminal law has been a major contributing factor to this pendulum swing back toward a strong impunity norm. The replacement of special UN-backed criminal tribunals with an International Criminal Court, changes in the official policy of the United Nations as a negotiating body,<sup>12</sup> and a (tidal) wave of academic writings catalyzed a newly energized effort to enforce a consistent regime of international respect for basic human rights, which demanded the investigation and punishment of grave offenses. International criminal law, as distinct from international human rights or humanitarian law, acquired a new influence and visibility. Influential international NGOs such as Human Rights Watch and (the now somewhat ironically named) Amnesty International became energetic

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<sup>12</sup> See especially the landmark 2009 UN High Commissioner for Human Rights policy paper “Rule-of-Law Tools for Post-Conflict States: Amnesties” ([http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf)), written with the help of Diane Orentlicher, who has played a central role in the promulgation of the anti-impunity norm. In this UN document the fundamental normative orientation is consequentialist: “The United Nations policy of opposing amnesties for war crimes, crimes against humanity, genocide or gross violations of human rights, including in the context of peace negotiations, represents an important evolution, grounded in long experience. Amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict.”

advocates opposing amnesty deals for outgoing autocrats, rebel leaders, or any other perpetrators of serious international crimes; conditional amnesties for lower-level perpetrators came under international legal scrutiny, and a serious debate began on the question of whether South African-style domestic amnesties even for lower-level perpetrators would be acceptable under an energized regime of international criminal law.

Together with this newly enhanced profile and influence of international criminal law came what we might term a prosecutorial culture in international peace negotiations. Some voices in the early 2000s already expressed concern about the juridification of formerly political discourses of domestic transition or regional or international diplomacy.<sup>13</sup> But these were exceptions; overall, the twenty-first century began as the era of the prosecutor. Revocations of 1970s and 1980s amnesties in Peru and Argentina enforced the view that such amnesties would not survive longer-term political scrutiny under democratic governance; even the Spanish policies toward its Francoist past, consisting of sweeping amnesties and a policy of official ignorance of past atrocities, seemed to gradually buckle with the passage of time.<sup>14</sup>

New calls for the enforcement of the impunity norm emphasized states' absolute, nonderogable duty to prosecute international crimes. International

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<sup>13</sup> Most significantly for the period see Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," International Security vol. 28, No. 3 Winter 2003-4, 5-44.

<sup>14</sup> For a comprehensive analysis of the Spanish approach to dealing with the aftermath of the Francoist period see Paloma Aguilar, "Transitional Justice in the Spanish, Argentinian and Chilean Case," <http://www.peace-justice-conference.info/download/WS%2010%20Aguilar%20report.pdf>.

criminal tribunals often took dim views of domestic amnesties, pointing out that such amnesties would have no bearing on their prosecutions. States exercising universal jurisdiction underlined a growing legal consensus that domestic amnesties for international crimes would have no extraterritorial validity,<sup>15</sup> and the International Criminal Court clarified that even within a state's own territory, the international court would not recognize the validity of a domestic amnesty for anyone under the Court's indictment.<sup>16</sup>

Whatever the other factors behind this "age of the prosecutor" may be, the underlying justice principle that underwrote it is clear: in transitions, the international legal and diplomatic communities have a responsibility to prevent impunity, and this frequently entailed holding reluctant states to their international legal obligations to investigate, prosecute, and punish individual perpetrators through domestic legal proceedings if possible, and through international courts if necessary.<sup>17</sup> Indeed the goal of "battling impunity" became such a ubiquitous formula in the language of international juridical bodies and NGOs –finding its way even into the preamble of the Rome Statute of the ICC -- that it was easy to get the impression that the specter of impunity for individual perpetrators posed

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<sup>15</sup> This legal claim underlay the principle of universal jurisdiction permitting the arrest in London of Augusto Pinochet by Spanish authorities. On universal jurisdiction see Stephen Macedo, editor, *Universal Jurisdiction* Princeton 2004. The SCSL also expressly declared that the Lomé amnesty would have no bearing on its own jurisdiction.

<sup>16</sup> This is a controversial point. In the case of the ICC's indictment of members of the LRA in Uganda, the ICC Prosecutor made plain that no Ugandan amnesty would be considered to bind the court's hands in its efforts to arrest them; however, this point was largely academic as most of the Lord's Resistance Army's leadership were not present in Ugandan territory.

<sup>17</sup> For an influential early formulation see Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?" 12 Hum. Rights Q, (1990).

the greatest single threat to a just and peaceful international order; that international organizations, unable to rely on the mettle of national-state actors, would need to step into the breach, often at great cost, to ensure that impunity would not prevail.

Is this international impunity norm a justifiable and legally coherent bar to domestic amnesties for serious crimes under international law? Few can doubt that such domestic amnesties, regardless of their intended consequences, are at least *prima facie* deviations from ordinary criminal justice. This is virtually analytically true given the stipulated definition of amnesties as suspensions of the ordinary operation of domestic criminal justice in return for some objective that has been judged politically desirable. If the goal of any transition, whether from war to peace, or from authoritarian to democratic rule, is the establishment of a just mode of social and political stability, then it's possible that some forms of amnesty simply undermine this goal from the outset, since they would guarantee an unjust impunity for those who are supremely deserving of punishment. The idea that transitions typically combine high expectations and low returns in terms of justice is a familiar feature in transitional justice studies – can the same be said for *jus post bellum*?

But we can take this one step further: the injustices that are attached to amnesties don't stop with failures of retribution, of course. Amnesties also facially deprive victims or their survivors of their rights to legal remedy, effectively re-

injuring them by making their legitimate legal complaint null and void.<sup>18</sup> On consequentialist grounds, moreover, both individualized amnesties and larger and more complex amnesty programs can presumably have the indirect effect of weakening rule of law institutions by publicly staging the plasticity of rule of law institutions for the sake of political expediency. (A version of this consequentialist argument – the unjust omission of an opportunity for the rule-of-law enhancing effect of criminal trials – lies at the core of the influential idea of a “justice cascade” developed by Kathryn Sikkink and Ellen Lutz, and other collaborators.)<sup>19</sup>

Therefore the impunity norm’s objection to amnesties is certainly formidable, stretching across a range of interested stakeholders and including both deontic arguments for retribution and legal remedy as well as consequentialist claims concerning the possible benefits of (usually domestic) prosecutions of the worst perpetrators. The question, however, is not whether amnesties are compatible with complete political and legal justice. They are not. The question rather is in narrower terms whether the kinds of injustices that amnesties generate make them incompatible with states’ obligations under international law, and therefore whether the international community ought to discourage or even attempt to ban such amnesties in what it is prepared to

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<sup>18</sup> This was one of the two chief objections to the amnesty provision of the South African Truth and Reconciliation Commission in the AZAPO case.

<sup>19</sup> Lutz, Ellen, and Kathryn Sikkink. “The Justice Cascade: The Evolution and Impact in Latin America of Foreign Human Rights Trials,” *Chicago Journal of International Law*, 2:1 (Spring 2001), 1-34.

regard as good-enough *jus post bellum* arrangements.

Interpreting just what these practically mean in terms of the policies and conduct of international organizations and courts toward negotiated peace settlements or post-conflict arrangements is of course a much bigger question, and well beyond the scope of this paper. At a minimum, certainly, state amnesties for international crimes can expect no extraterritorial recognition, and beneficiaries of such amnesties cannot assume any immunity from prosecution by any body, whether an international court or a state exercising universal jurisdiction for a *jus cogens* violation, outside of the territory of the amnesty-granting state. This in itself is not nothing – it may substantively limit the amnestied person’s freedom to travel, may help to authorize the seizure of assets or property, and in general may reduce the practical value of an amnesty offer.

At the other extreme, one reading of the concept of *jus cogens* violations may imply that states have no inherent legal right to legislation that effectively shields persons from crimes that any domestic system of criminal law is under an obligation to prosecute and punish, and doing so places that state itself, and not just the amnestied person, in a conflict with the institutions and principles of international law. It may imply that internal or international negotiations may not legitimately include amnesties for international crimes and expect recognition or acceptance by the relevant international bodies. Amnesties, in other words, may facially violate an emergent or ‘crystallizing customary norm, with strong significance for articulating a *jus post bellum*.

On this maximalist reading (which I think is far more common than the minimalist one), various provisions of *treaty-based* international law, for instance of the Convention against Torture or the Genocide Convention, are violated if serious crimes are shielded from domestic legal attention, since such treaties contain provisions for investigation, prevention, and enforcement collectively implying non-derogable duties imposed on state signatories, and these duties would (on the consensus view) be violated by amnesties. Moreover, in terms of *customary* international law, the international consensus appeals to a crystallizing norm of customary law according to which amnesties for the most serious crimes are contrary to the law, even in the absence of specific treaty obligations.

As Mark Freeman points out, on this reading, a distinctive feature of the current anti-impunity consensus is that a strong, often exceptionless opposition to amnesties for upper-level perpetrators is compatible with toleration or in some cases even active encouragement of more broad-based amnesties for low level combatants as elements of DDR programs, whether during or after the conclusion of military conflicts.<sup>20</sup> In the latter case, arguments for the permissibility of amnesty don't tend to rest on, or primarily on, pragmatic arguments for the effectiveness of amnesty offers to induce lower level combatants to disarm and submit to some range of non-prosecutorial justice mechanisms. Rather, the arguments are themselves predominantly normative ones, highlighting the reduced liability of low-level combatants, their status as

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<sup>20</sup> Freeman, *Amnesties and DDR*, 5.



conscripts and/or minors, as kidnapped, drugged, or in some other way as compelled to fight.<sup>21</sup> And for this reason the impunity norm can embrace or at least tolerate rather extensive amnesty programs for low-level combatants without contradiction, by arguing that such amnesties, provided that they are parts of larger post-conflict legal arrangements and are running in tandem with other justice and accountability mechanisms, don't actually constitute failures of retributive justice, or that low-level perpetrators by their circumstances have committed crimes, but not international crimes.

In crude strokes, in other words, the impunity norm has staked out the following formula in cases of perpetrators of serious violations of international

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<sup>21</sup> This is a complex and highly debatable point. See the characteristic policy positions such as Amnesty International, *Child Soldiers: Criminals or Victims?* (London: Amnesty International, 2000); the United Nations Disarmament, Demobilization and Reintegration Resource Centre document on "Post-Post Conflict Stabilization, Peace-Building and Recovery Frameworks," <http://www.unddr.org/iddrs/framework.php>; Council on Foreign Relations Backgrounder on DDR in Africa, <http://www.cfr.org/africa/disarmament-demobilization-reintegration-ddr-africa/p12650>; Coalition to Stop the Use of Child Soldiers, "Global Report on Child Soldiers" (London: Coalition to Stop the Use of Child Soldiers, 2001). See also Tim Wright, "When Children Commit Atrocities in War," *Global Change, Peace & Security* 22:3, 2010. 315-326. Forthcoming work by Mark Drumbl (*The Agency and Innocence of Child Soldiers*) will address this issue in depth. It does not seem to be at all self-evident, either legally or morally, that lower level perpetrators, even minors, are by virtue of their status presumptive candidates for amnesty from prosecution, where top-level political leadership are not. One can well imagine a situation where an inept and befuddled gerontocracy may bear a degree of legal and moral responsibility for atrocities that is diminished in comparison to triggermen who may have been legal minors at the time of their induction into the ranks of combatants, but who then compiled a truly horrific body count as young adults. DDR programs that waive prosecution for these young men in return for disarming and promising to kill no more may in this case offend the principles underlying international criminal law far more than failed prosecutions of their distant political leadership. Moreover, we should be mindful of the possibility that the principle of command responsibility and the parallel principle of selectivity of prosecution, which together compel prosecutorial resources up the chain of command toward the smallest number of most culpable and highest-ranking leaders, is itself an artifact of the Nuremberg experience that may not be fully transferrable to the kind of long-term, low-level domestic or regional conflicts involving one or more failed or failing states, conflicts that are more typical of contemporary *jus post bellum* than the 'classical' international war in which at least one party is an authoritarian state.

crimes: *never* amnesty big fish; *sometimes* amnesty the lowest-level perpetrators, in cases where the amnesty program is a part of a broader DDR program that includes justice mechanisms ensuring some quasi-legal procedure of accountability.

The impunity norm rests on the claim that the law is on its side. It does not, or does not merely, develop moral or political arguments about what the law ought to say, but legal arguments about what the law does say. Referring to the distinction I introduced at the beginning of this chapter, the impunity norm entails a claim not just about the *justifiability* but the *permissibility* (or better the impermissibility) of domestic amnesties for international crimes. It claims that treaty-based law includes various duties and obligations to prosecute and punish that domestic amnesties compel states to violate,<sup>22</sup> and that customary international law is in the process of crystallizing into a norm of the unlawful character of such amnesties, as evidenced, for instance, by the rulings of domestic and international courts, the writings of publicists, and established state practice.<sup>23</sup>

With Mark Freeman, I've argued elsewhere that both of these claims are not well defended.<sup>24</sup> Regarding treaty based law, while it's true that numerous international treaties and conventions contain clauses committing signatories to

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<sup>22</sup> For a classic statement see Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Violations of a Prior Regime," *Yale Law Journal* vol. 100, 1991.

<sup>23</sup> See Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst, editors, *An Introduction to International Criminal Law and Procedure*, Cambridge 2009, 33ff.

<sup>24</sup> Mark Freeman and Max Pensky, "The Amnesty Controversy in International Law," in Leigh Payne et. al., *Amnesty in the Age of Accountability: Brazil in Comparative and International Perspective*, Cambridge University Press, 2012.

investigate and punish breaches, it takes a long chain of inferences, with numerous weak links, to conclude from these clauses that member states commit themselves to forswear specific forms of legislation such as amnesties, let alone that such legislation is contrary to law. Treaties themselves do not contain language with that degree of specificity and concreteness -- for good reason. So while treaties such as the Geneva Conventions, the 1987 UN Convention against Torture (specifically Article 7) and the Genocide Convention can plausibly be read as committing state parties to a range of preventative, investigative, and punitive measures in the face of breaches,<sup>25</sup> it is simply not true that treaties and conventions can be unambiguously interpreted as making amnesties contrary to law.<sup>26</sup> Indeed, as many commentators have noted,<sup>27</sup> the entire post-Nuremberg family of treaty-based international law contains only one single reference to amnesty measures, and that one, article 6[5] of Protocol II of the Geneva Convention, actually *demands*, rather than forbids, amnesty as a component of *jus post bellum*: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."<sup>28</sup>

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<sup>25</sup> For a recent nuanced view see Michael Scharf, ""From the eXile Files: An Essay on Trading Justice for Peace," *Washington & Lee Review* no. 63, 2006.

<sup>26</sup> For more see Mark Trumbull, "Giving Amnesties a Second Chance," *Berkeley Journal of International Law* vol. 25, no. 2, 2008, p 288ff.

<sup>27</sup> For a thorough discussion see Freeman 32ff.

<sup>28</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 6(5). As Freeman, Mallinder 2010 and others have noted, this provision facially leaves open the status of former combatants in non-international conflicts such as civil

Regarding customary international law, here too the current impunity consensus encounters a severe difficulty. As I've discussed, there is no doubt that the past decade has witnessed a remarkable number of new initiatives, institutions, laws, and courts, all dedicated to battling the specter of impunity for the gravest of breaches of international law. The preamble of the Rome Statute of the International Criminal Court explicitly dedicates the world court to the battle against impunity.<sup>29</sup> Beginning in the new millennium, in the wake of the 1999 Sierra Leone peace negotiations, the United Nations, previously a decidedly pragmatic negotiator for international peace treaties, also took a marked anti-impunity turn by declaring on principle its refusal to support the inclusion of amnesties for international crimes in negotiated peace settlements. A host of international NGOs, UN special rapporteurs, international lawyers, judges and academics have all strengthened and deepened this consensus with legal rulings

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wars who may have committed international crimes, and would therefore actually encourage, rather than restrict, the granting of domestic amnesties in such cases. The most significant legal use of art. 6(5), interestingly, was the opinion of the South African Supreme Court in the famous AZAPO case, where relatives of victims of apartheid-era violence, including the survivors of Steve Biko, sued to block the implementation of the Amnesty Committee of the South African Truth and Reconciliation Commission on the grounds that such amnesties effectively denied them and surviving victims their constitutional right to legal remedy, and were inconsistent with international law insofar as they foreclosed the non-derogable obligation to investigate and prosecute serious human rights violations. In its decision to permit the operation of the Amnesty Committee, the Court affirmatively referred to 6(5) to support its argument that the amnesties were in fact compatible with international law.

<sup>29</sup> Rome Statute of the International Criminal Court, preamble: "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 by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes..."

and scholarly writings. All of these, developments, it seems add up to clear evidence of a crystallizing norm in international law that such amnesties are in principle contrary to law.

This is however simply not how custom works in international law. The core requirements for a legal principle to be entrenched as custom is the demonstration of consistent state practice *opinio juris*; that is, states must not only conform to the norm, but must conform to it as a law that they regard as binding upon them.<sup>30</sup>

Here we find a genuine difficulty for the impunity norm. Several comprehensive studies, including Louise Mallinder's exhaustive amnesty database, have firmly documented that over the course of the decade in question, amnesty measures as components of negotiated peace settlements on the part of sovereigns states have not only failed to decrease; in fact they have significantly *increased*.<sup>31</sup> This means that the claim that a crystallizing customary norm barring domestic amnesties as violating states' nonderogable duties to criminally prosecute perpetrators of serious crimes is decisively refuted, not

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<sup>30</sup> See the traditional source for the definition of customary international law in the Charter of the International Court of Justice Art. 38.1.b., which defines custom as "evidence of a general practice accepted as law."

<sup>31</sup> For the most comprehensive investigation of the frequency of amnesty provisions in international, bilateral or domestic peace negotiations as well as transitional justice programs see Mallinder. Also of great interest is the recent research of Leslie Vinjamuri, "Trends Regarding Peace Agreements and Accountability from 1980 to 2006," working paper, and Leslie Vinjamuri and Aaron Boesnecker, "Accountability and Peace Agreements: Mapping Trends from 1980 to 2006", SOAS Research Online, working paper, 2007.

confirmed, by established state practice.<sup>32</sup> Whether it ought to be or not, the claim that it is seems to be a notable instance of bootstrapping.

This fact effectively undermines the ‘crystallization thesis’ insofar as it rules out the claim that amnesties are contrary to international customary law, even as it might still suggest that a current time-slice view of a situation in flux indicates the direction that legal custom is likely to go. But it also poses an obvious political question: *why* are states either not reducing or possibly even increasing the frequency of amnesties as elements of negotiated peace settlements?

Initially we can certainly appeal to a simple realist argument: states amnesty because amnesties work. They are, or at least can be, effective and low-cost means to incentivize recalcitrant leadership out of power; to lubricate stuck peace negotiations, or to lure combatants out of the bush. By preempting prosecution, they avoid the many costs and uncertain outcomes of criminal prosecutions. They offer a tempting short-term path toward tangible goods of security, or at least a cessation of hostilities, in contrast with the less tangible good of criminal justice and its attendant benefits. It’s little wonder that states are reluctant to remove amnesties from their negotiating tool-kit.

But I think we miss something central if we ascribe the persistence of amnesties *post bellum* merely to (some) states’ calculations of their short-term

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<sup>32</sup> Trumbull concludes that “[s]tate practice, especially the practice of states most affected by serious crimes under international law, is the strongest indication that there is no customary international law imposing a duty to prosecute perpetrators of such crimes.” 295. See also Scharf, “From the eXile Files,” 360: “Notwithstanding the chimerical conclusions of some scholars, there is scant evidence that a rule prohibiting amnesty or asylum in cases of crimes against humanity has ripened into a compulsory norm of customary international law.”

self-interest. In addition to realist factors, amnesties bear an important expressive function as well. Especially as executive decrees, amnesties can operate as powerful expressions of state sovereignty, with significant influence both for domestic and international addressees.

“Sovereign is he who declares the exception,” as the Nazi legal philosopher Carl Schmitt once put the matter.<sup>33</sup> If a system of domestic criminal justice is a basic functional component of a sovereign state government, then the power to declare when and why this system is suspended in its normal operation can be a tremendous expressive act of political supremacy, directed both internally to competing political groups, but also externally, as a signal of unequivocal mastery of the institutions of political rule. Surely domestic prosecutions by newly-established governments are powerful expressive acts – indeed the expressive power of state prosecutions for deposed tyrants can be remarkable, as we have seen in more recent instances following the Arab Spring.

But expressivism can run in more than one direction, and the sovereign decision to *suspend* prosecution can certainly have a powerful expressive function of its own. Indeed, in the context where a newly-hatched state power is trying to announce its sovereign authority against the background of multiple, overlapping transnational and international bodies, amnesty policies can potentially be more expressive of regained national sovereignty than trials, which after all are also expressions of the state authority’s recognition of, and

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<sup>33</sup> Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty*, George Schwab (trans.), Chicago: University of Chicago Press, 2005, p. 5.

subservience to, the authority of international law.

This expressive power of amnesties should remind us of the fact that quite frequently peace treaties, or indeed any effort to bring about the end of military hostilities, will overlap with political transitions – in the best case certainly a transition in one or more belligerents from an authoritarian or failed state into a democratic state, however fragile and burdened. Less dramatic and ideal-typical transitions are more common. In either case, the expressive function of public acts of political transition turns out to play a considerable role in the rationale and comportment of the most important political players. This expressivism has become more and more salient over the last decade – arguably as reactions to the very rise of the international anti-impunity paradigm just described.

As a conclusion to this chapter, it's worth speculating on the link between the expressive power of domestic amnesties in the aftermath of military defeat and political transition, and the documented rise in the popularity of amnesty policies even as the impunity norm took hold over the past two decades. The overall rise of amnesties in the age of international criminal law, in other words, is certainly traceable in part to that dimension of the impunity norm that continues to see qualified amnesties for low-level perpetrators, with accountability procedures attached, as tolerable elements of larger reconciliation and DDR programs in fragile post-conflict states, and such states are often quite prepared for considerable international legal oversight in designing and implementing such programs.

But post-conflicts states have pressing goals besides reconciliation. High



among these goals is the unequivocal expression of the status of the new government as the sole, unified sovereign political authority. Amnesty policies have a powerful expressivist potential in part as a reaction to encroachments on a very traditional, “Westphalian” definition of the principle of state sovereignty by the cosmopolitanism inherent in the institutions and principles of international law itself.<sup>34</sup> In offering amnesty, a government expresses not just its supreme power over its own system of criminal law. It also appeals to, presumes, and demands recognition by, an established international order of sovereign states. Indeed, defiance of a global or regional court’s prohibitions on amnesties could well count as an expression of just this demand for reciprocal recognition as an equal member in the international state system.<sup>35</sup> Thus, for those legal and political

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<sup>34</sup> As the text of Article 2 of the Peace of Westphalia reads: “[t]hat there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd, in such a manner, that no body, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any Trouble to each other; neither as to Persons, Effects and Securitys [...] That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such a manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.” For a very helpful reading of the significance of the amnesty clause of the Peace of Westphalia and its transformation of earlier modern amnesty provisions see Randall Lesaffer, “The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Treaties prior to 1648”. *Grotiana*, 18 (1997) 71-95.

<sup>35</sup> This is not to say that states consistently act in narrow national self-interest or trumpet their sovereignty nor that international bodies consistently promote a cosmopolitan agenda. Both of these are false – sovereign states are still the most important agents in efforts at legal and political cosmopolitanism, for instance, and international organizations are often effective advocates for the principle of the inviolability of state sovereignty, as the often-contradictory comportment of the United Nations shows. Rather, the point is that amnesty and its legal and normative justifications are divided between a Westphalian and a post-Westphalian interpretation,

cosmopolitans (like myself) who see international criminal law as one amongst many legal mechanisms pressing for a gradual decline in the primacy of state sovereignty, it's possible that the impunity norm has generated a counter-productive blowback. This expressivist function may be at least part of the explanation for the phenomenon I described above, in which the impunity norm's claim to a "crystallizing" legal custom is actually refuted by state practice -- amnesties are growing more, and not less popular in post-conflict states. If jus post bellum holds that amnesties ought to be off the table except in cases where prosecutions are incompatible with the realization of the overall set of jus post bellum principles, then it may be of help, as international coalitions negotiate and coordinate with often fragile new post-conflict administrations, to be sensitive to the Westphalian dimension of domestic amnesties. Over-aggressive demands for prosecution, and for heavy-handed international oversight of such prosecution, may well have counter-productive effects by inadvertently raising the expressive power of domestic amnesties as public resistance to external interference, and hence as demonstrations of the sovereign control of government over the tools and procedures of municipal law.

What I've described as the current constellation of positions regarding amnesties is only a momentary glimpse of a process with a long and complex developmental arc. That arc does indeed lead in the direction of justice, and the proliferation of the impunity norm over the past decade has had a crucial role to play in undeniable progress. The prospect of unilateral, blanket self-amnesties

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and at times both states and international bodies can advocate, or condemn, one, the other, or both.

familiar from the Southern Cone in the 1970s and 1980s would not conceivably win any international legal recognition today, and even internally such blanket amnesties have poor prospects of long-term political legitimacy.<sup>36</sup> The very idea of sovereign immunity for international crimes has largely been taken off the table; the question of the extraterritorial effect of domestic amnesties has received a firm response. UN opposition toward blanket amnesties for serious human rights violations has become consistent since the now-famous “reservation” to elements of the 1999 Lomé Accord.<sup>37</sup> Upper-level perpetrators in receipt of domestic offers of unconditional amnesty for war crimes, genocide, or crimes against humanity can count on international criminal attention, and cannot even count on their safety from international warrants being executed within their own territory. The nations offering such unconditional amnesties can expect little support, and likely condemnation, in the international court of public opinion, and their own domestic constituencies may well regard such amnesties as intolerable. These are important victories for international justice.

However, an impasse between the international legal community’s pursuit of a consistent anti-impunity norm, on the one side, and expressivist uses of Westphalian amnesty measures, on the other, runs the risk of stalling this progress, and perhaps even reversing it. One way forward, as I’ve argued elsewhere, would be to move beyond the battle against impunity as an

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<sup>36</sup> See William Burke-White, “Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation,” *Harvard International Law Journal*, no. 42, 2001, 478-9.

<sup>37</sup> See the UN’s denunciation of the 2007 Ouagadougou Political Agreement in Cote d’Ivoire; the 2008 Reconciliation and General Amnesty Law in Afghanistan; UN 2011 denunciation of Brazilian Supreme Court’s ruling upholding its 1979 Amnesty Law.

aspirational norm for international criminal law, and re-assessing the relative value of individual impunity in relation to other compatible legal and diplomatic goals.<sup>38</sup>

Impunity is merely one subset of a larger category of accountability, which is a term covering both legal and political procedures and, more crucially, the productive interaction between the rule of law and democratic politics in transitional and/or post-conflict contexts. The pursuit of procedures ensuring accountability has multiple advantages over the battle against impunity, insofar as accountability refers to a spectrum of more or less strongly institutionalized deliberative procedures for the giving and taking of reasons in the justification of political and legal norms, of which criminal trials at domestic or international levels comprise merely one part. To say that amnesties make justice impossible is to limit the scope of analysis to the due retribution associated with conviction. But it can also be taken as an invitation for the kind of institutional imagination that sees criminal trials as one public accountability procedure among many others, and for the overall purposes of *jus post bellum* perhaps not the central one.

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<sup>38</sup> Max Pensky, "Amnesty on Trial: Impunity, Accountability, and the Norms of International Law," *Ethics & Global Politics* 1:1-2, 2008.