

Ch. 2 The Amnesty Controversy in International Law

Introduction

Amnesty policies offered by states as components of peacemaking or of longer-term transitional processes are surely among the most controversial aspects of contemporary transitional justice. The offer of immunity from criminal prosecution to perpetrators of some of the most heinous of crimes is undeniably at odds with the demand for retribution, an affront to victims and their survivors, and potentially a blow to the longer-term prospects for rule-of-law institutions in recovering states. And yet amnesties have also undeniably been important components of negotiations that have brought protracted conflicts to resolution or restored democracy after periods of authoritarian rule.

Arguments for and against domestic amnesties for serious crimes under international law are many and complex, in keeping with the remarkable number and diversity of amnesty policies and measures that have emerged in transitional contexts around the world over the past several decades. However, since the of the 1990s at least, an anti-impunity position has taken hold across a wide spectrum of international legal and political bodies such as the United Nations secretariat, as well as international NGOs and academics. According to this position, individual criminal accountability for serious crimes under international law is a cornerstone of a global human rights community. Domestic amnesties that waive prosecution of individuals for designated acts are thus at odds with the basic values of such a community, and for this reason should be interpreted as contrary to states' commitments under international law. The position, in other words, entails the project of removing amnesties for such crimes from the political and legal toolkits of transitional states.

The anti-impunity position has very serious implications for the conduct of international peace negotiations, for the comportment of regional and international

courts, and for the judicial interpretation of the obligations of states. In this chapter, we examine the specifically legal claims on which the anti-amnesty aspect of the position rests. Specifically, we review some of the most relevant aspects of public international law, both treaty-based and customary, as a way of assessing the strength and cogency of the claim that amnesties violate states' international legal obligations.

This chapter does not offer a defence of amnesties, whether on principled or on pragmatic grounds. We regard amnesties as potentially serious failures of justice, whose legitimacy and prospects for contributing to a more just and lasting peace rest upon a complex and contextual evaluation of a myriad of factors that will vary from place to place. We do suggest, however, that the anti-impunity assertion that such amnesties are in every instance contrary to international law, rests on legal arguments considerably weaker than the advocates of the position acknowledge.

By reviewing the most significant sources of public international law, relevant texts and rulings on the permissibility of domestic amnesties for international crimes, we argue that treaty law has little directly to say about the permissibility of amnesties, though does offer numerous arguments for a state's duty to prosecute and punish, from which the incompatibility of amnesties can be, and has frequently been, inferred. Customary international law has also been appealed to as evincing a 'crystallizing' norm against impunity, from which a corresponding crystallizing anti-amnesty norm has once again been inferred. However, this inference is seriously compromised by the inconsistency of established state practice regarding the use of amnesty in the context of transitional justice schemes, a necessary condition for the "crystallization thesis" to be convincing. Finally recent rulings of international criminal tribunals and the comportment of the International Criminal Court (ICC) offer some interesting though not entirely consistent subsidiary sources of international criminal law regarding amnesties. In the case of the ICC in particular, serious questions persist regarding what sorts of post-conflict amnesty arrangements would be acceptable.

By the end of the discussion, it ought to have become clear why the debate on amnesty continues to be controversial. The subject is one on which it always will be difficult to remain neutral – especially when, as is so often the case, the interests of peace and justice must compete for priority. Precisely for that reason, a central goal of this chapter is to offer a critical reconstruction of the relevant international legal

sources, in order to chart more clearly just what states' obligations in respect to amnesties actually amount to.

Treaties and Conventions

International treaties would be the most obvious first place to look for a definitive statement of the legality of domestic amnesties for international crimes. Yet in this area, what stands out the most is the *absence* of an explicit prohibition of amnesty in any human rights, humanitarian, or criminal treaty. There is not a single treaty that, in an explicit way, even discourages any kind of amnesty. This remarkable fact about amnesties and international law should cause us to question any thesis about widespread state antagonism to amnesties for human rights crimes.

Regarding this lacuna from the perspective of international relations rather than international law makes it less mysterious. In the diplomatic realm, states are jealous of their sovereignty. When negotiating the terms of international treaties, states have unsurprisingly been extremely reluctant to bind themselves to treaties that explicitly remove what is understood as a powerful tool in any diplomatic toolkit. Further, we should be careful to understand amnesties not just as pragmatic tools for tough negotiations with perpetrators, but also as powerful and more general expressions of state sovereignty, useful both in foreign and domestic policy spheres. Amnesties for any crime under domestic law, let alone those crimes whose gravity rises to meet the definition of an international crime, are acts whereby the normal operation of a domestic law system is suspended. The power to dictate the normal and extraordinary function of domestic law – as the German legal theorist Carl Schmitt would put it, the power to declare the exception to the law – is an integral and highly symbolically visible dimension of state sovereignty.

Thus both on pragmatic and what we can call symbolic grounds, states have shown extreme reluctance to commit to treaty language that explicitly disavows the power to grant amnesties, and this may be particularly apposite for post-conflict democratizing states, for whom the expressive dimension of sovereignty, both internally and externally, may well be very significant.

The silence of international treaty law on the very notion of amnesties does have one exception, though it is an unexpected one. The 1977 Protocol II to the Geneva Conventions, which governs the protection of victims in non-international conflicts,

provides that “[a]t 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.”¹ The majority of national courts that have applied Article 6(5) have used it as a legal basis to validate or uphold amnesties covering serious crimes, including war crimes that would violate Protocol II to the Geneva Conventions.¹³⁹

Perhaps the most well-known analysis to date is the judgment of the South African Constitutional Court in the AZAPO case, in which it was held that the amnesty provisions of the 1995 Promotion of Unity and Reconciliation Act (which established the country’s TRC) were consistent with both the national constitution and international law.² 140 Though its analysis of Article 6(5) is made *in obiter* (i.e., as a judicial aside), the Court offers a compelling explanation of why the article appears specifically in Protocol II and not in humanitarian law treaties that concern international armed conflicts: “It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity.”³ 141

Despite the (near) absence of any explicit reference to amnesties in the language of international treaties, many courts and legal scholars have nevertheless argued that

¹ 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).

² *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others*, Constitutional Court of South Africa, Case No. CCT17/96 (July 25, 1996).

³ *Ibid.*, at para. 31.

international treaty obligations entail states' duties to prosecute and punish the prohibited acts of genocide and crimes against humanity.⁴ This of course establishes an inference that amnesties, precisely insofar as they may bar prosecutions for such acts, are contrary to or in violation of a state's legal treaty obligations, and in this sense, certainly, contrary to international law.⁵

This inference from international treaties can be drawn in several ways, all of which involve treaty sources implicitly related to amnesty: 1) In some cases, international treaties can be interpreted to establish a binding legal obligation on states to *prosecute*; 2) in others, treaties seem to imply a variety of rights of *legal remedy* on the part of victims and survivors that are at least in principle incompatible with amnesties; 3) certain treaties contain prohibitions on *statutory limitations* for certain international crimes, which an amnesty would effectively erase by eliminating the possibility of prosecution; and 4) finally, state parties may have the duty to "respect and ensure" certain *nonderogable rights* granted through treaties, entailing policies of prevention of international crimes that could preclude amnesties. Though the legal issues here are complex and have generated a large interpretive literature, no unambiguous reading of treaty law exists that definitively rules out domestic amnesties, since every attempt to infer such a ban is subject to alternative interpretations that establish at least the possibility of plausible arguments for the compatibility of amnesties. Let us now examine these distinct inferential paths individually.

1) Prosecutorial Obligations

The first and perhaps most frequently used argument against amnesties centers on the significant number of multilateral treaties that explicitly require criminal prosecution of individuals responsible for specific crimes.¹⁵¹ The precise nature and scope of the obligation varies from one treaty to the next, but the general obligation to ensure individual criminal accountability is clear.¹⁵²

Examples include the following:

Genocide: Article I of the Genocide Convention provides, "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."¹⁵³ This seems

⁴ 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. [Page numbers?](#)

⁵ For a classic statement see Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Violations of a Prior Regime," *Yale Law Journal* vol. 100, 1991. [Page numbers?](#)

to imply that states offering amnesties to potential *genocidaires* are in breach of their treaty obligations, but this would be a matter for adjudication, since it is not immediately obvious whether punishment could only entail the kind of investigation, prosecution, trial, conviction, and sentencing normally envisioned as the suite of legal procedures that amnesties foreclose.

Grave breaches of the Geneva Conventions and Protocol I: All states are parties to the four Geneva Conventions.¹⁵⁵ Each convention creates state duties concerning “grave breaches,” which include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, and unlawful confinement of civilians committed in the context of international, but not internal, armed conflicts. Among other things, states parties are obligated to search for, prosecute, and punish perpetrators of grave breaches, unless they extradite them for purposes of trial by another state party. It has been asserted that the official commentary to the Geneva Conventions indicates that the obligation to prosecute grave breaches is absolute.¹⁵⁸ This implies that an amnesty or any similar impediment to prosecution of grave breaches would violate a state’s obligations under the treaty.

But whether the “grave breaches” provisions of the Geneva Conventions unambiguously determines a state’s legal duty to eschew amnesties for its own nationals is not at all straightforward. There is first of all the distinction between international armed conflict, the ultimate concern of the Conventions, and internal or domestic conflict, which as we have seen is referred to in Protocol II, but in that case in a sense that actually seems to *encourage* amnesties, rather than forbid them. The ultimate purview of all the Conventions, international warfare, is as many commentators have noted now actually a rather small subset of all global conflicts in which international crimes are committed. Therefore, even insofar as we can interpret the Geneva Conventions to declare amnesties as violations of states’ legal obligations to investigate and prosecute grave breaches, this would apply only to the small minority of domestic amnesties granted for involvement in an interstate, as opposed to an internal, conflict.

Torture: Article 7 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) declares an obligation on the part of states parties to prosecute or extradite persons alleged to have committed torture.¹⁶¹ Yet the precise wording implies something less than an absolute obligation.¹⁶² As Louise Mallinder notes, the convention requires any state party, in which an alleged torturer is

present, to investigate the facts, and if appropriate, 'submit the case to its competent authorities for the purpose of prosecution' or extradite the suspect.⁶ This wording is more ambiguous than the explicit obligations outlined in the Genocide Convention, and consequently has caused many commentators to argue that there is a degree of permissiveness regarding the manner in which a state must carry out its duties under the CAT. It seems, instead, to leave the decision on whether to prosecute alleged torturers to the prosecutorial authorities.⁷163

Therefore, while the requirement to prosecute torture is explicit, it is not mandatory, and the ambiguity of the language gives states considerable discretion on what kind of investigation or prosecution they must conduct.¹⁶⁸ Moreover, the treaty covers only allegations of torture committed by public officials or those who are acting under some sort of authorization of public officials, effectively excluding members of rebel groups from the relevant provisions.

Enforced disappearance: Article 6 of the International Convention for the Protection of All Persons from Enforced Disappearance requires states parties to hold criminally responsible those who are both directly and indirectly responsible for the commission of enforced disappearance. Article 11(1) further provides: "The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution." The Inter-American Convention on the Forced Disappearances of Persons uses a similar formulation.¹⁶⁶ However, like the definition of torture, the definition of forced (and enforced) disappearance is applicable only to state actions. There is no treaty-based concept of enforced disappearance applicable to acts committed outside of the state's direction and control.

2) Right to remedy

⁶ CAT, art. 7(1): "The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."

⁷ L. Mallinder, *Amnesty, Human Rights and Political Transitions*, L. Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford: Hart, 2008), at 127-28.

A second treaty-based justification used to oppose the legality of certain amnesties concerns the right-to-remedy provisions established in various human rights treaties. The obligation to ensure an effective remedy in the event of a human rights violation appeared as early as the adoption of the Universal Declaration on Human Rights.¹⁷⁴ Other prominent examples include Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the Committee on the Elimination of Racial Discrimination CERD.¹⁷⁵ Broadly understood, the right-to-remedy obligation encompasses, inter alia, state responsibility and authority to ensure the punishment of human rights violators. In that respect, it appears to be in direct conflict with the primary function of amnesties, namely to remove the prospect and consequences of domestic criminal judgment.

Yet the right to an effective remedy is not as broad as it may appear. For example, it does not provide private persons with a right to force the state to prosecute a specific person.¹⁷⁷ The decision to prosecute an individual – or alternatively to decline to do so – is for the state to make. In addition, the right to remedy merely places an obligation on the state to make a good faith effort to conduct “a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure.”¹⁷⁸ The primary function of right-to-remedy provisions actually is to ensure the right of victims of human rights violation to compensation through a judicial, or possibly nonjudicial, proceeding. There is therefore leeway in the type of ‘thorough and effective investigation’ required. For example, Mallinder emphasizes that amnesties from criminal proceedings do not necessarily impede the right of victims to compensation, as there may be acceptable nonjudicial recourses that fulfill this right. A prominent example of this is the introduction of community-based justice processes in Uganda. Traditional Acholi justice practices such as *matu oput*, in combination with conditional amnesties, have been offered as reconciliation mechanisms and as a potential replacement for international trials.⁹

3) Prohibitions on Statutory Limitations

⁸ *Abd'ulsamet Yaman v. Turkey*, European Court of Human Rights (November 2, 2004), App. No. 32446/96, para. 53.

⁹ L. Mallinder ‘Can Amnesties and International Justice be Reconciled?’ *The International Journal of Transitional Justice* 1 (2007):208-230.

A third treaty-based justification advanced for opposing the legality of certain amnesties is related to prohibitions on statutory limitations for certain international crimes. The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity is the best-known treaty on the subject.¹⁸² Article 1 of the Convention provides that no statutory limitations shall apply to war crimes and crimes against humanity. Article 4 provides that states parties to the convention must ensure that statutory “or other limitations” shall not apply to the prosecution and punishment of war crimes and crimes against humanity, and “shall be abolished.” Article 29 of the Rome Statute similarly provides that genocide, crimes against humanity, and war crimes “shall not be subject to any statute of limitations.”

The statutory-limitations-based argument against amnesties is straightforward. The claim is that by putting an immediate end to prosecutions for specific crimes, an amnesty effectively erases the protection afforded by statutes of limitation, whose primary function is to preserve the possibility of prosecutions during a designated time frame. The argument, in short, is that it would be logically inconsistent to forbid statutory limitations for specific crimes yet allow amnesties for the same crimes. This argument is initially appealing but ultimately unconvincing. The main purpose of treaty provisions prohibiting statutory limitations for specific crimes is to prevent states from creating a general or standing law that would restrict, *ad infinitum*, the timing for prosecution of certain international crimes. The main purpose of an amnesty, by contrast, is to put an immediate end to prosecutions and punishment for specific crimes, not as a general rule, but as an *ad hoc*, extraordinary legal measure.¹⁸³ In other words, the effect of an amnesty would not be to undermine the benefit of the statutory limitation prohibition in any general and prospective sense. It would apply once, and not generally, and would have effect retrospectively, not prospectively.¹⁸⁴

Another significant weakness in the statutory-limitations-based argument against amnesties is that there is no evidence that states view or treat such prohibitions as *per se* limits on their discretion to promulgate amnesties. This fact was underscored most recently in the context of the negotiations of the Rome Statute, where the discussions of statutory limitations, and those on amnesties, were conducted and concluded separately. There is no evidence that any government viewed Rome Statute Article 29, which prohibits statutory limitations for ICC crimes, as having legal consequences for the issue of amnesty.

4) **Nonderogable state obligations**

The nonderogability of certain state obligations in the realm of human rights has been used as an argument against the legality of certain amnesties. In times of genuine public emergency threatening the life of a state, governments may temporarily suspend or derogate from certain rights pursuant to certain treaties that contain explicit derogation clauses.¹⁸⁵ However, most derogation clauses provide that certain core rights –including the right to life and the prohibitions against torture and slavery – cannot be the subject of derogation.¹⁸⁶ On this basis, it has been asserted, for example, that an amnesty that includes torture would, *ipso facto*, violate international law.¹⁸⁷

However, the argument is mistaken. The fact that the freedoms from state sponsored torture, murder, or slavery are nonderogable state obligations only establishes that there is a hierarchy of violations. That is to say, it establishes only that certain duties are nonderogable (e.g., ensuring the right not to be tortured) whereas others are not (e.g., ensuring the right of peaceful assembly). Nowhere does it state, for example, that the duty to investigate and punish torture or slavery is paramount to the duty to halt or prevent their commission.

Instead, there is simply the right to be free from such acts. Indeed, in considering the relevant articles of the ICCPR in this context, they provide only that humans shall not be subjected to state-sponsored torture or slavery.¹⁸⁸ In short, it is the negative duty to refrain from the carrying out of violations such as torture or slavery, and not the positive duty to ensure legal remedies for such violations, which is explicitly nonderogable during a national emergency. Therefore, it does not necessarily follow that amnesties, which remove criminal liability for previously committed offenses, would violate these obligations.

In sum, while it is certainly true that states are under a number of general obligations to do or refrain from doing certain acts in respect to their status as parties to international treaties and conventions, it is far less clear whether any treaty requires a state party to refrain from a specific act of national amnesty. The chain of inferences leading from states' obligations via the paths of prosecutorial duties, rights of remedy, or obligations regarding statutes of limitations entail a number of steps between the general legal duties of states, and the specific amnesty positions that states may take. In most cases, these intermediate steps require quite extensive interpretations, and while such interpretations may well resolve that a specific amnesty does indeed comprise a breach of a state's legal obligations, others may well not.

Customary International Law

Unlike national legal systems, public international law claims among its sources not just the text of international treaties (most of which, in any case, have less than universal ratification amongst the community of nations) but also customary international law, which as its name implies refers to legal principles that are the firmly established, reflecting a widespread and consistent practice of states.¹⁰ For our purposes in particular it is important to bear in mind that, under the relevant definitions as laid out in Art. 38 of the Statute of the International Court of Justice (the codification of the accepted sources of international law), custom is equally valid as a source of law as international treaties.

Two conditions must be met in order for a law or legal principle to rise to meet the requirements of customary international law. First, the legal principle must be factually observed to be a general state practice – in layperson’s terms, one must be able to show convincingly that the principle is actually applied by the vast majority of states. Second, such state practices, in which states do factually conform their adjudication to a given principle, must be *opinio juris*; that is, it must be demonstrable that states conform to the principle because they recognize that they are legally obligated to do so, rather than, say, because they believe conformity may be in their temporary interest or because it is expedient to do so.

While customary international law provides a much richer and more promising resource for answering the question of the legal status of domestic amnesties, that richness comes with its own price, since customary international law, in its vagueness and curiously self-validating quality, can be remarkably open-ended, leaving all too much room for interpretation.

The questions for us are now the following: first, whether established customary norms of international law prohibit domestic amnesties; second, if we cannot answer this question affirmatively, whether there is nevertheless growing evidence that an explicit anti-amnesty rule is in the process of emerging as custom, or as legal scholars occasionally put it, “crystallizing” as a customary norm.

¹⁰ 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.”

The first question deals with the specific relevance of customary international law in its determination of *jus cogens*, literally “compelling” or higher law. The Vienna Convention on the Law of Treaties defines *jus cogens* as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹¹

As it is commonly used in the language of international criminal law, *jus cogens* refers to a set of acts that must be illegal under any system of domestic law; and, conversely, to acts which all domestic criminal law systems are obligated to declare illegal, even in the absence of specific treaty obligations. Such *jus cogens* crimes thus establish a set of corresponding norms that are considered peremptory; that is, they are universally binding on states without exception or derogation. And the peremptory, nonderogable status of *jus cogens* crimes, in turn, can be used to ground an inference to a universal or peremptory obligation on the part of states to prevent, investigate, prosecute, and punish such crimes. In the terminology of international law, insofar as a state accepts that certain acts are violations of *jus cogens*, they also thereby assume a duty “*erga omnes*,” that is, a duty owed to everyone, universally and independently of any particular jurisdiction or any treaty obligations a state may or may not have.¹²

Such an *erga omnes* obligation certainly entails that states cannot adopt laws that permit *jus cogens* offences. An argument can therefore be mounted that amnesties covering such offences would deviate from this very strong claim, and indeed much of the legal opinion that holds domestic amnesties as contrary to *customary* international law infers such a status from these peremptory universal obligations to outlaw and punish.

Jus cogens originated in the universal and exceptionless ban on crimes such as high-seas piracy and state-sanctioned slavery. The expansion of the catalogue of *jus cogens* crimes to genocide, crimes against humanity, torture, rape, and other grave violations of international treaty law was among the less spectacular but most

¹¹ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 53. See Freeman 274, note 236.

¹² In the famous “Barcelona Traction Case,” the International Court of Justice defined *erga omnes* obligations as those that “derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” 91, Barcelona Traction Case, (1970) ICJ Reports 3 at page 32.

influential developments in the post-Nuremberg regime of international criminal law. If, therefore, customary law has in fact generated a coherent set of legal norms, under which are included most if not all of the acts that are usually proscribed as grave violations of human rights under international treaties, then a number of conclusions may follow that bear directly on our question.

First, identifying crimes such as genocide and crimes against humanity as *jus cogens* violations, which generate in turn *erga omnes* duties to prosecute, circumvents the obvious limitations of treaty law: the absence of explicit references to amnesties, and the patchwork nature of treaties. Not all states are parties to all international treaties, after all. Many states are signatories of treaties without having ratified them; some states may ratify treaties but subsequently fail to incorporate the treaty provisions into their domestic law systems, and so on. The strongest treaty-based duty, the “grave breaches” regime of the Geneva Conventions, governs international conflicts only.

But a duty to prosecute derived from customary international law would be binding on all states irrespective of their treaty commitments or lack of them, covering both international and internal conflicts. This commitment is evident in experiments in ‘universal jurisdiction,’ in which sovereign states investigate and prosecute non-nationals outside of their own territory. While the most famous of these experiments were the legal proceedings against former Chilean dictator Augusto Pinochet, arrested in London on a Spanish warrant, other (West European) countries, most notably Belgium, also made concerted attempts to transform international criminal law by asserting their duty and jurisdiction to prosecute *jus cogens* crimes.¹³ On the surface at least, customary international law’s exceptionless character presents a stronger inference from states’ duties to a proscription of amnesties than treaty law does.

However, the use of customary international law as a resource for mounting this kind of argument against amnesties comes at a high price. The process by which a legal norm is granted this customary status is not merely and perhaps not even predominantly legal but ultimately political in nature. State practices, in other words, are frequently said to “crystallize” into a new legal norm, a metaphor suggesting a great deal of causal complexity. As a new legal norm crystallizes, what begins as a fluid and

¹³ For a balanced and not uncritical account of the ICTR in Rwanda, see Payam Akhavan (1997) Justice and reconciliation in the Great Lakes Region of Africa: the contribution of the international criminal tribunal for Rwanda, *Duke Journal of Comparative and International Law*, 7.

dynamic process of political negotiation, gradually solidifies into hard law as states, looking to other states, accept that a given norm is not just one policy option among others to be followed or rejected according to the calculation of national interest, but indeed a generally acknowledged legal obligation that constrains the freedom of states' political action. And once crystallized, so the metaphor implies, cold hard law will remain a durable barrier to state practice indefinitely into the future.¹⁴

The widespread use of the crystallization metaphor certainly has the advantage that it describes the deep mutual dependence of the development of new international law norms and the dynamic process of political and even moral norms in the context of international politics and international relations. States' adoption of norms as binding on their practice obviously has both a political dimension, where in the course of a justice cascade¹⁵ a norm reaches a 'tipping point' where it is accepted as valid, rather than conformed to strategically, and a legal dimension that corresponds to the concept of *opinio juris*, the second necessary condition for custom together with consistent state practice.¹⁶

But like any controlling metaphor, crystallization also has the potential for producing a range of interpretive problems, both generally and in the particular context of the question of the legality of national amnesties.

Crystallization is, crucially, in the eye of the beholder: both established state practices and *opinio juris* are liable for subjective judgments, and those doing the subjective judging – courts with their rulings and governmental agents but also legal scholars, non-governmental organizations and other diplomatic, policy and academic experts – are generally interested parties. When it comes to amnesty, in particular, two persons looking at the same facts can even come to opposite conclusions. For example, one person may view the widespread resistance to a purported anti-amnesty norm as evidence of an absence of *opinio juris* on the subject, whereas another person may view such resistance as an implicit recognition of the existence of the norm. Although the

¹⁴ On customary international law generally see Mark E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of Interrelating Sources*, The Hague: Kluwer, 1997.

¹⁵ We refer here to the influential term coined by Ellen Lutz and Kathryn Sikkink: see 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.

¹⁶ On the differences between these areas of international law see, e.g., M. Freeman and G. van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004), at 63-67.

latter account is more circular in its reasoning, as it means that resistance or endorsement of the norm constitutes evidence of its existence, both views have merit.²⁵³ Yet there should be little tolerance when there is a failure to examine actual amnesty practice, including what amnesty laws actually say, how the enacting parties actually explain and defend them, and how the external community of states actually reacts.²⁵⁴ On the latter aspect, a review of the outcomes of the UN Human Rights Council's Universal Periodic Review process is telling for its near-total lack of criticism of states that recently adopted amnesties covering human rights crimes, such as Algeria and Afghanistan.²⁵⁵ (FRANCESCA TO CHECK IF HRC HAS CRITICISED OTHER STATE AMNESTIES SINCE NOV 2009 WHEN BOOK CAME OUT)

Thus declaring a customary norm to be crystallized, or crystallizing, can raise the suspicion of wishful thinking, bootstrapping, or the hope of a self-fulfilling prophecy, dressed up as an objective claim of fact. The very idea of customary international law labours under the suspicion of enacting what philosophers call a naturalistic fallacy, an unjustified inference from facts about what is the case to normative claims about what ought to be.

Naturalistic fallacies, however, run in two directions, and claims about a given norm having already crystallized in custom, or about norms that are in the crystallization process, can easily appear as unjustified inferences from what the commentator wishes to be so, to what she claims is already so. Indeed the peculiarities of the emergence conditions for new legal norms lie at the heart of multiple criticisms of custom as a valid source of international law on a par with treaty law.¹⁷

On the question of the legality of amnesties for international crimes, appealing to customary international law to argue for a crystallizing or crystallized norm that such amnesties are contrary to states' legal obligations to prosecute, and are therefore contrary to international law, presents us with a massive problem. On the one hand, there can be no doubt whatsoever that the category of *jus cogens* crimes, and their *erga omnes* character, has in fact crystallized, incorporating the Nuremburg-era schedule of basic human rights and the corresponding set of international crimes as the expression of a set of peremptory legal norms. This crystallization accelerated dramatically in the

¹⁷ See e.g. J. Patrick Kelly, "The Twilight of Customary International Law," *Virginia Journal of International Law*, no. 40, 2000; N.C.H. Dunbar, "The Myth of Customary International Law," *Austin Yearbook for International Law* no. 1, 1983.

late 1980s and throughout the 1990s, in the wake of democratization processes in Latin America, the former Soviet Union, East Asia and to a limited extent in sub-Saharan Africa. With all obvious caveats, it is settled practice amongst the community of sovereign states to bar such acts as torture, genocide, ethnic cleansing and mass atrocity; and one can certainly argue that these bars are not mere expediency but express *opinio juris*; that states may not legally torture or murder their way towards their national interest.

And yet on the other hand, Louise Mallinder's amnesty database, collecting and analyzing amnesty policies internationally, offers strong empirical confirmation for the claim that, in the years subsequent to the rise of a far stronger anti-impunity sentiment over the last ten years, far from reducing the number of domestic amnesties for suspects of international crimes, states have in fact *increased* the number of such amnesties.¹⁸

One explanation for this apparent paradox is simply a product of realism in international relations: just because international legal norms crystallize doesn't mean that states are prepared to do anything much about them.¹⁹ But Mallinder cites another, perhaps diametrically opposed explanation offered by Ronald Slye. According to this argument, the increased use of amnesties since the early 1990s actually expresses the growing influence of international criminal law, which now represents a credible threat that perpetrators of the most serious of international crimes will face indictment and prosecution. Rather than take impunity for granted, then, state agents issue amnesties to guard against prosecutions that previously would have been unlikely, whether at the domestic or the international level. Hence in a classic example of blowback of unintended consequences, the rise of international law has actually served if not to raise the value of domestic amnesties, then to raise at least the perception of this value to relevant state agents, and quite possibly for expressivist reasons (the expression and solidification of the sovereignty claims of a particular administration) that are distinct from the immediate pragmatic goals of the amnesty policy itself.

¹⁸ Mallinder, *Amnesties, Human Rights, and Political Transitions*, chapter 3; see also Ronald Slye, "The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?" *Virginia Journal of International Law* no. 43, 2002; Trumbull 295.

¹⁹ See Leyla Sadat, "Exile, Amnesty, and International Law," 9.

This casts arguments for a customary anti-amnesty norm under a certain cloud of suspicion – of attempting to promote (on scant evidence), rather than report, the crystallization of such a norm: as Michael Scharf puts the matter, “[T]hose who argue that customary international law precludes amnesty/exile for crimes against humanity base their position on nonbinding General Assembly resolutions, hortative declarations of international conferences, and international conventions that are not widely ratified, rather than on any extensive state practice consistent with such a rule.”²⁰

One should note, however, that some legal scholars take the view that customary international law is forming in such a way that *opinio juris* is ahead of state practice in its development. Applied to amnesty, the argument is that despite the inconvenient realities of amnesty practice (i.e., amnesties are still extensively used, accepted, and unlike the practice of torture, openly defended by practicing states), one could still assert the existence of an emerging customary norm on the basis that states increasingly believe themselves forbidden from amnestying certain international crimes. If this were the case, such state beliefs could indeed constitute evidence of an embryonic customary norm. However, a bolder claim of crystallization would be untenable in light of contradictory state practice and the absence of discouraging or prohibitive wording about amnesties in treaty law.

In conclusion, even based on a selective and partial account of amnesty practice, the most that one can proclaim is the existence of an emerging customary norm against amnesties that purport to cover international crimes. Whether such a norm ultimately crystallizes, or whether a reinterpretation arises on the basis of a more complete consideration of amnesty practice, is a matter of speculation for the time being.²⁵⁶ But this discussion should suffice to show that the most promising source of a univocal voice in international law on the status of amnesties, a purportedly crystallizing norm in customary international law, cannot be said to exist.²¹

International Court Rulings

²⁰ Scharf, “From the eXile Files,” 360-1.

²¹ 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.”

State practice can be expressed not just by national legislation but also by national adjudication; that is, how domestic law systems operate, what kind of judicial rulings they produce, and whether these rulings become definitive precedent for subsequent state practices. But beyond such national sources, transnational and international courts also play a crucial role in the production of customary law. Indeed the remarkable rise of the profile and influence of public international law over the course of the past years consists largely in the caselaw of high-visibility international tribunals such as the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights, (IACHR), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) the Special Court for Sierra Leone (SCSL), and, since 2002, the International Criminal Court (ICC). Some of these judicial bodies are well-established and long-term courts with a lengthy history of rulings; the ECHR dates to 1959; the IACHR was established as a cornerstone of the system of human rights protection and enforcement of the Organization of American States in 1979. Others, such as the ICTY and SCSL, are extraordinary criminal tribunals with limited temporal and geographical jurisdiction. The ICC, of course, is a permanent and global criminal court with over 100 state parties.

All of these courts have in varying degrees had to deal with the amnesty controversy. . For the most part, they have been consistent in their position that domestic amnesties for international crimes are inconsistent with international legal norms, and represent failures of states to fulfill various international legal obligations. Moreover, international courts frequently appeal to one another's rulings, reinforcing and consolidating a network of caselaw. Therefore one might be inclined to see the development of jurisprudence from the constellation of super-national courts as making a significant contribution to the crystallization of a customary anti-amnesty norm.

This conclusion would be difficult to justify, however. First of all the status of such judicial rulings is strongly limited. Custom in international law arises by statute from a combination of established state practice and *opinio juris*. The rulings of international courts may be considered relevant secondary resources that may indicate the broad outlines of developing international law. However, while such courts can offer observations on perceived trends in customary law or on its perceived content, they

cannot “make” customary law. In that respect, any trend in amnesty jurisprudence, as such, bears no direct relation to the formation of custom.

State practice and international jurisprudence can even move in contrary directions, as evident by the increasing use of calibrated, partial amnesties at the domestic level. Nevertheless, the amnesty-relevant rulings of international criminal courts have been frequently appealed to by commentators arguing for the crystallization of an anti-amnesty principle, and for this reason it’s important to discuss some of the most significant and influential of international courts’ more recent decisions regarding the status of amnesties.

But before doing so it is important to acknowledge the amnesty jurisprudence of the Inter-American Court of Human Rights in particular, which has developed a substantial record in battling impunity in the Americas, and has long played a lead role in the effort to compel regional states to enforce human rights, to make public information about the fate of “disappeared” victims of state repression, and to prevent, investigate, prosecute, and punish serious human rights violations. The full scope of the IACHR’s caselaw in human rights enforcement is well beyond the scope of this chapter. We focus on one clearly germane recent ruling to indicate the Court’s posture and influence.

In its ruling in *Gomes Lund v. Brazil* (2010), the Court took up the case of members of the “guerrillas of Araguaia,” a small group of students and workers, over sixty of whom were “disappeared” (in fact, brutally tortured, murdered, and tossed in local rivers) by elements of the Brazilian army and state police in the mid-1970s. Brazil’s 1979 Amnesty Law has prevented both the release of definitive information on the fates of the victims and the investigation and prosecution of those responsible for their disappearance. In its decision, the Court found that the many transitional justice efforts of the post-1982 Brazilian government – including extensive efforts to locate the bodies of the missing and monetary reparations – did not rise to meet its obligations under the Convention, which requires states to guarantee citizens’ recourse to fair legal procedures in cases where their fundamental rights have been violated. Indeed, the Court held, “the investigation and punishment of those responsible for the enforced disappearance of the victims [...] is impossible due to the Amnesty Law.[...] The application of amnesty laws to perpetrators of serious human rights violations is

contrary to the obligations established in the Convention and in the Inter-American Court's jurisprudence."²⁴

By inferring Brazil's inability to discharge its obligations under the American Convention because of its domestic amnesty legislation, the Court's ruling in *Gomes Lund v. Brazil* asserted not only the "non-compatibility of amnesties related to serious human rights violations with international law;" but indeed such amnesties' "illegality." Citing Article 2 of the American Convention, which requires state parties to take measures to ensure that human rights are protected and enforced in their own domestic legal systems, the Court thus found that "the provisions of the Brazilian Amnesty Law that impedes the investigation and punishment of serious human rights violations lack legal effect."

Given the Brazilian Supreme Court's affirmation of the Amnesty Law only six months before the IACHR's ruling, this is a remarkably forceful expression. Moreover, the Court was explicit in its cataloguing of parallel transnational courts' rulings on amnesties in other contexts, that it was attempting to crystallize and consolidate an international law norm. However, despite such a muscular ruling, the IACHR is of course limited in its jurisdiction to its regional state parties. More substantially, however, the Court's decision in *Gomes Lund v. Brazil*, while affirming that such 'soft' justice mechanisms as monetary reparations for next of kin do not rise to meet states' obligations to investigate and punish human rights abuses, does not resolve whether, in every case, criminal prosecution, whether at the domestic or international level, is the sole avenue for discharging such obligations, or whether other accountability and sanction mechanisms might also satisfy them.

We now turn briefly to relevant rulings in two international criminal tribunals. First, in *Prosecutor v. Furundzija*, the Trial Chamber of the ICTY ruled that, insofar as torture is a *jus cogens* violation implying a legal obligation to prosecute, any amnesty for such an act would be "generally incompatible with the duty of states to investigate" torture.²⁵ Insofar as the discussion of amnesties was not central to the facts or the legal issues of the case, however, the Court's assertion was *obiter dictum*; that is, a comment

²⁴ Inter-American Court of Human Rights, Case of *Gomes Lund et al.* ("Guerrilha do Araguaia" v. Brazil, Judgment of November 24, 2010, 47.

²⁵ *Prosecutor v. Anto Furundzija*, Judgment, Case No., IT-95-17/1-T, para. 155. <http://www.icty.org/case/furundzija/4>

not necessarily essential to any legal principles asserted in the resolution of the case.²⁶ Nevertheless, many commentators cite the assertion as proof of the state of international law in relation to amnesties. The Court's logic, however, is seriously open to question. To the extent that the torture prohibition may be considered a *jus cogens* norm, this fact would establish only that states are precluded from engaging in torture. To determine whether, when, or how acts of torture may be the subject of an amnesty involves more legal analysis than the Court provided. The Court did not even undertake the prior step of adducing existence of widespread state practice or *opinio juris* in support of its legal assertion concerning amnesty, without which it does not attain customary status, let alone the supercustomary status of *jus cogens*.

In the more significant case of the Special Court for Sierra Leone, among the court's most pressing initial tasks was to confront the general amnesties that had been granted to Foday Sankoh and his rebel movement in the 1999 Lome Accord, which brought a temporary stop to the ongoing violence in Sierra Leone's civil war. Already at the time of the signing of the Lome Accord, the official UN representative present had registered a last-minute reservation to the amnesty's inclusion of crimes against humanity and war crimes, and explained that the UN, for its part, would not recognize any amnesty for these crimes.

The eventual statute of the Special Court for Sierra Leone incorporated the same waiver for amnesties for crimes against humanity and war crimes contained in the UN's reservation: no such amnesties would be regarded as legitimate by the court. It was this statute and its implications that were subsequently challenged. In the court's ruling in *Prosecutor v Kallon and Kamara*, the court rejected the claim that its refusal to recognize the Lome amnesty violated valid international treaties. Supporting its ruling, the court wrote that "...that there is a crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law is amply supported by materials placed before the Court [but the view] that it has crystallized may not be entirely correct...it is accepted that such a norm is developing under international law."²⁷ The Court's judgment, however, have been criticized on a number

²⁶ The Furundzija ruling did not choose to issue any views of amnesties per se, therefore took no position on the general permissibility of amnesties as a matter of international law.

²⁷ *Prosecutor v Morris Kallon and Brimma Bazzy Kamara*, SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), Decision of 13 March 2004, para 71; *Prosecutor v Augustine Gbao*, SCSL-2003-01-I, Decision of 31 May 2004, para 9. For a complete account of the Lome process and its subsequent legal effect on the

of grounds. These include the confusing claim to be a court possessing universal jurisdiction instead of transferred territorial jurisdiction, the failure to classify the Lome amnesty according to the specific terms and circumstances of its adoption, and the cursory analysis of the link between an obligation to prosecute and the validity of an amnesty.²⁴⁹ The Court's approach and conclusions are especially unconvincing when put side by side with the research and findings of Mallinder whose comprehensive research shows the ongoing and extensive state practice of adopting broad amnesties and the rare lack of criticism by other states of such practice. It is also worth remarking that the Court's views also contrasted with those of Sierra Leone's Truth and Reconciliation Commission, another product of the Lome Accord, which accepted the terms of the accord's amnesty.

While international tribunals such as the SCSL and the ICTY were sharply limited both in their territorial jurisdiction and their duration, the International Criminal Court is meant to be a permanent, global court of international criminal law. Like other international treaties the Rome Statute of the International Criminal Court makes no explicit reference to amnesty; and like other treaties, this omission expresses the reluctance of the negotiating state parties to commit to such language, and therefore an awkward compromise that attempts to define the Court's core value of complementarity of prosecution in such a way that amnesties are at least indirectly discouraged. The ICC's self-defined role is as a 'backstop' criminal venue, and the principle of complementarity holds that preference will always be given to domestic prosecutions for the crimes of genocide, crimes against humanity, war crimes, and (potentially as of 2017) crimes of aggression, the four categories of international crime that the Rome Statute determines to be under the ICC's jurisdiction. Given the obvious relevance of domestic amnesties for the principle of complementarity, the Rome Statute's extreme indirectness on the topic can be spun as a kind of creative ambiguity²⁸ that consciously refrains from tying the hands of the ICC's Office of the Prosecutor, and

SCSL see Priscilla Hayner, "Negotiating Peace in Sierra Leone: Confronting the Justice Challenge," *Center for Humanitarian Dialogue Report*, 2007.

²⁸ Scharf attributes this term to Phillippe Kirsch, Chairman of the Rome Diplomatic Conference. Scharf also cites the comments of Kofi Annan that it would be 'inconceivable' for the ICC to "undermine an amnesty-for-peace arrangement by pursuing prosecution in a situation like South Africa." Kofi Annan, Speech at the Witwatersrand University Graduation Ceremony, Sept. 1, 1998, quoted in Darryl Robinson, "Serving the Interests of Justice," 12; quoted here in Scharf, "From the eXile Files," 367.

that tough cases regarding domestic amnesties will be the subject of accumulated case law as the ICC receives referrals and initiates prosecutions of its own.²⁹

More realistically, however, the status of amnesties under international criminal law is such an immediate and pressing concern for the most basic prosecutorial functions of the ICC that the Statute's subtlety has ended up depriving the ICC and its member states of a minimally requisite degree of legal clarity, and the Court's work, from its very first referral, has reflected this absence.³⁰ The very complex role played by the ICC's arrest warrant against Joseph Kony, leader of the Lord's Resistance Army in Uganda, is a demonstration of the challenges arising when a domestic amnesty has no *domestic* effect according to an international prosecutor.³¹

Article 17 of the Rome Statute expresses the principle of complementarity by determining the admissibility of cases before the Court; specifically the article clarifies that such cases are inadmissible where "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Hence the question arises of what the attitude the ICC, in particular the Office of the Prosecutor, will be in cases where a domestic amnesty can be interpreted as an expression or documentation of a state's "unwillingness" to prosecute. The introduction of the word "genuinely" in the language of the article bears all the marks of a cumbersome negotiated compromise, at once granting room for maneuver for international negotiators, but also creating a legal grey area.

Thus, the Court has the discretion to call off a prosecution if the case would be inadmissible under Article 17. This could arguably include a situation in which a state party adopts an amnesty covering ICC crimes. Most have concluded that Article 17 is the provision of the Rome Statute that offers the most plausible basis to potentially allow for the types of amnesties under examination in this chapter. For example, it is an open question "whether intense military pressure not to prosecute falls within the category of inability or whether an unwillingness to jeopardise a democratic transition

²⁹ See [Cassese]

³⁰ See Michael Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court," *Cornell International Law Journal* no. 32, 1999.

³¹ See Max Pensky, "Amnesty on Trial: Impunity, Accountability, and the Norms of International Law," *Ethics and Global Politics* 1:1-2, June 2008; Louise Mallinder, "Uganda at the Crossroads: Narrowing the Amnesty?" Working paper 1 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation*, Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009.

constitutes unwillingness within the terms of the Statute.”³⁷⁷ Be that as it may, the ICC is independent. Thus, even where an amnesty has been adopted in good faith under extreme exigency, the Court’s judges might decide to ignore the amnesty and proceed with the case based on a strict interpretation of unwillingness or inability.

There is no question that the ICC does not and should not regard itself as bound in any way by a domestic amnesty for a person who has been investigated and indicted in the course of its own procedures. Such a person – for example, Col. Muammar Qadafi in Libya, or Joseph Kony in Uganda – could not expect a national amnesty to have any extraterritorial effect in the eyes of the court, but could also not expect the court to recognize the amnesty as valid for its own purposes even within Libyan or Ugandan national territory (though the question of the execution of an arrest warrant, or more likely the impossibility of such an execution, raises questions about the practical meaning of the court’s position.) In reference to Uganda, it also was, and continues to be, impossible for the government to guarantee that the ICC would respect any amnesty it wishes to offer to the LRA. Once the ICC is operating in a country – whether through state referral, Security Council referral, or Prosecutorial initiation of an investigation in respect of such a crime in accordance with Article 15 – control over the solutions necessarily becomes a shared burden, and all concerned parties enter a realm of uncertainty in which politics inevitably compete with law.³²⁴⁰²

A more pertinent question is whether the court in general, and the Office of the Prosecutor in particular, would be prepared to accept as legally appropriate a domestic transitional justice approach that replicated the relevant quasi-judicial accountability mechanisms in the absence of criminal trials from the amnesty experiment of South Africa. That is, would a domestic transitional justice approach that integrated conditional, individualized amnesties for perpetrators of international crimes meet Article 17’s definition of a “genuine unwillingness” to prosecute?³³

³² Article 15 of the Rome Statute states: ‘The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court... If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation.’

³³ The question of the sort of amnesty that would prove acceptable to the Office of the Prosecutor of the ICC – that is, that would not trigger the “genuine unwillingness to prosecute” clause of Article 17 – has been the subject of a very large amount of scholarly speculation, most recently in relation to amnesty programs in Colombia and Argentina. See among others Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 2004; Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal

One could argue that the South African amnesty model did indeed provide a mechanism for prosecution. Those perpetrators unwilling to satisfy the numerous requirements for the amnesty application – including a criminal confession and exhaustive testimony – remained liable to prosecution, as did those whose applications were refused by the court-like Amnesty Committee. And even in cases where such conditional, individualized amnesties were offered – where selective amnesties in exchange for demanding conditions could be documented to contribute both to larger goals of justice and to conditions of relative peace and security – many commentators find it difficult to imagine that an international court would attempt to block such a policy, which in any event would require a politically unlikely constellation of events, including the Prosecutor’s decision to initiate investigation and prosecution under his or her own initiative (the “*proprio motu*” provision of the Rome Statute), and referral or at least non-interference by the UN Security Council. Pragmatically, such a unilateral initiative could well demonstrate that the ICC’s willingness to intrude in the course of domestic transitional justice processes well in hand would be too high a price for its role as a ‘backstop’ source of criminal justice.

These increasingly complex balancing acts between political and legal concerns may push the ICC to redefine its mission. Rather than framing the Court’s role as a provider of individual accountability, the focus may turn to the direct and indirect benefits of the Rome Statute framework as a whole in the realm of international justice. Signs of this rebranding already are apparent to some degree. The ICC is increasingly emphasizing, for example, how the threat of ICC prosecution can lead to more principled peace deals,⁴⁰⁴ increase the international criminal law component of military training,⁴⁰⁵ and encourage changes in domestic legislation and practice through what the prosecutor’s office terms positive complementarity.⁴⁰⁶ These signs reflect awareness that in the “court of public opinion,” the ICC will lose if it is primarily perceived as a court, whereas it will win if it is perceived primarily as a lynchpin in a new global system of justice. As the prosecutor emphasized from an early stage, a lack of ICC trials would, paradoxically, constitute the best evidence of an effective ICC, as that

Court,” *European Journal of International Law* no. 14, 2003; Southwick, Katherine, “Investigating War in Northern Uganda: Dilemmas for the International Criminal Court,” *Yale Journal of International Affairs* (Summer/Fall 2005).

would imply states parties are able and willing to deal with Rome Statute crimes on their own.⁴⁰⁷

Conclusion

In the current geo-political constellation, international criminal law is not able to offer clear guidance regarding the legality of domestic amnesties for international crimes. The language of international treaties, silent on such amnesties, can be only be indirectly interpreted as banning such amnesties, by expressing a nonderogable duty to prosecute such crimes. This indirect route has enough areas of ambiguity and loopholes as to make treaty-based arguments relatively weak. A slightly stronger argument against the use of amnesty can be found in customary international law, specifically the crystallization of a norm of states' obligations to outlaw *jus cogens* crimes.

But again, despite many attempts to read the development of customary international law in this manner, such a crystallized norm does not translate directly into a corresponding norm barring domestic amnesties. A key requirement for such a crystallized norm, established state practice, cannot be unequivocally proven. On the contrary, the rise of international criminal law is associated with an increase in such amnesties, not a decrease. The rulings of the international criminal tribunals for Sierra Leone and the former Yugoslavia have offered instances where amnesties were regarded as contrary to international law, and tracking these legal rulings and opinions does indicate an emerging dimension of criminal case law. But the weakness of the courts' legal arguments, and the rarity of international caselaw in general when it comes to amnesty – not least the lack of any definitive position on the part of the ICC – preclude any serious claim of a new legal norm

The status of amnesty under international law is truly unsettled. Indeed, if there is such a thing as an emergent norm of criminal justice, it may be an accountability norm that moves beyond a narrow and retributivist conception of legal punishment: given a pyramid of accountability, processes of demilitarization, disarmament and reintegration of low-level combatants may encourage conditional, individualized amnesties as a key component, maximizing the effectiveness of other mechanisms to reconcile the goals of security and those of criminal accountability.

Such an accountability norm calling for a combination of low-level conditional amnesties and high-level mandatory prosecutions certainly does not answer the core

question of the legal status of amnesties, and in fact raises significant new questions of its own (not least, the status in such an approach of the mid-level of criminal responsibility, where arguably many of those most appropriately prosecuted would be found). But it also highlights a central challenge facing international criminal justice, which can serve as a provisional conclusion to this chapter.

As the global experiment with new and energized institutions of international criminal justice approaches its twentieth birthday, lingering questions remain concerning the fit, or the lack of fit, between the paradigmatic commitments of criminal justice – the deontological approach – and the characteristic challenges of post-conflict transitions. The former is based on a retributivist claim that deserved punishment of perpetrators is such a powerful intrinsic good that it is the source of a duty urgent enough to trump other considerations.³⁴ The latter involves a broad, socialized, and diverse set of events, persons and processes in which individual criminal acts can certainly always be identified, but only at the potential cost of a loss of perspective and context.

Within this wider framework, the question surrounding amnesty is what one can do about it to limit the concessions to impunity. There are actually dozens of significant choices in the design and negotiation of an amnesty that can, and should, affect our evaluation of any individual amnesty. Such choices make the difference between what one might characterize as a principled versus an unprincipled amnesty. At the same time, it is important to recognize that even a principled amnesty cannot guarantee accountability in practice. Amnesties are merely legal instruments, and no more or less likely to be honored in the breach than other laws. We should judge states not merely by their adoption of good laws but also, and to a much greater extent, by their implementation of both the letter and the spirit of such laws.

³⁴ M. Pensky 'Amnesty on Trial: impunity, accountability, and the norms of international law' *Ethics and Global Politics* 1 (1-2) (2008): 1-49