

Amnesty for war crimes: Defining the limits of international recognition

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Criminal prosecution of those accused of committing war crimes is a fundamental aspect of a victim's right to justice. However, in armed conflicts where serious violations of the laws of war have been committed on a massive scale, the notion of remedial or retributive justice¹ for victims of war crimes often has to be balanced against the need of the territorial State to deal effectively and progressively with past atrocities and not to provoke or maintain further violence. In these circumstances a restorative justice approach incorporating limited amnesties, focusing on the normative rather than the punitive objectives of criminal law, may be the more appropriate model.²

The complex issue of the legality of amnesties³ for war crimes⁴ under international law and the related question of whether amnesty laws, agreements or practices may be given *de jure* or *de facto* recognition⁵ by foreign or international courts is coming to a head. Amnesties designed to preclude the prosecution of persons suspected or accused of war crimes usually take the form of legislative or constitutional acts of States, or are contained in treaties or political agreements. However, other State practice may also prevent domestic or international courts from adjudicating war crimes cases, such as decisions not to exercise jurisdiction and Security Council exemptions. In addition, certain principles of international law may bar prosecutions for war crimes, such as immunities for State officials.

As a case in point, at the height of the recent crisis in Liberia former Liberian President Charles Taylor, indicted for war crimes by the United Nations-sponsored Special Court for Sierra Leone, was asking for the

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indictment to be removed as a condition for leaving the presidency.⁶ Had this deal been accepted, the removal of the indictment would not strictly speaking constitute an amnesty in the sense of a national law or negotiated agreement barring prosecution, but its object and effect (dropping war crimes charges to secure a peace deal) would essentially be the same. Liberia has since applied to the International Court of Justice (ICJ),⁷ claiming that the arrest warrant should be voided on the basis of the customary rule of immunity of foreign heads of State.⁸ In addition, by granting asylum to Taylor, Nigeria appears to be contravening the widely accepted principle

1 Remedial justice may be characterized as the legal means to recover a right or to prevent or obtain redress for a wrong. Retributive justice focuses on the need to punish the wrongdoer for illegal acts committed. For a discussion thereof, see K. Avruch and B. Vejarano, "Truth and reconciliation commissions: A review essay and annotated bibliography", *The Online Journal of Peace and Conflict Resolution*, Vol. 4.2, 2002, pp. 34-76.

2 See generally, R. Teitel, "Transitional jurisprudence: The role of law in political transformation", *Yale Law Journal*, Vol. 106. No. 7, 1997, p. 2009, esp. p. 2037. A contextual approach should also take into account the fact that notions of justice, truth, forgiveness, reconciliation and accountability are socially constructed and culturally constituted.

3 Amnesty literally means "[f]orgetfulness, oblivion; an intentional overlooking". *Oxford English Dictionary*, 2nd ed., 1989. Legally, it means foreclosing criminal prosecution for past offences. This pre-conviction measure may be distinguished from a pardon, which officially recognizes the guilt of the offender but foregoes the sentence. The word "amnesty" is derived from the Greek "*amnestia*" meaning oblivion or not remembering.

4 For reasons of subject and space limitation, this article will not deal directly with the recognition of amnesties for other serious international crimes, such as torture, genocide, or crimes against humanity.

5 In this article, the word "recognition" is taken to mean the acknowledgement of legal validity under international law by States or courts.

6 Charles Taylor left the presidency and the territory of Liberia on 11 August 2003 following strong international pressure and the intervention of a Nigerian-led ECOWAS peacekeeping force. The indictment for war crimes of the Sierra Leone Special Court, originally issued on 7 March 2003 and then re-issued on 4 June 2003, remains in force. The Security Council, in Res. 1478 (2003), UN Doc. S/RES/1478, 6 May 2003, has shown support for the indictment, calling on "all States, in particular the Government of Liberia, to cooperate fully with the Special Court for Sierra Leone" (preamble para. 10).

7 "Liberia applies to the International Court of Justice in a dispute with Sierra Leone concerning an international arrest warrant issued by the Special Court for Sierra Leone against the Liberian President", International Court of Justice Press Release 2003/26, 5 August 2003.

8 In a judgment that has sparked criticism, the International Court of Justice (ICJ) has recently upheld the absolute immunity of an incumbent Minister of Foreign Affairs under customary law. In the *Arrest Warrant of April 11th 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, Merits, 41 ILM 536 (2002), the Court held that the issue and circulation, by a Belgium magistrate, of an arrest warrant against an incumbent Minister of Foreign Affairs of the Democratic Republic of Congo failed "to respect the immunity from criminal jurisdiction and the inviolability [of] the incumbent Minister (...) under international law" (para. 78). On the future agenda of the ICJ is the case of *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, which concerns

that States may not give asylum to persons accused of international crimes such as war crimes.⁹

In other developments in recent months, the United States of America has effectively prevented the International Criminal Court (ICC) from prosecuting its nationals and the nationals of other States not party to the Rome Statute of the International Criminal Court¹⁰ for war crimes (and other serious international crimes) by pressuring the Security Council to approve another one-year exemption from the jurisdiction of the ICC for peacekeepers who are nationals of non-party States.¹¹ This condition was also attached to the Security Council resolution allowing a multinational force to intervene in the Liberian civil war in order to enforce the 17 June 2003 ceasefire agreement.¹² A series of bilateral agreements (so-called Article 98 agreements) between the US and some 53 States ensure the non-surrender to the

the Republic of Congo's complaint against France that, *inter alia*, "by attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country", France violated "the principle that a State may not, in breach of the principle of sovereign equality (...) exercise its authority on the territory of another State". It is further asserted by the Republic of Congo that, in issuing an arrest warrant instructing police officers to examine the President of the Republic of the Congo as witness in the case, France violated "the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court". International Court of Justice Press Release 2003/21, 16 July 2003.

9 Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, General Assembly Res. 3074 (XXVIII), 3 December 1973, para. 7. Art. 14(2) of the Universal Declaration of Human Rights, General Assembly Res. 217 A (III), 10 December 1948, states that individuals have no right to seek asylum from "prosecutions arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

10 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002) [hereinafter "Rome Statute"].

11 The first resolution of this kind was passed on 12 July 2002 in United Nations Security Council Res. 1422 (2002), UN Doc. S/RES/1422 (2002). This resolution requested the International Criminal Court (ICC) to refrain from initiating investigations or proceedings to peacekeepers of States not party to the Rome Statute, while reaffirming its intention to "renew the request (...) under the same conditions each 1 July for further 12 month periods...". On 12 June 2003, the Security Council approved (12-0, with 3 abstentions from France, Germany and Syria) another one-year exemption for peacekeepers who are nationals of non-party States. United Nations Security Council Res. 1487 (2003), UN Doc. S/RES/1497, 12 June 2003.

12 United Nations Security Council Res. 1497 (2003), UN Doc. S/RES/1497, 1 August 2003. Para. 7 of the resolution provides that "...current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State".

ICC of US nationals and contractors accused of war crimes who find themselves on the territories of those States.¹³

These recent examples of State practice barring the prosecution of war crimes not only shed light on the contextual background of the amnesty issue, but also highlight the interconnections between the international legal principles impacting upon the emerging system of international criminal law. The present article examines the main international legal rules and principles which determine or affect a foreign or international court's ability to recognize an amnesty for war crimes. This examination, together with a survey of recent practice, provides a broad analytical framework which could facilitate an assessment by domestic and international courts of the validity of such an amnesty.

International recognition of amnesties for war crimes: framing the issue

Amnesties for war crimes and other international crimes come into being mainly when States are going through periods of transition, often from war to peace, and of extreme political upheaval, for example, the handing over of power from military regimes to democratic civilian governments. During such turbulent and politically sensitive times, international law needs to be able to reconcile the competing needs of the territorial State (to move on from the past and not to upset the delicate political process towards peace or democratic consolidation) and those of the international community (to prosecute those accused of international crimes).¹⁴ Over the last few decades, with the emergence of an international criminal prosecution system, a general

¹³ A list of the States who have entered into these bi-lateral agreements with the US is available on the website of the Coalition for the International Criminal Court, <<http://www.iccnw.org/documents/otherissuesimpunityagreement.html>>. 25 of these States are party and 10 are signatories to the Rome Statute.

¹⁴ On the theory of transitional justice and how it may accommodate the peculiar needs of transitional societies, see generally D. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *The Yale Law Journal*, Vol. 100, No. 8, 1991, p. 2537; D. Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", *Law and Contemporary Problems*, Vol. 59, 1996, p. 225; N. J. Kritz, (ed.), *Transitional Justice*, Vol. I, Institute of Peace Press, Washington, 1995; N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995; Teitel, *op. cit.* (note 2), p. 2009; J. Dugard, "Dealing with crimes of a past regime. Is amnesty still an option?", *Leiden Journal of International Law*, Vol. 12, No. 4, 1999, p. 1009; P. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001; S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed., Oxford University Press, Oxford, 2001.

presumption of illegality of amnesties for international crimes has developed.¹⁵ However, if all amnesties for war crimes in all circumstances were to be considered as invalid and never to be accorded international recognition, this might seriously blunt a useful tool for ending or preventing civil wars,¹⁶ facilitating the transition to democratic civilian regimes¹⁷ or aiding the process of reconciliation.¹⁸ Other policy reasons for the international recognition of amnesties include the fact that mechanisms for discovering the truth might be compromised if a person subject to a domestic amnesty (on condition of full disclosure of his or her involvement in the international crime) fears prosecution if he or she crosses a border.¹⁹ By generally obliging governments to

15 Voicing a widely agreed statement, the Princeton Principles on Universal Jurisdiction, adopted by a group of international law experts in 2001, proposed that “Amnesties are generally inconsistent with the obligation on states to provide accountability for serious crimes under international law”; Principle 7, Princeton Principles on Universal Jurisdiction 28 (2001), Princeton University Program in Law and Public Affairs, Princeton University, Princeton, 2001. Human rights bodies have come to the same conclusion: Inter-American Court of Human Rights, *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)* 14 March 2001; *Rodriguez v. Uruguay*, Communication No. 322/1988, UN Human Rights Committee, 19 July 1994; Human Rights Committee General Comment No. 20 on Art. 7 (replacing General Comment 7 concerning prohibition of torture and cruel treatment or punishment, 10 March 1992).

16 For example, amnesties have been negotiated as part of peace deals in Sudan (Sudan Peace Agreement of 21 April 1997), the Democratic Republic of Congo (1999 Lusaka Ceasefire Agreement) and Sierra Leone (Lome Peace Agreement of 8 July 1999), among others, as measures to stop the bloodshed. More recently, the Russian Duma has enacted new amnesty laws as a means to help resolve the conflict in Chechnya: “Total 126 people have applied for amnesty in Chechnya”, Relief Web (source: government of the Russian Federation), 1 July 2003. President Joseph Kabila of the Democratic Republic of Congo has recently signed amnesty laws for Congolese rebels, though war crimes are reportedly not covered. M. Durmnett, “Amnesty for Congolese rebels”, BBC News, <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/2953621.stm>>, 16 April 2003.

17 During the past several years, Argentina, Cambodia, El Salvador, Guatemala, Haiti and Uruguay among others have each granted amnesty, as part of the peace arrangement, to members of the former regime that committed international crimes. N. Roht-Arriaza, “State responsibility to investigate and prosecute grave human rights violations in international law”, *California Law Review*, Vol. 78, 1990, p. 451, pp. 458-61; US Delegation Draft “State practice regarding amnesties and pardons”, presented to the Preparatory Committee for the Establishment of an International Criminal Court, 4th Sess., August 1997.

18 The most clear example is that of South Africa, where the Promotion of National Unity and Reconciliation Act 34 of 1995 sets up a mechanism to grant a broad amnesty for those who had committed politically motivated crimes during the apartheid regime. See *The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and ors.*, Case CCT 17/96, (South Africa), 1996 (hereinafter the AZAPO case), para. 22.

19 The “amnesty for truth” argument was also used by the Constitutional Court of South Africa in the AZAPO case to justify the Promotion of National Unity and Reconciliation Act 34 of 1995, *ibid.*, pp. 683-685. See also Dugard, *op. cit.* (note 14), p. 1009; A. O’Shea, *Amnesty for Crime in International Law and Practice*, Kluwer Law International, The Hague, p. 310.

prosecute and punish those accused of international crimes, international law is able to some extent to de-politicize trials of former leaders or members of military regimes.²⁰ At the same time, by not requiring governments to risk provoking or maintaining a civil war and by recognizing the importance of other objectives such as reconciliation, international law is able, through the mechanism of principled and limited amnesties, to accommodate the transitional process.²¹

As international crimes are the concern of the entire international community, it is extremely important to broadly define the parameters of the internationally acceptable amnesty for war crimes. Moreover, by internationally acknowledging the validity of certain types of amnesties in appropriate circumstances and, by inference, by acknowledging that amnesties outside these boundaries are invalid, States are more clearly constrained to enact laws or enter into agreements which fall within these acceptable parameters. The chances for broad-brush impunity are thereby narrowed,²² this being a central objective of the emerging system of international criminal justice.²³

Most commentators point out that even limited and principled amnesties normally have no extraterritorial effect, as they do not affect treaty obligations or entitlements under customary law to prosecute persons accused of war crimes.²⁴

20 Although, as the ongoing trial of the former Yugoslav President Slobodan Milosovic at the ICTY demonstrates, accused persons will still argue that trials for serious violations of human rights, even at the level of international criminal courts, are motivated by political factors rather than by legal considerations. The establishment of the ICC may go some way to removing these types of objections, since it will have jurisdiction over international crimes committed on the territory of any States Parties or over persons who are nationals of States Parties. See Rome Statute, Art. 12.

21 For a thorough analysis of this theory, see generally Orentlicher, *op. cit.* (note 14) and Teitel, *op. cit.* (note 2).

22 "Impunity" has been defined as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to them being accused, arrested, tried and if found guilty, convicted". Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights), Final Report prepared by Mr. Joinet pursuant to Sub-Commission Resolution 1996/119, E.CN.4/Sub.2/1997/20, 26 June 1997 [hereinafter "Joinet Report"].

23 Thus, the preamble to the Rome Statute of the International Criminal Court declares at para. 5 that the States Parties are "[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] (...) and thus to contribute to the prevention of such crimes".

24 For example, R. Boed, "The effect of a domestic amnesty on the ability of foreign States to prosecute alleged perpetrators of serious human rights violations", *Cornell International Law Journal*, Vol. 33, No. 2, 2000, pp. 297 and 323. Some domestic courts have come to the same conclusion. In several cases involving the forcible disappearance of Spanish citizens in Argentina it has been held that Argentina's domestic amnesty is not binding on Spanish courts. For example, *Fortunata Galtieri Case*, Judgement of March 1997, available at: <<http://www.derechos.org/nizkor/arg/espana/authgalt.html>>.

This may be true, but a closer examination of the principles and rules influencing the decision-making of domestic and international fora in this regard suggests that this conclusion does not necessarily preclude the international recognition of all amnesties in all circumstances. To arrive at a complete answer, the following questions need to be addressed. Are foreign or international courts bound by amnesties for war crimes? If they are not, may they nonetheless recognize or give effect to an amnesty for war crimes under international law? If foreign or international courts are able to recognize certain amnesties for war crimes, what limits does international law impose on their ability to do so?

Are foreign or international courts bound by amnesties for war crimes?

In principle, States are bound only by their internal law, by treaty obligations which they have entered into, and by rules of customary international law.²⁵ Amnesties which are purely internal to a State, for example, those agreed in a peace deal between the government and rebel groups or between such groups ending a civil war, or which have been negotiated between an outgoing and incoming regime during a period of political transition, are not formally binding on other States.²⁶ Amnesties which are brokered between two or more States, for example, in the context of a peace agreement ending an international armed conflict, would as a matter of treaty law be binding on those States only: third States would not be so bound.²⁷

In treaties regulating the transfer of proceedings in criminal matters, States Parties are often under an obligation to bar prosecution where a person is the subject of a pardon or amnesty in another contracting State, owing to the principle of

²⁵ As Brownlie writes: "...the state must be independent of other state legal orders, and any interference by such legal orders, or by an international agency, must be based on a title of international law." I. Brownlie, *Principles of Public International Law*, 5th ed., Clarendon Press, Oxford, 1998, p. 72.

²⁶ Under the principle of the sovereign independence of States, States are not obliged to give effect to the internal laws of other States as this would be an encroachment on their own sovereign independence. See Brownlie, *ibid.*, p. 72. An example of the same reasoning can be found in the French case of *Abetz*, where it was held that diplomatic immunity was not relevant to a war crimes prosecution since the legal basis of prosecution rests with offences against the community of nations and as such any domestic interference through grants of immunity would "subordinate the prosecution to the authorization of the country to which the guilty person belongs"; quoted in J. Paust *et. al.* (eds), *International Criminal Law: Cases and Materials*, Carolina Academic Press, Durham, 1996 [hereinafter *International Criminal Law*], p. 78.

²⁷ Art. 31 of the Vienna Convention on the Law of Treaties, of 23 May 1969.

ne bis in idem.²⁸ However, the *ne bis in idem* principle creates international obligations only between the signatories; it is generally not considered part of customary international law.²⁹ Although the principle could be considered a general principle of law recognized by civilized nations,³⁰ this should be distinguished from the situation under customary international law, which is that no double jeopardy attaches to prosecutions by different sovereign States.³¹ During the negotiations in Rome on the Statute of the International Criminal Court, both amnesty and pardon were rejected in the context of the defence of *ne bis in idem*.³²

There are a wide variety of legal sources supporting the principle that domestic laws or judicial decisions cannot exempt a person accused of international crimes from individual criminal responsibility or prevent a foreign or international court from prosecuting. For example, as early as 1919 the Commission on the Responsibility of the Authors of the War and on Enforcement and Penalties took note of the rule that “no trial or sentence by a court of the enemy country shall bar trial and sentence by the tribunal or by a national court belonging to one of the Allied or Associated States.” The Allied Control Council Law No. 10 of 1946 similarly provided that no statute, pardon, grant of immunity or amnesty under the Nazi regime would be admitted as a bar to trial or punishment.³³

²⁸ For example, Art. 35 of the European Convention on Transfer of Proceedings in Criminal Matters, of 15 May 1972. The UN Model Treaty on Extradition, UN Doc. A/RES/45/116 of 14 December 1990, provides that a request for extradition for a person may be refused if that person has become immune from prosecution or punishment, including by reason of amnesty (Art. 3(e)); see also Articles 10(3), 12(1), and 53 (1)(b)(ii) of the European Convention on the International Validity of Criminal Judgments, of 28 May 1970; and Art. 62(2) of the Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders.

²⁹ *International Criminal Law*, *op. cit.* (note 26), p. 574.

³⁰ Art. 38(1)(c) of the 1945 Statute of the International Court of Justice.

³¹ Art. 14(7) of the International Covenant of Civil and Political Rights, of 16 December 1966 (which reiterates the *ne bis in idem* principle) does not prevent the prosecution, in another State, of a defendant who has benefited from an amnesty in the territorial State, because the procedure for an amnesty does not amount to an “acquittal” within the meaning of that provision. Moreover, the Human Rights Committee has decided that Art. 14(7) does not prohibit trial for the same offence in another State. *A.P. v. Italy*, Comm. No. 204/1986, 2 November 1987, UN Doc. A/43/40, at 242.

³² Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, p. 40, para. 174 (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Sess. Supp. No. 22, UN Doc. A/51/22; UN Doc. A/CONF./283/2/Add. 1 (1998), Art. 19.

³³ Allied Control Council Law No. 10, 31 Jan. 1946, Art. II.5. The Principles of the Nuremberg Charter and Judgement recognized that even though domestic law “does not impose a penalty for an act which constitutes a crime under international law it does not relieve the person who committed the act from responsibility under international law.”

In 1968, the United Nations General Assembly stated that no statutory limitation would apply to war crimes, crimes against humanity, or genocide.³⁴ Moreover, recognition of an amnesty covering a person for war crimes may constitute a violation of a State's duties under the Geneva Conventions and Additional Protocol I to prosecute or extradite persons accused of grave breaches thereof.³⁵ Customary doctrines of exception such as necessity, distress and *force majeure* which preclude the wrongfulness of a State's failure to comply with its international obligations in exceptional circumstances do not easily accommodate amnesties.³⁶

The only conceivable situation in which a third State could be considered legally bound by an amnesty is where the amnesty deal is brokered (or given approval) by the United Nations Security Council for the purpose of maintaining international peace and security. Where non-recognition of the amnesty would require that State to act in contravention of its obligations under the Charter of the United Nations – for example, thereby threatening international peace and security – it will be constrained to give effect to the amnesty.³⁷ Clearly, this sets a very high threshold for an amnesty binding on

³⁴ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, General Assembly Res. 2391, 26 November 1968.

³⁵ See text accompanying notes 49-56. On arguments against the international recognition of amnesties for war crimes, see J. Paust, "My Lai and Vietnam: Norms, myths and leader responsibility", *Military Law Review*, Vol. 57, 1972, pp. 118-23.

³⁶ The doctrine of necessity would not provide a State with justification to avoid its obligations, unless it could show that prosecution would entail a grave and imminent peril for the State and that the State's sole means to safeguard an essential interest is not to abide by its international legal duty to prosecute. Furthermore, necessity cannot be invoked unless to do so does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. Arguably, the duty to prosecute those accused of war crimes is an essential interest of the international community. See Art. 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission on 29-31 August 2001, ILC, Report on the work of its fifty-third session, 23 April - 1 June and 2 June - 10 August 2001, GAOR Fifty-fifth Sess. Supp. No. 10 (A/56/10) (hereinafter ILC Articles on State Responsibility). The General Assembly took note of the Articles on 12 December 2001 in GA Res. 56/83. To invoke *force majeure*, a State would need to show that the failure to prosecute arose from the occurrence of an irresistible force or an unforeseen event beyond the control of the State, making it materially impossible to perform the obligation (see ILC Articles, Art. 23, *ibid.*). Distress could be invoked only if the failure to prosecute was the only reasonable way, in a situation of distress, of saving the perpetrator's life or the lives of other persons entrusted to the perpetrator's care (see ILC Articles, Art. 24, *ibid.*).

³⁷ This argument derives from the principle established in Art. 103 of the Charter of the United Nations which provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

third States. There would have to be evidence that going ahead with prosecution would undermine the peace agreement and ultimately threaten international peace and security. This is a fairly difficult calculation to prove, but is not beyond reasoned contemplation.

Indeed, the inclusion of Article 16 in the Rome Statute of the International Court,³⁸ which gives the Security Council the power to defer proceedings before the Court for twelve months by passing a resolution (which may be renewed) under Chapter VII of the UN Charter, is a clear acknowledgement by States that unlimited prosecution for international crimes may amount to a threat to peace and security.³⁹ This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing or maintaining peace will prevail.⁴⁰

The Security Council's recent renewal of its resolution requesting the ICC to refrain from exercising jurisdiction over nationals of non-party States gives some insight into the scope of the Security Council's power of deferral under Article 16. On the face of it, these Security Council resolutions are not about recognizing amnesties for war crimes, nor are they arguably binding on the ICC, given that they are framed in terms of a "request". Nevertheless, the wide interpretation by the Security Council of its obligation to identify a "threat to the peace"⁴¹ and its rather liberal and repeated

³⁸ Art. 16 of the Rome Statute provides: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

³⁹ The point has been made that the time limit of the deferral (notwithstanding the possibility of renewal) suggests that this is a delaying mechanism only and not a means to achieve a permanent recognition of a domestic amnesty. J. Gavron, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly*, Vol. 51, Pt. 1, Jan. 2002, p. 110.

⁴⁰ See generally V. Gowlland-Debbas, "The role of the Security Council in the new International Criminal Court from a systemic perspective", in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality*, Liber-Americorum Georges Abi-Saab, Martinus Nijhoff Publishers, Kluwer Law International, 2001, pp. 629-650.

⁴¹ The resolutions fail to positively identify a "threat to the peace, breach of the peace, or act of aggression" which is a prerequisite for action under Chapter VII of the Charter, merely stating that "it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council". Security Council Res. 1487 (2003), *op. cit.* (note 11), preambular para. 7. See UN Charter, Art. 39.

use of Article 16⁴² indicate that political pressure may well compel the ICC to refrain from exercising jurisdiction over war crimes cases. Since the ICC assumes jurisdiction under the complementarity principle only when States are unable or unwilling to prosecute perpetrators – which could arguably include situations where States have given amnesties for war crimes – this type of Security Council action under Article 16 would in such circumstances give effect to amnesties for war crimes for as long as the deferral lasted.

It is therefore crucial to stress that although the Security Council has a wide measure of discretion in the way it chooses to carry out its functions and is normally its own judge when it interprets its powers under the Charter, it nonetheless remains bound by the purposes and principles of the Charter.⁴³ It also remains bound by certain fundamental principles of international law, in particular peremptory norms of international law from which no derogation by any subject of international law, including the Security Council, is ever permitted.⁴⁴ Moreover, at a procedural level, a determination of the existence of a “threat to the peace, breach of the peace, or act of aggression” is a *sine qua non* for action under Chapter VII; this condition must therefore be fulfilled before the Security Council can request the ICC for deferral of a case under Article 16.⁴⁵

From the foregoing, it may be concluded that domestic courts and international courts are not normally bound by amnesties for war crimes, save in the extreme case where prosecution of an accused who is subject to an amnesty as part of a peace deal brokered by the United Nations could threaten international peace and security. However, even in these

⁴² The drafting history of Art. 16 suggests that the provision was not meant to be applied prospectively to groups of people, nor to provide for permanent deferral. Rather, it was intended to be applied on a case-by-case basis to specific situations where proceedings before the Court might hamper efforts to restore or maintain peace. At least 116 States expressed criticisms of the resolution during the drafting stages. See Amnesty International, “The International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice”, May 2003, AI Index: IOR 40/006/2003. See also K. Ambos, “International criminal law has lost its innocence”, *German Law Journal*, Vol. 3, No. 10, 1 October 2002; B. MacPherson, “Authority of the Security Council to exempt peacekeepers from International Criminal Court proceedings”, *ASIL Insights*, July 2002, p. 2.

⁴³ UN Charter, Art. 24(2).

⁴⁴ 1969 Vienna Convention on the Law of Treaties, Art. 53. See also D. Schweigmann, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*, Kluwer Law International, The Hague, 2001, p. 197.

⁴⁵ UN Charter, Art. 39.

circumstances, the amnesty must be consistent with fundamental principles of international law in order to render it valid and internationally acceptable.

May foreign or international courts recognize or give effect to an amnesty for war crimes?

The answer to this question depends largely on whether States are under a positive obligation to prosecute persons accused of war crimes. If States have such a duty, then third States' courts or international courts would not be able to recognize an amnesty for these types of crimes unless that duty could be derogated from under international law. On the other hand, if States are merely *entitled* to prosecute or extradite persons accused of certain war crimes, then a State would be able to give effect to an amnesty law covering these crimes by choosing not to exercise jurisdiction. Notwithstanding any other possible jurisdictional bases connected with territory or nationality, it is increasingly accepted that customary international law entitles all States to exercise universal jurisdiction over war crimes.⁴⁶ Several countries have enacted legislation allowing them to try war crimes perpetrators under the universality principle,⁴⁷ and in recent years many

⁴⁶ W. Cowles, "Universal jurisdiction over war crimes", *California Law Review*, Vol. 33, 1945, p. 177. See generally, A. Segall, *Punishing Violations of International Humanitarian Law at the National Level*, ICRC, Geneva, 2001, especially pp. 30-38. But see also Brownlie, who argues that the legal consequences of breaches of the laws of war (especially of the Hague Convention of 1907 and the Geneva Conventions of 1949) are not correctly expressed as an acceptance of the principle of universality, since what is punished is the breach of international law. This, he claims, is different from "the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal." Brownlie, *op. cit.* (note 25), p. 308. In the *Tadic* case, Judge Cassese declared in relation to the principle of universal jurisdiction: "This is all the more so [justified] in view of the nature of the offences alleged against the Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind. As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held: '...The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognize borders, punishing criminals wherever they may be...Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lese-humanite* (reati di lesa umanita) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one.' (13 March 1950, in *Rivista Penale* 753, 757 (Sup. Mil. Trib., Italy 1959; unofficial translation)", *The Prosecutor v. Dusko Tadic*, International Tribunal for the Former Yugoslavia, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber, 2 October 1995), p. 57.

⁴⁷ See for example, in Canada, the Crimes against Humanity and War Crimes Act (2000); in Germany, the International Crimes Act (2002); in Switzerland, the Code pénal militaire 1968; in Nicaragua, the Criminal Code 1974.

domestic courts have prosecuted persons (non-nationals or without any other territorial connection) accused of war crimes and other serious international crimes committed in third States.⁴⁸ The following sections assess which war crimes entail a duty to prosecute and those which merely entail an entitlement under customary law to do so.

Grave breaches regime

Conventional law imposes a mandatory system of universal jurisdiction over “grave breaches”⁴⁹ of the Geneva Conventions of 1949 and Additional Protocol I.⁵⁰ The ICRC Commentary on the Geneva Conventions states that this obligation is “absolute”.⁵¹ This conclusion is supported by the fact that States Parties are unable to absolve themselves or any other State Party of any

⁴⁸ See for example, *Prosecution v. Refik Saric*, Third Chamber of the Eastern Division of the Danish High Court, 25 November 1994; *Prosecution v. Refik Saric*, Supreme Court of Denmark, 15 August 1995, *Ugeskrift for Retsvaesen*, p. 838; *En la cause Fulgence Niyonteze*, Tribunal militaire de division 2, Lausanne, 30 April 1999; *En la cause Fulgence Niyonteze*, Tribunal militaire d’appel 1a, Geneva, 26 May 2000; Tribunal militaire de cassation, Yverdon-les-Bains, 27 April 2001.

⁴⁹ Articles 50/51/130/147 common to the four Geneva Conventions define the conduct constituting grave breaches of the Conventions. Offences amounting to grave breaches include wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health. Article 85 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (hereinafter Additional Protocol I) expands the list of grave breaches to include serious violations of the laws and customs of war (sometimes referred to as “Hague Law”), when committed wilfully, in violation of the relevant provisions of Protocol I, and causing death or serious injury to body or health.

⁵⁰ Articles 49/50/129/146 common to the four Geneva Conventions of 1949 provide: “The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention. (...) Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.” Art. 85(1) of Additional Protocol I states that the provisions of the Geneva Conventions relating to the repression of breaches and grave breaches, supplemented by Protocol I, apply equally to the repression of breaches and grave breaches of Protocol I. Art. 86 of Protocol I reaffirms the obligation of States Parties to repress grave breaches, and adds that States must take measures necessary to suppress all other breaches, of the Conventions or of Protocol I which result from a failure to act when under a duty to do so.

⁵¹ J. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary: IV Geneva Convention* (hereinafter *Commentary on Geneva Convention IV*), ICRC, Geneva, 1960, p. 602. Furthermore, the Commentary states that: “The universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment.” *Ibid.*, p. 587.

liability incurred in respect of grave breaches.⁵² While in the Commentary's view, the latter provision is "intended to prevent the vanquished from being compelled in an armistice agreement or a peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor",⁵³ this provision may also be interpreted as preventing States from avoiding their obligation to prosecute those accused of grave breaches, insofar as this may form part of war reparations.⁵⁴ States party to the aforesaid instruments must also suppress all other violations. Although the obligation to *suppress* violations does not require the adoption of criminal legislation, States are able to take whatever legislative, administrative or disciplinary measures are deemed appropriate.⁵⁵

Thus, if a person is suspected of grave breaches, wherever the commission of the crimes occurred and whatever his or her nationality, States party to either or both the Geneva Conventions and Additional Protocol I are formally obliged to prosecute or extradite that person. This would logically mean that any amnesty covering a person accused of grave breaches could not ordinarily have any legal effect in the State promulgating the amnesty,⁵⁶ nor could it be given recognition in other States.

Customary duty to prosecute grave breaches and other serious violations of the laws and customs of war

By virtue of the almost universal ratification of the Geneva Conventions⁵⁷ and the widespread occurrence of implementing legislation

⁵² Articles 51/52/131/148 common to the four Geneva Conventions of 1949.

⁵³ *Commentary on Geneva Convention IV, op. cit.* (note 51), p. 603.

⁵⁴ The *Commentary, ibid.*, continues, "As the law stands today (...) [o]nly a State can make such claims on another State, and they form part, in general, of what is called 'war reparations'." Principle 15 in a UN text on the right to reparation proposes that judicial or administrative sanctions or "a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim" may constitute satisfaction as part of reparations. Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, prepared by Mr. Theo van Boven pursuant to decision 1995/117 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996.

⁵⁵ See Segall, *op. cit.* (note 46), especially pp. 30-38.

⁵⁶ As Oppenheim writes, "If a State (...) possess[es] such rules of Municipal Law as it is prohibited from having by the Law of Nations, it violates an international legal duty." L. Oppenheim in H. Lauterpacht (ed.), *International Law*, 8th ed., 1955, p. 45; 1969 Vienna Convention on the Law of Treaties, Art. 27; *Polish Nationals in Danzig*, 1931 PCIJ (ser. A/B) No. 44, p. 24; *Fisheries (United Kingdom v. Norway)*, ICJ Reports 1951, 116 at 132; *Nottebohm (Liechtenstein v. Guatemala)*, ICJ Reports 1955, 4 at 20-21.

⁵⁷ At 25 August 2003 there were 191 States party to the Geneva Conventions of 1949.

enacted by States around the world,⁵⁸ it can confidently be stated that the obligation to prosecute or extradite persons accused of grave breaches, as enumerated in the Geneva Conventions, is a customary rule of international law. Whether the other serious violations of the laws and customs of war (mostly deriving from the 1907 Hague Convention IV and its annexed Regulations), included in the extended list of grave breaches in Article 85 of Additional Protocol I, also entail mandatory universal jurisdiction under customary international law remains a question of debate.⁵⁹

The Hague Conventions and Regulations themselves contain no provision dealing with individual responsibility for violations of the rules contained therein, nor do they specify a duty for States Parties to prosecute those who have breached even the most serious of the laws.⁶⁰ However, the Nuremberg International Military Tribunal in 1945 held that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 “were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war”.⁶¹ The Statute of the International Criminal Tribunal for the former Yugoslavia provides for jurisdiction over “violations of the laws and customs of war”.⁶² The adoption of the Rome Statute is significant in this respect, since it was a guiding principle during negotiations that definitions of war crimes should reflect customary international law.⁶³ The inclusion of the large majority of serious violations of the laws and customs of war in the authoritative list of “war crimes”

⁵⁸ See the ICRC Advisory Service compilation of national implementation mechanisms of international humanitarian law, available at: <<http://www.gva.icrc.org/ihl-nat>>.

⁵⁹ During the negotiations in Rome on the list of war crimes to be included in the Statute of the International Criminal Court, States strongly disagreed on the customary status of the rules in Additional Protocol I. See 1995 Ad Hoc Committee Report, para. 74, and 1996 PrepCom Report, Vol. I, para. 81.

⁶⁰ Art. 3 of the 1907 Hague Convention IV concerning the Laws and Customs of War does, however, specify a duty for the State to pay compensation for violations committed by persons in its armed forces.

⁶¹ International Military Tribunal, *Trial of the Major War Criminals*, 14 November 1945, 1 October 1946, Vol. 1, Nuremberg, 1947, p. 254. The International Military Tribunal also pointed out that: “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” *Ibid.*, reproduced in the *American Journal of International Law*, Vol. 41, 1947, pp. 220-221.

⁶² Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Security Council Res. 827 (1993), UN Doc. S/RES/827, 25 May 1993 (hereinafter ICTY Statute), Art. 3.

⁶³ H. von Hebel and D. Robinson, “Crimes within the jurisdiction of the Court”, in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute: Issue, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 122.

under the jurisdiction of the International Criminal Court⁶⁴ now definitively attests to the fact that States are entitled to prosecute persons accused of those crimes under customary international law.⁶⁵

However, whether the criminalization of serious violations of the laws and customs of war under customary international law entails the *mandatory* prosecution of violators is another matter. It could tentatively be argued that the complementarity principle enshrined in the Rome Statute implies a definite duty for States to prosecute persons accused of crimes within the jurisdiction of the Court. According to that principle, if they are unable or unwilling to fulfil this duty, the ICC will assume jurisdiction.⁶⁶ If States party to the Rome Statute wish to take advantage of the principle of complementarity, they must pass appropriate criminal legislation and actively prosecute those accused of the relevant crimes who are found on their territory. The formulation of the complementarity rule in negative terms, i.e. when States are deemed *unable*⁶⁷ or *unwilling*⁶⁸ to prosecute such crimes, seems to suggest that normally States should be able and willing to prosecute persons accused of international crimes, and that the ICC has to take jurisdiction over the

64 Some norms were deleted from the Statute on the ground that a violation of the rule was not serious enough to come before the Court. For example, the prohibition of “unjustifiable delay in the repatriation of prisoners of war or civilians”, which is a grave breach under Art. 84(4)(b) of Additional Protocol I. See 1995 Ad Hoc Committee Report, para. 72, and 1996 PrepCom Report, Vol. I, para. 74.

65 During the negotiations in Rome on war crimes for the Statute of the International Criminal Court, there was no disagreement that the norms laid down in the Hague Conventions and Regulations gave rise to individual criminal responsibility under customary international law. See 1995 Ad Hoc Committee Report, para. 74, and 1996 PrepCom Report, Vol. I, para. 81.

66 Art. 17(1)(a) of the Rome Statute provides: “...the Court shall determine that a case is 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.”

67 According to Art. 17(3) of the Rome Statute, in order to determine inability in a particular case, “the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

68 According to Art. 17(2) of the Rome Statute, in order to determine unwillingness, the Court “shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

case only as an exception. This could imply that a general duty to prosecute international crimes exists. On the other hand, the fact of setting up a mechanism for an international court to take over cases where States choose not to prosecute, or are unable to do so, could be construed as an implicit acknowledgement within the Rome Statute that an absolute duty to prosecute does not attach to all international crimes within the ICC's jurisdiction.⁶⁹ It is submitted that the attempt to reach a definite conclusion as to whether there is indeed a customary duty to prosecute international crimes on the basis of the complementarity principle infers too much from what is essentially a mechanism to establish which court is competent to try a case.

The preamble to the Rome Statute seems to assume that there exists a duty to prosecute all serious international crimes under customary law, recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".⁷⁰ By using the words "recalling", "duty", and "every State" the preamble seems to imply that all States have a legal obligation to ensure the prosecution of serious international crimes under customary international law. If this assertion is correct, this means that even non-party States not subject to the complementarity principle of the Rome Statute are under the positive duty, under customary international law, to prosecute persons accused of serious international crimes.⁷¹ It is beyond the scope of this article to assess the existence or non-existence of a customary duty to prosecute all serious international crimes.⁷² Suffice it to say at this point that for all other serious violations of the law of armed conflict, apart from grave breaches of the Geneva Conventions, the question whether there exists a duty under customary law to prosecute or extradite perpetrators thereof remains an exercise in interpretation.

⁶⁹ Admittedly, this argument can be fairly easily refuted by the objectives of the Rome Statute as expressed in the preamble, which states in para. 4 that "serious crimes of concern to the international community as a whole must not go unpunished". Even so, care must be taken not to overstretch the interpretation of the legal obligations contained in treaties by too much deference to the non-binding preamble.

⁷⁰ Rome Statute of the International Criminal Court, preambular para. 6.

⁷¹ The assertion of a general duty to prosecute for serious international crimes has been made in a host of United Nations resolutions, reports of Special Rapporteurs and other UN texts. See for example, UN Commission on Human Rights Res. 2002/79 on Impunity in which the Commission explicitly recognizes that "amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take actions in accordance with their obligations". Furthermore, "crimes such as (...) war crimes (...) are violations of international law and (...) perpetrators of such crimes should be prosecuted or extradited by States, (...) all States [are urged] to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes". *Ibid.*, para. 2.

⁷² For a comprehensive analysis, see Roht-Arriaza, *op. cit.* (note 14), esp. pp. 28-40.

Nonetheless, it is significant that during the deliberations in Rome concerning the list of war crimes to be included in the jurisdiction of the International Criminal Court, disagreements over the customary character of Additional Protocol I did not centre on whether the grave breaches regime could be extended to serious violations of the laws and customs of war, but on *which* of the expanded list of grave breaches in Article 85 of Additional Protocol I did in fact represent customary international law.⁷³ This could indirectly indicate that States accepted that these crimes entailed mandatory universal jurisdiction. However, the purpose of the Rome negotiations concerning the list of war crimes was simply to identify serious war crimes under customary law, therefore the question of whether these crimes were attached to a customary duty (not just the right) to prosecute did not have to be decided. This would seem the more realistic interpretation, given that several of the “other serious violations” in Article 8(2)(b) of the Rome Statute reflect rules in Additional Protocol I, violations of which are not even listed as grave breaches in that instrument.⁷⁴ Other crimes listed in Article 8(2)(b) of the Rome Statute have never been explicitly contained in a humanitarian law treaty.⁷⁵ As States are normally reticent to assume any additional obligations under customary law by implication of their ratification of a new legal instrument, the final list of war crimes is much more likely to represent simply the serious violations of international humanitarian law to which individual criminal responsibility is attached under customary

⁷³ See von Hebel and Robinson, *op. cit.* (note 63), pp. 109-118. A few acts defined as grave breaches in Additional Protocol I were not included in the Statute, such as Art. 85(3)(c) on attacks against works or installations containing dangerous forces and Art. 85(4)(b) on unjustifiable delay in the repatriation of prisoners of war or civilians.

⁷⁴ For example, Art. 8(2)(b)(i) (attacks against civilians) is a mix of Art. 85(3)(a) and Art. 52(1) and (3) of Additional Protocol I; Art. 8(2)(b)(ii) (attacks against civilian objects) is based on Art. 52(1) of Additional Protocol I; Art. 8(2)(b)(iii) (attacks against humanitarian or peacekeeping missions) is based on Art. 85(3)(b) together with Arts 35(3) and 55(1) of Additional Protocol I; Art. 57 of Additional Protocol I was largely used to define proportionality in Art. 8(2)(b)(iv); Art. 8(2)(b)(xxvi) (conscription of children under 15) is based on Art. 77(2) of Additional Protocol I and Art. 38 of the Convention on the Rights of the Child of 1975.

⁷⁵ For example, Art. 8(2)(b)(iii) prohibiting intentionally directing attacks against United Nations personnel and material involved in a humanitarian assistance or peacekeeping mission “as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict” and Art. 8(2)(b)(xxii) prohibiting crimes of sexual violence “also constituting a grave breach of the Geneva Conventions”. The latter phrase has the purpose of affirming that sexual violence can constitute a grave breach. It should be noted that both types of violations, although never listed as war crimes in treaties prior to the Rome Statute, are already covered by customary prohibitions and therefore are not new crimes as such.

international law, rather than a list of crimes which entail mandatory universal jurisdiction. If there is no customary duty to prosecute persons accused of these violations, then States might be able to give effect to an amnesty law by choosing not to exercise jurisdiction over perpetrators of such crimes.

War crimes committed as part of a plan or policy

An observation may also be made in relation to the introductory paragraph of the war crimes article in the Rome Statute, the so-called jurisdictional threshold clause, which provides: “The Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (emphasis added). The threshold clause was included largely to allay the misgivings of States which felt that the Court should have jurisdiction only over systematic or large-scale instances of war crimes, as only these crimes would be of concern to the international community.⁷⁶ Other States opposed such a clause, contending that such a threshold would create different categories of war crimes, that the complementarity principle already provided a safeguard against the Court taking up isolated occurrences of war crimes, and that a threshold clause might have the effect of deterring national courts from prosecuting sporadic cases.⁷⁷

Essentially, this article directs the Court to focus on the most heinous occurrences of war crimes which have a destabilizing effect at the international level. Although Article 8(1) strictly-speaking relates only to a jurisdictional aspect of the ICC, in view of the purported customary law character of the definitions of crimes in the Statute, due consideration should be given to the possible import of such limiting clauses for the duty to prosecute war crimes under customary international law. The emphasis on prosecuting mainly perpetrators of war crimes committed on a large scale and in an organized manner would seem to indicate that no amnesty could be valid for those persons. It also indirectly implies that the Court should concentrate on

⁷⁶ The threshold was first proposed by the United States in 1997. A particular concern of the United States, among other States, was that the Court should not have jurisdiction over isolated cases of war crimes which might be committed, for example, by American peacekeepers during an operation mandated by the United Nations.

⁷⁷ Von Hebel and Robinson, *op. cit.* (note 63), p. 108. The original proposal which provided that the Court shall have jurisdiction over war crimes “*only* when committed as part of a plan or policy or as part of a large-scale commission of such crimes” was then replaced by “only when committed...” before being watered down to “in particular when committed...”. As von Hebel and Robinson point out, this language implies that “Article 8(i) may be best described as a (...) guideline rather than a threshold”, *ibid.*, p. 124.

the authors of the plans and policies to commit war crimes, rather than on those who are ordered to take part in such plans. Article 8(1) could therefore be construed as supporting international recognition of amnesties for war crimes which are not committed as part of a plan or policy. Conversely, those persons who commit war crimes on such a scale as to merit international adjudication must be prosecuted without exception (subject to possible Security Council deferral). This interpretation is consistent with recent practice in the prosecution of persons accused of international crimes in special courts set up to deal with these crimes, which have jurisdiction only over those “most responsible” for the commission thereof.⁷⁸

Serious violations of Article 3 common to the four Geneva Conventions of 1949 and other serious violations of the laws and customs of war committed in non-international armed conflicts

Serious violations of this nature have traditionally not been considered criminal offences attracting universal jurisdiction or a duty to prosecute and punish under international law.⁷⁹ Neither common Article 3 nor Additional Protocol II contains provisions on grave breaches or enforcement. However, recent developments in the law have increasingly challenged this position,⁸⁰ largely in response to the atrocities committed in the former Yugoslavia and Rwanda during the armed conflicts of the early 1990s. The International Criminal Tribunal for Rwanda (ICTR) was specifically given subject matter jurisdiction over serious violations of common Article 3 and Additional Protocol II.⁸¹ Although the ICTY was not given the same specific competence, the Tribunal decided in the *Tadic* case that customary international law imposes criminal liability for serious violations of common Article 3 and that it had jurisdiction over such violations.⁸²

⁷⁸ See notes 166-174 and accompanying text.

⁷⁹ D. Plattner, “The penal repression of violations of international humanitarian law applicable in non-international armed conflict”, *International Review of the Red Cross*, Vol. 30, 1990, p. 414.

⁸⁰ T. Graditzky, “Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts”, *International Review of the Red Cross*, Vol. 322, 1998, pp. 29-56; T. Meron, “International criminalization of internal atrocities”, *American Journal of International Law*, Vol. 89, 1995, p. 554. The ICJ in the *Nicaragua* case in 1986 noted the customary character of common Art. 3 of the Geneva Conventions: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports* 1986, pp. 113-114, para. 218.

⁸¹ ICTR Statute, Art. 4, Annex to Security Council Res. 955 (1994), S/RES/955 (1994), 8 Nov. 1994.

⁸² *Prosecutor v. Dusko Tadic*, Appeals Chamber of the ICTY, 2 October 1995, para. 137, 35 I.L.M. 32 (1996).

The Rome Statute provides for jurisdiction over serious violations of the rules applicable in internal armed conflicts.⁸³ These rules are derived from a range of sources, including the Hague Regulations, the Geneva Conventions and Additional Protocol II. Given the complementarity principle enshrined in the Rome Statute, it could be argued that domestic courts would also have jurisdiction over these offences once enabling legislation providing for domestic jurisdiction over war crimes in the Rome Statute has been passed. On this basis one could go a step further and assume that a duty to prosecute under international law attaches to such offences,⁸⁴ with the corollary that amnesties for such crimes could not normally be recognized. However, the reservations already expressed as to assuming such a customary duty to prosecute on the basis of the complementarity principle of the Rome Statute apply equally to serious violations of humanitarian law committed in non-international armed conflicts. In fact, given the historic reluctance of States to assume precise duties in relation to the law of armed conflict in internal conflicts, there is more reason to be hesitant about inferring a mandatory system of enforcement from the negotiations of the Rome Statute and their results.⁸⁵

Amnesty exception in internal armed conflicts? Article 6(5) of Additional Protocol II

Article 6(5) of Additional Protocol II is sometimes invoked to justify the granting of amnesties for war crimes. It stipulates that “[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest

⁸³ Rome Statute, Art. 8(2)(c) and (e).

⁸⁴ See Y. Dinstein, “The universality Principle and war crimes”, in M. Schmitt and L. Green (eds), *The Law of Armed Conflict: Into the Next Millenium*, International Law Studies, Vol. 71, Naval War College, Newport, R.I., 1998, pp. 17 and 21. See also the 1999 resolution of the United Nations Commission on Human Rights on Sierra Leone which “[r]eminds all factions and forces in Sierra Leone that in any armed conflict, *including an armed conflict not of an international character*, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts.” UN Commission on Human Rights Res. 1999/1, 6 April 1999 (emphasis added).

⁸⁵ Most commentators on the negotiations of the Rome Statute note that the list of crimes relating to internal armed conflicts was among the most controversial issues to be decided on. While the inclusion of common Article 3 was eventually able to achieve general acceptance at the Rome Conference, there was continued opposition to the inclusion of most of the other norms. See von Hebel and Robinson, *op. cit.* (note 63), p. 125.

possible amnesty to persons who have participated in the armed conflict". The exact scope of this provision has been the subject of debate.⁸⁶ Several courts have used it to support their findings that amnesties are valid under international law. Their conclusions are bolstered by stressing the need for reconstruction after violent civil wars, which is interpreted as the rationale behind Article 6(5).⁸⁷

However, there are strong arguments countering the applicability of Article 6(5) of Protocol II to war crimes. First, if one applies the rules of interpretation of the 1969 Vienna Convention on the Law of Treaties, which directs States Parties to interpret in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,⁸⁸ it is difficult to conclude that Article 6(5) covers amnesties for war crimes. Additional Protocol II was designed to ensure greater protection for the victims of non-international armed conflicts by developing and supplementing Article 3 common to the Geneva Conventions.⁸⁹ If Article 6(5) were to allow amnesties which prevent prosecution for the most egregious human rights abuses during armed conflict, the provision would be inconsistent with the primary objective of the Protocol. The words "shall endeavour to grant the broadest possible amnesty" can be interpreted in the sense that Article 6(5) should be employed only when it can be implemented without infringing other binding international treaties or customary international law.⁹⁰

Secondly, the International Committee of the Red Cross (ICRC) has interpreted Article 6(5) of the Protocol narrowly. In an official letter dated

⁸⁶ The ICRC commentary on this article states that "[a]mnesty is a matter within the competence of the authorities" and that "[t]he object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided". ICRC Commentary on Protocol II of 1977 to the Geneva Conventions of 1949, paras 4617 and 4618, available at: <<http://www.icrc.org>>.

⁸⁷ For example, *Guevara Portillo Case*, Salade lo Penal de la Corte Suprema de Justicia, San Salvador (16 August 1995), p. 11; *AZAPO case*, *op. cit.* (note 18), p. 53; *Romo Mena Case*, Corte Suprema de Chile (26 October 1995), p. 12.

⁸⁸ 1969 Vienna Convention on the Law of Treaties, Art. 31(1).

⁸⁹ Additional Protocol II, Art. 1 and preambular para. 1.

⁹⁰ Roht-Arriaza and Gibson also argue that the phrase could be interpreted as meaning "the broadest possible amnesty' without destroying victims' hopes and needs for retribution and denunciation, or 'the broadest possible amnesty' without causing social unrest because of the injustice in letting these criminals go free". See N. Roht-Arriaza and L. Gibson, "The developing jurisprudence on amnesty", *Human Rights Quarterly*, Vol. 20, 1998, p. 866.

1995 from the head of the Legal Division to the ICTY Prosecutor, it stated that Article 6(5) essentially provides for “combatant immunity”, which ensures that a combatant cannot be punished for the mere fact of taking part in hostilities, “including killing enemy combatants, as long as he respected international humanitarian law...”.⁹¹ The provision is inapplicable to amnesties that extinguish penal responsibility for persons who have violated international law. This conclusion was based partly on the drafting history of Article 6(5), which indicates that “the provision aims at encouraging amnesty, i.e. a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law.”⁹² This interpretation has subsequently been affirmed by the Inter-American Commission of Human Rights and the UN Human Rights⁹³ Committee.⁹⁴ Such a rationale was applied in much earlier decisions in the United States not recognizing amnesties for serious violations in internal conflicts.⁹⁵

The duty to “respect and ensure respect” for the Geneva Conventions

Article 1 common to the Geneva Conventions of 1949 and reiterated in Article 1(4) of Additional Protocol I states that: “The High Contracting

⁹¹ Letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997.

⁹² *Ibid.* During the debate at the Diplomatic Conference negotiating Protocol II, the delegate for the Soviet Union stated that draft Article 10 (which became Article 6) of Protocol II “could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.” *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977*, Vol. 9. Federal Political Department, Berne, 1978, p. 319.

⁹³ Inter-American Commission on Human Rights, Report No. 199, Case 10,480, *Lucio Parada Cea and ors.* (El Salvador), 27 January 1999, para. 115.

⁹⁴ UN Doc. CCPR/C/79/Add.78, para. 12 (concerning the amnesty for human rights violations committed against civilians during the civil war in Lebanon).

⁹⁵ *Ex parte Mudd*, manuscript opinion of Judge Boynton, 9 Sept. 1868, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9, 899), (concerning petition for *habeas corpus* for civilians convicted by military commission for complicity in assassination of President Lincoln). In response to the petitioners’ contention concerning the presidential proclamation of amnesty of 4 July 1868, the court stated, “But that proclamation plainly excludes (...) petitioners, whether they have been convicted or not. It pardons the crime of treason (...) but it pardons no person who has transgressed the laws of war – no spy, no assassin, no person who has been guilty of barbarous treatment to prisoners (...). Such a provision would refer to those prisoners who had made open and honorable war and transgressed the fearfully wide rules which war allows to be legal.” Quoted in *International Criminal Law, op. cit.* (note 26), p. 252.

Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”⁹⁶ Since one of the most effective ways of ensuring respect for the Convention or Protocol is to have a system of enforcement, including penal sanctions, for serious violations of the rules contained therein, a certain expectation of criminal repression arises. It should be noted that common Article 1 also applies to non-international armed conflicts, as it includes ensuring respect for common Article 3 of the Geneva Conventions. Additional Protocol II, which develops and supplements common Article 3, could also indirectly be covered by the principle.⁹⁷

The ICJ in the *Nicaragua* case found that the obligation to “respect and ensure respect” forms part of customary international law.⁹⁸ This finding was reaffirmed in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁹⁹ Moreover, the ICJ found that such rules were “intransgressible principles of international customary law”,¹⁰⁰ implying that “no circumstance may justify a ‘transgression’ of such rules”.¹⁰¹ In the *Tadic Appeals* case, it was stressed in the ICTY’s ruling that a State’s armed forces abroad must respect humanitarian rules (including the obligation to search for persons accused of war crimes and the duty to prosecute or extradite).¹⁰² Although the extent to which common Article 1 can be rendered operational to bolster the duty to prosecute those accused of war crimes remains uncertain, it is clear that this “quasi-constitutional”¹⁰³ provision raises the community expectation of the enforcement of humanitarian norms.¹⁰⁴

⁹⁶ On the legal value and consequences of common Art. 1 of the Geneva Conventions, see generally L. Boisson de Chazournes and L. Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 82, No. 837, March 2000, pp. 67-86.

⁹⁷ *Ibid.*, p. 69.

⁹⁸ *Nicaragua case*, *op. cit.* (note 80), para. 220.

⁹⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, para. 79.

¹⁰⁰ *Ibid.*

¹⁰¹ Boisson de Chazournes and Condorelli, *op. cit.* (note 96), p. 75.

¹⁰² *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber, Judgment, The Hague, 15 July 1999, Case No. IT-94-1.

¹⁰³ Boisson de Chazournes and Condorelli, *op. cit.* (note 96), p. 85.

¹⁰⁴ Paust, in “My Lai” *op. cit.* (note 35) has made the salient point that: “[i]nternational law is based upon common expectations of the human community and does not solely become operative when in conformity with one state’s notions of ‘just wars’ or other political conclusions of a nation (...). This is due to the fact that international legal norms have a universal character or value content, and these human expectations cannot be ignored on the basis of local self interest. (...). Today, as the human society is forced to exist on the basis of the sovereign state system it can be argued that it is the duty of the sovereign to execute community legal expectations.”

An analogy may be drawn between Article 1 of the Geneva Conventions and the obligation in human rights treaties to ensure respect for the rights contained therein. Although comprehensive human rights treaties are silent as to a duty to prosecute and punish those accused of violations of fundamental rights, authoritative sources have interpreted the obligation to ensure the rights guaranteed by the treaties¹⁰⁵ as entailing the duty to investigate abuses and to put those alleged to have committed such abuses on trial. For example, the Human Rights Committee has stated in relation to the crime of torture that “States must ensure an effective protection through some machinery of control (...). Those found guilty must be held responsible.”¹⁰⁶ In the *Velasquez Rodriguez* case, the Inter-American Court of Human Rights held that as a consequence of the obligation to ensure the rights in the American Convention on Human Rights, States must prevent, investigate, and punish any violation of the rights recognized by the Convention.¹⁰⁷ The European Court of Human Rights has interpreted Article 1, which obliges the parties to “secure to everyone within their jurisdiction the rights and freedoms defined” in the European Convention on Human Rights, as including an affirmative obligation to prevent or remedy breaches of that Convention.¹⁰⁸ The European Commission interpreted this obligation as including criminal prosecution where appropriate.¹⁰⁹

On the basis of such interpretations of the treaty obligation to ensure rights, it could be argued that the obligation in the Geneva Conventions “to respect and ensure respect for the Conventions” should entail the mandatory prosecution of a person accused of violating any of the fundamental provisions thereof and of their Additional Protocols. A distinction should be made, however, between the obligation to ensure the fundamental rights of individuals and the duty to respect and ensure respect for humanitarian rules during a situation of armed conflict. Clearly the latter obligation of ensuring “respect” is both much broader and more vague than the aforesaid duty of

¹⁰⁵ Art. 2(1) of the International Covenant on Civil and Political Rights, 16 December 1966; Art. 1(1) of the American Convention on Human Rights, 7 January 1970; Art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

¹⁰⁶ Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40) Annex V, general comment 7(16), para. 1, UN Doc. E/CN.4/Sub.2/Add.1/963 (1992).

¹⁰⁷ Inter-American Court of Human Rights, Case *Velasquez Rodriguez*, Judgment of 29 July 1988, Series C, No. 4, para. 166.

¹⁰⁸ *Ireland v. U.K.*, 25 Eur. Ct. H.R., para. 239 (ser. A) (1978).

¹⁰⁹ *Mrs. W. v. United Kingdom*, 32 Collection of Decisions 190, 200 (Feb. 28, 1983).

ensuring “rights”. It is conceivable, for example, that a limited amnesty law covering those “least responsible” for the commission of war crimes, coupled with a truth commission and enacted for the purpose of ending a civil war, could still be consistent with a State’s obligation to “respect and ensure respect” for the Geneva Conventions. On the other hand, the obligation to ensure inalienable rights in the human rights conventions necessitates a legal mechanism to guarantee enforceable rights.

A series of UN General Assembly resolutions also testify to an international expectation that States will prosecute those accused of war crimes. For example, a 1973 resolution on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity affirmed that:

“War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”¹¹⁰

It has also been reiterated in other resolutions that a refusal “to cooperate in the arrest, extradition, trial and punishment” of such persons is contrary to the United Nations Charter “and to generally recognized norms of international law.”¹¹¹ While these resolutions are not conclusive in themselves of a customary duty to prosecute all war crimes (particularly as the scope of “war crimes” was not commonly agreed at the time), they do provide evidence that the international community generally expects States to enforce norms prohibiting war crimes by instituting criminal proceedings. This expectation means that States could legitimately prosecute persons accused of war crimes even if they are not under an obligation to do so. At the same time, an expectation of enforcement that does not amount to an obligation does not preclude giving effect to certain amnesties which do not, in the circumstances, contravene the duty to respect and ensure respect for the Geneva Conventions or other “non-derogable” principles of international law.

¹¹⁰ Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, *op. cit.* (note 6), para. 1.

¹¹¹ Quoted in J. Paust, “Universality and the responsibility to enforce international criminal law: No sanctuary for alleged Nazi war criminals”, *Houston Journal of International Law*, Vol. 11, 1989, pp. 337-40, reproduced in *International Criminal Law*, *op. cit.* (note 26), p. 75.

Consequences of the *jus cogens* nature of war crimes

In recent years, the notion has emerged that certain overriding principles of international law exist, forming a body of *jus cogens* norms from which no derogation is permitted.¹¹² Clearly accepted and recognized *jus cogens* norms include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity, and torture.¹¹³ It is now increasingly accepted that war crimes may be included in this category.¹¹⁴ If this contention is accepted, the following questions then arise: what are the consequences of violating a *jus cogens* norm and is any derogation from them also precluded?

112 Art. 53 of the 1969 Vienna Convention on the Law of Treaties provides a definition of a *jus cogens* or peremptory norm of international law: “a peremptory norm of general international law is 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.” In the *Barcelona Traction* case (Second Phase), the ICJ drew the distinction between obligations of a State arising vis-a-vis another State and obligations “towards the international community as a whole”, saying: “[s]uch obligations 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”. ICJ Reports 1970, 3 at p. 32. See also *East Timor Case (Portugal v. Australia)*, ICJ Reports 1995, 90 at p. 102.

113 The International Law Commission gave the following examples of treaties which would violate Art. 53 of the Vienna Convention on the Law of Treaties: “(a) a treaty contemplating an unlawful use of force contrary to the principles of the [UN] Charter; (b) a treaty contemplating the performance of any other act criminal under international law; and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate (...) treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples”: *Yearbook of the ILC 1966*, Vol. II. p. 248.

114 In the *Nicaragua* case, the ICJ found that Article 3 common to the Geneva Conventions represented a customary rule of international law, adding that the rules reflect “elementary considerations of humanity” *Nicaragua* case, *op. cit.* (note 80), p. 104. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court recognized that the “fundamental rules [of humanitarian law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary law.” *op. cit.* (note 99), p. 257, para. 79. Some judges went further and clearly stated in separate opinions that the rules of war have acquired the status of *jus cogens*; see Weeramantry J, p. 496, President Bedjaoui, p. 273, Koroma J, p. 574. In the *Haas and Priebke* cases, Military Court of Appeal of Rome/Supreme Court of Cassation, 7 March 1998/16 November 1998, the judgments describe the principle of the non-applicability of statutory limitations to war crimes as a peremptory norm of general international law, necessarily implying that war crimes also have a *jus cogens* nature. See also, A. Cassese, “On the current trends towards criminal prosecution and punishment of breaches of international humanitarian law”, *European Journal of International Law*, Vol. 9, No. 1; H-P. Gasser, “International humanitarian law”, in H. Haug (ed.), *Humanity for All*, Henry Dunant Institute, Paul Haupt Publishers, Berne, 1993, at p. 556; C. Bassiouni, “International crimes *jus cogens* and *obligatio erga omnes*”, in C. Joyner and C. Bassiouni (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Rights*, Association Internationale de Droit Pénal, Ramonville-St.-Agne, 1998, at p. 267.

The ICTY elaborated on the consequences of breaching a *jus cogens* norm in the *Furundzija* case¹¹⁵ concerning the crime of torture. In terms of criminal liability, the Tribunal found that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that “every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”¹¹⁶ This seems to suggest that the non-derogable character of the norm attaches only to the norm itself and not necessarily to its consequences. According to the ICTY, States have the “right” to prosecute those accused of *jus cogens* crimes,¹¹⁷ implying that this is not a mandatory obligation.

The ICTY’s characterization of the consequences of *jus cogens* norms as merely giving States the right to prosecute or extradite may be contrasted with the assertion of other commentators that both the norm prohibiting the commission of war crimes and the resulting obligation to prosecute or extradite persons accused of these crimes have a peremptory character.¹¹⁸ Were this conclusion to be correct, it would mean that States could never under any circumstances derogate from their duty to prosecute such persons and would also rule out the possibility of any international recognition of amnesties for war crimes. The argument commonly used by advocates of this position is that “the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law.”¹¹⁹ Support for the view that a peremptory character may attach to the “prosecute or extradite” rule may be found to some extent in the ICRC Commentary on the Geneva Conventions, which notes that “repression of grave breaches was to be universal (...) [with those

115 *Prosecutor v. Anto Furundzija*, Judgement, IT-95-17/1-T, 10 December 1998 .

116 *Ibid.*, paras 153-157. The Court also found that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption. *Ibid.*, para. 153.

117 *Ibid.*, para. 156, citing the Supreme Court in *Eichmann* and the USA Court in *Demjanjuk*. *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 ILR 298; In the Matter of the Extradition of John Demjanjuk, 612 F. Supp.544, 558 (N.D. Ohio 1985). The Court also refers to *Demjanjuk v. Petrovsky*, 776 F. 2d 571 (6th Cir. 1985), cert. Denied, 475 U.S. 1016 S. Ct. 1198, 89 L. Ed. 2d 312 (1986) for a discussion of the universality principle as applied to the commission of war crimes.

118 Bassiouni, “International Crimes”, *op. cit.* (note 114), writes at p. 265: “Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite (...)”; see also Cassese, *op. cit.* (note 114); Paust, “Universality”, *op. cit.* (note 111), at pp. 337-40.

119 Bassiouni, “International Crimes”, *op. cit.* (note 114), p. 266.

reasonably accused] sought for in all countries,” adding that “the obligation to prosecute and punish (...) [is] absolute.”¹²⁰

Similar arguments have been used by human rights bodies to argue the extension of non-derogability to normally derogable rights (such as the right to *habeas corpus*) which are necessary in order to uphold non-derogable rights (such as the prohibition of torture).¹²¹ But their reasoning may be distinguished from the “prosecute or extradite” rule: in the case of human rights it is argued that the crime (violation of the non-derogable right) could not have occurred if the other right had been of a non-derogable nature;¹²² conversely, the duty to prosecute or extradite does not arise until *after* the war crime has been committed. It is therefore much more difficult to argue that the duty to prosecute or extradite actually prevents the violation of preemptory norms. The only feasible argument along these lines is that of the theory of deterrence, but it is limited, as there is little evidence that criminal sanctions have a direct impact on the behaviour of future perpetrators of international crimes.¹²³

Furthermore, it is difficult to prove that the duty to prosecute every case of war crimes is “a norm accepted and recognized by the international

¹²⁰ *Commentary to Geneva Convention VI, op. cit.* (note 51), pp. 587-602.

¹²¹ For example, the Inter-American Court of Human Rights has held that the “essential” guarantees which are not subject to derogation under the American Convention on Human Rights include *habeas corpus*, *amparo*, and any other effective remedy which is designed to guarantee respect for the non-derogable rights and freedoms in the Convention. *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87 of 6 October 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987) at 41. In the *Case of Barrios Altos*, the Court stated, “it is unacceptable to use amnesty provisions (...) as a means of preventing the investigation and punishment of those responsible for gross violations of human rights (...) all of which are prohibited as breaches of non-derogable rights recognized under International Human Rights Law.” *Barrios Altos case, op. cit.* (note 15), para. 41.

¹²² The classic example is that of torture of detainees inside police stations, which would be much less likely to occur if *habeas corpus* was a non-derogable right, because judges would have the chance to see the detainee in person soon after the arrest and would be able to tell if he or she had been incorrectly treated while in custody.

¹²³ The International Law Association has pointed out that the deterrent effect should not be overstated, noting that serious crimes on a massive scale continued to be committed in Kosovo after the Chief Prosecutor of the ICTY had announced her intention of investigating and prosecuting these crimes in a letter addressed to President Milosevic and other senior officers. Letter from Justice Louise Arbour to President Milosevic and other senior officials, ICTY press release JL/PIU/389, 26 March 1999, quoted in International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference 2000, p. 4, available at: <<http://www.ila-hq.org>>. During the Second World War, atrocities by German soldiers continued to be committed after the Allies had announced their intention to pursue the perpetrators “to the uttermost ends of the earth”. “Declaration of German Atrocities”, 1 November 1943, *Dep’t St. Bull.*, Vol. 9, 1943, pp. 310 - 311.

community of States as a whole as a norm from which no derogation is permitted". The historical – and continuing – practice of States of enacting amnesties at the end of armed conflicts,¹²⁴ the fact that the duty to prosecute grave breaches under the Geneva Conventions may be derogated from if it conflicts with an obligation under the UN Charter,¹²⁵ and the more recent State practice in the form of special courts in transitional societies prosecuting only those "most responsible" for serious violations where mass war crimes have been committed, all lead to conclude that the international community does not at the present time consider that this rule has a non-derogable character.

A distinction must be drawn, as the ICTY did in the *Furundzija* case, between the non-derogable nature of the *jus cogens* norm (the ban on commission of the crime) and the *erga omnes* consequences (the method of enforcement) deriving from the breach of such a norm.¹²⁶ The latter obligation concerns the means of compliance with the preemptory norm.¹²⁷ Because *erga omnes* obligations are "[by] their very nature (...) the concern of all States [and] all States can be held to have a legal interest in their protection...",¹²⁸ under customary law, any State regardless of injury may invoke the responsibility of another State if the obligation breached is owed to the

124 See O'Shea, *op. cit.* (note 19), for the historical use of amnesties, at pp. 5-23.

125 UN Charter, Art. 103. It could be argued, however, that the customary status of the "prosecute or extradite" rule for grave breaches of the Geneva Conventions is not subject to the same hierarchy of rules under treaty law.

126 The ICTY identified the rationale behind these consequences as follows: "While the *erga omnes* nature (...) appertains to the area of international enforcement (*lato sensu*), the *other* major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order [*jus cogens*]". *Furundzija* case, *op. cit.* (note 115), para. 153 (emphasis added). This implies that the non-derogable nature applies only to the norm prohibiting torture.

127 Examples of obligations *erga omnes* given by the ICJ are rules deriving from the outlawing of acts of aggression and genocide, and the rules and principles concerning the basic rights of the human person, including protection from slavery and racial discrimination. *Barcelona Traction*, *op. cit.* (note 112), p. 32; *East Timor* case, *op. cit.* (note 112), *ICJ Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 99), p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia), Preliminary Objections*, *ICJ Reports 1996*, p. 595, at pp. 615-616, paras 31-32. In the *Pinochet* litigation in the United Kingdom, Lord Hope made the point that the fact that an act has acquired the status of *jus cogens* under international law "compels all states to refrain from such conduct under any circumstances and imposes an obligation *erga omnes* to punish such conduct." *Pinochet No. 3*, House of Lords 24 March 1999, reproduced in R. Brody and M. Ratner (eds), *The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain*, Kluwer Law International, The Hague, 2000, pp. 253-4.

128 *Barcelona Traction*, *op. cit.* (note 112).

international community as a whole.¹²⁹ However, the fact that a State has a legal interest in ensuring that an obligation is complied with does not necessarily translate into a positive duty to prosecute every instance of war crimes. This would mean that domestic or international courts could legitimately recognize a limited amnesty for war crimes where the failure to prosecute does not conflict with the particular consequences attached to a serious breach of *jus cogens*. Under customary law, there are two additional consequences for all States when serious breaches of peremptory norms have been committed.¹³⁰ The first is that States must cooperate to bring any serious breach to an end through lawful means. The second is that no State may recognize as lawful a situation created by a serious breach or render aid or assistance in maintaining that situation.¹³¹ In the *Furundzija* case, the ICTY also commented on the effects of a peremptory norm at the inter-State level. According to the Tribunal:

“it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State, say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international recognition.”¹³²

Care should be taken not to interpret the Tribunal’s words as ruling out any possibility of international recognition of amnesties for *jus cogens* crimes. Only where recognition of the amnesty law is tantamount to authorizing, condoning or recognizing as lawful the situation created by the illegal act

¹²⁹ ILC Articles on State Responsibility, Art. 48, *op. cit.* (note 36).

¹³⁰ According to the ILC Articles, a serious breach involves a “gross or systematic” failure by the responsible State to fulfil the obligation. ILC Articles on State Responsibility, Art. 40(2), *op. cit.* (note 36).

¹³¹ The customary “particular consequences” of serious breaches of peremptory norms are articulated in the ILC Articles on State Responsibility, Art. 41, paras 1 and 2. Art. 41 is without prejudice to the other consequences that a breach may entail under international law (Art. 41(3)). See *Nicaragua* case, *op. cit.* (note 80), p. 100, para. 188; *Legal Consequences for States in the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports, 1971, p. 16 at p. 56, para. 126.

¹³² *Furundzija* case, *op. cit.* (note 115), para. 155.

does the amnesty law lose all legal validity and the responsibility of the State is incurred.¹³³ Similarly, the *Restatement (Third) of the Foreign Relations Law of the United States* adopts the view that a complete failure to punish repeated or notorious violations of rights protected by customary law renders a government sufficiently complicit to generate State responsibility.¹³⁴ While a third State's recognition of a blanket amnesty for war crimes self-proclaimed by an outgoing regime in another State would probably contravene both the "non-recognition" and *Restatement* principles, the international recognition of a principled and limited amnesty for war crimes brokered by the United Nations, for example, for the purposes of securing peace in a State or region and coupled with a truth commission would not amount to "condoning" or "authorizing the situation created by the breach of the *jus cogens* norm, nor indeed its recognition as lawful. Prosecutions that focus on those most responsible for devising and implementing a past system of war crimes, and are combined with a limited amnesty for persons not within this category, would still be consistent with the obligations to terminate the serious breach and not to recognize as lawful a situation created by a serious breach. By recognizing the limited amnesty, the courts of third States would likewise be in keeping with the *Restatement* approach, under which customary law would be violated by complete impunity for *jus cogens* crimes, but which would not require prosecution of every person who committed such an offence.¹³⁵

International and "quasi-international" criminal courts: the possibility of recognizing amnesties for war crimes

In terms of the possibility for international or quasi-international courts to recognize amnesties for war crimes, the same legal principles

¹³³ For example, this principle was enunciated in relation to any acquisition of territory brought about by force in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, General Assembly Res. 2625 (XXV), para. 10. The validity of the rule was affirmed by the ICJ in the *Nicaragua* case, *op. cit.* (note 80), p. 100, para. 188. The ICJ's advisory opinion in the *Namibia (South West Africa)* case also called for a non-recognition of the situation created by the denial by a State of the right to self-determination, *op. cit.* (note 131), p. 56, para. 126.

¹³⁴ *Restatement (Third) of the Foreign Relations Law of the United States* (1987), para. 702. In *Henfield's Case* and 1 Op. Att'y Gen. 68, 69 (1797), the Court found that if a State did not initiate prosecution of one reasonably accused of international crime, it was recognized that the State could become an "accomplice" to illegality and be subject to various international sanctions.

¹³⁵ Orentlicher, *op. cit.* (note 14), p. 2599.

discussed above generally apply. However, the statutes of courts will often specify whether or not amnesties for certain crimes will or will not be recognized. In terms of the Rome Statute of the International Criminal Court, commentators have argued that an “amnesty exception” may be inferred from several of its provisions: (1) on the basis of Article 17(1)(b), which provides that the ICC will declare a case inadmissible where the State which has jurisdiction over the case decides not to prosecute the accused, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (2) on the basis of Article 53(2)(c), which allows the Prosecutor to refuse prosecution where he or she concludes that “a prosecution is not in the interests of justice, taking into account all circumstances”,¹³⁶ (3) on the basis of Article 16 giving the Security Council the power to defer proceedings; and (4) under Article 15, which gives the Prosecutor discretion to decline to prosecute *proprio moto*.¹³⁷

The Statutes of both the ICTY and the ICTR are silent on the possibility for the Tribunals to recognize amnesties, but given the fact that these tribunals were established by Security Council resolutions which identified a need to prosecute persons accused of serious international crimes in order to facilitate the restoration and maintenance of peace in those regions,¹³⁸ it would be contrary to their very purpose to exempt an accused from prosecution on the basis of an amnesty in these particular contexts. As for other international or quasi-international courts set up in recent years to deal with war

¹³⁶ The problem lies in interpreting what is meant by “interests of justice”. The term is undefined. The provision itself states that in making the decision the Prosecutor should take into account the gravity of the offence, the interests of the victims, the age or infirmity of the perpetrator and the role he or she played. However, this list is not exhaustive. Gavron makes the point that while it is potentially arguable that a prosecution that is likely to spark further atrocities is not in the interests of justice, this involves speculating about future events and contradicts the deterrence argument. Gavron, *op. cit.* (note 39), p. 111.

¹³⁷ On a discussion of these possible ways to accommodate amnesties within the Rome Statute, see also generally, M. Scharf, “The amnesty exception to the jurisdiction of the International Criminal Court”, *Cornell International Law Journal*, Vol. 32, 1999, p. 507; R. Wedgwood, “The International Criminal Court: An American view”, *European Journal of International Law*, Vol. 10, 1999, p. 97; G. Hafner, K. Boon, A. Rübesame and J. Huston, “A response to the American view as presented by Ruth Wedgwood”, *European Journal of International Law*, Vol. 10, 1999, p. 107.

¹³⁸ Security Council resolutions 827, S/RES/827 (1993), 27 May 1993, and 955, (1994) respectively. In Security Council resolution 827 (1993) which established the ICTY, the Security Council stated that it was “[c]onvinced that (...) the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim [of putting an end to such crimes] to be achieved and would contribute to the restoration and maintenance of peace.” Security Council resolution 827, preambular para. 6.

crimes (and other international crimes), the statutes establishing the courts generally reject any possibility of recognition of amnesties for international crimes. The Statute of the Special Court for Sierra Leone expressly prohibits recognizing amnesties for serious international crimes within the jurisdiction of the Court,¹³⁹ as does the regulation establishing a Commission for Reception, Truth and Reconciliation in East Timor¹⁴⁰ and the Law on the Extraordinary Chambers in Cambodia.¹⁴¹ It could be argued that this rejection of amnesties for international crimes in the statutes of these courts is evidence of their illegality under international law and the impossibility for courts to give them recognition. However, the fact that these instruments needed to explicitly rule out recognizing amnesties for international crimes suggests that in the absence of a clause directing a court to disregard such amnesties, the courts would normally be able to recognize an amnesty for international crimes insofar as this was in accordance with international law.

Limits which international law imposes on a domestic or international court's ability to recognize an amnesty for war crimes

International law as a legal regime needs to accord with political realities in order to remain relevant, but should always be interpreted in a manner consistent with its rationale. If credence is given to the notion of transitional or restorative justice which secures the principle of legal adjudication of violations and consequently the basic tenets of democratic order and fundamental human rights, while not requiring unlimited prosecution, then limited amnesties within internationally accepted parameters can be considered consistent with the fundamental principles of international law as well as with the purposes and principles of the UN Charter.

It is thus necessary to determine whether or not an amnesty law is justified under international law. It is possible to glean from State practice and the decisions of national and international courts the elements which would seem to point towards an acceptable form of amnesty. In summary these would appear to be the following cumulative criteria: (1) the amnesty

¹³⁹ Statute of the Special Court for Sierra Leone, Art. 10, 16 January 2002.

¹⁴⁰ Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Schedule 1(4) and Section 22.2, UNTAET/REG/2001/10, 13 July 2001.

¹⁴¹ Art. 40 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 15 January 2001.

is prescribed and limited to achieving certain objectives, in particular, the objectives of securing peace and initiating or furthering reconciliation; (2) the amnesty is accompanied by other accountability measures such as truth commissions, investigatory bodies, or lustration; (3) the amnesty is not self-proclaimed, i.e., it is the result of negotiation between the outgoing and incoming regimes or of a peace deal brokered by international parties, such as the United Nations; and (4) the amnesty only applies to lower ranking members of armed forces or groups or those considered “least responsible” for the perpetration of international crimes. Attempts to exonerate persons accused of war crimes which do not fit into the above criteria, or which otherwise fail to conform to the fundamental principles of international law, should not in principle be accorded recognition by domestic or international courts.

Validity on the basis of the purpose of the amnesty

This basis for validity is founded on the argument that *but for* the recognition of a limited amnesty for war crimes it will be impossible, or at least much more difficult, to secure peace or to initiate or further the process of reconciliation which may be in conflict with a policy of unlimited prosecution. This argumentation was used by the Constitutional Court of South Africa to justify the broad amnesties granted under the Promotion of National Unity and Reconciliation Act 34 of 1995.¹⁴² While this judgment may be criticized for failing to thoroughly examine conventional and customary rules that require prosecution of international crimes and the question whether the Interim Constitution intended (or was able) to overrule these,¹⁴³ there is considerable evidence on the other hand that the “amnesty for truth” deal negotiated between the outgoing *apartheid* regime and the new government prevented the outbreak of a civil war.¹⁴⁴

¹⁴² Judge Mahomed found that “but for a mechanism for amnesty, the ‘historic bridge’ [the negotiated transition to democratic rule] itself might never have been erected.” *AZAPO case*, *op. cit.* (note 18), para. 19.

¹⁴³ The Court only considered the question of whether the provisions of the 1949 Geneva Conventions requiring prosecution for “grave breaches” were applicable (which it held were not), but made no attempt to examine rules relating to genocide, torture, war crimes or crimes against humanity. Given that *apartheid* has been deemed a crime against humanity by the General Assembly and the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, it is surprising that no attempt was made to address the question whether customary international law requires the prosecution of those who commit this crime.

¹⁴⁴ See Scharf, “The amnesty exception”, *op. cit.* (note 138), p. 510.

The UN has also shown support for amnesty agreements covering international crimes that appear necessary to end military stand-offs.¹⁴⁵ In recent years, however, there has been a tendency for it to reject the possibility of amnesties for international crimes in peace agreements.¹⁴⁶ Nonetheless, this practice does not foreclose all possibility of recognition of such amnesties, but merely puts the legal threshold and justification requirements for the recognition of amnesties for war crimes extremely high. In order to recognize an amnesty for war crimes, a domestic or international court would have to demonstrate that the amnesty is justified under the “but for” test as enunciated above. It may be noted that such a test stands in contrast to the Security Council’s resolutions requesting the ICC to refrain from exercising jurisdiction over nationals of non-party States to the Rome Statute which fail to positively identify a threat to the peace to justify the non-prosecution of such nationals accused of international crimes.¹⁴⁷

Validity on the basis that the amnesty is accompanied by other accountability measures

This justification stems from the idea that there are significant nuances to the concept of justice in transitional societies.¹⁴⁸ A “restorative justice” approach suggests that targeted prosecution together with a range of other accountability mechanisms fulfil a State’s duty to address accountability and put an end to impunity. Mr Joinet, in his “Final Report on the question of

¹⁴⁵ For example, in 1993 the United Nations gave its full support to the Governors Island Agreement which granted full amnesty to members of General Cedras’ and Brigadier General Biamby’s military regime accused of committing crimes against humanity in Haiti from 1990-1994. The Security Council described the Agreement as “the only valid framework for resolving the crisis in Haiti”. Statement of the President of the Security Council, UN SCOR, 48th Sess., 329th metg., at 26, UN Doc. S/INF/49 (1993). See M. Scharf, “Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?”, *Texas International Law Journal*, Vol. 31, No. 1, 1996, pp. 1-42.

¹⁴⁶ For example, although the UN endorsed the 1999 Lomé Peace Agreement ending the civil war in Sierra Leone, which included a broad amnesty, UN Special Representative for Sierra Leone Francis Okelo made an oral disclaimer that the amnesty does not apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. UN Doc. S/1999/836, p. 2, para. 1. See generally, C. Stahn, “United Nations peace-building, amnesties and alternative forms of justice: A change in practice?”, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 191.

¹⁴⁷ See text accompanying notes 38-45.

¹⁴⁸ Teitel explains that transitions imply a paradigm shift in the conception of justice: while in normal times the law maintains law and order, in periods of political upheaval, the legal responses create a “sui generis paradigm of transformative law”. Teitel, *op. cit.* (note 2), p. 2014.

the impunity of perpetrators of violations of human rights”, proposed under Principle 19 – Purpose of the Right to Justice – that:

“There can be no just and lasting reconciliation (...) without an effective response to the need for justice; the prerequisite for any reconciliation is forgiveness which is a private act that implies that the victim knows the perpetrator of the violations and that the latter has been able to show repentance. Over and above any verdict, that is the essential purpose of the right to justice.”¹⁴⁹

This conception of justice implies that a limited amnesty combined with an effective truth commission could satisfy “the essential purpose of the right to justice”.¹⁵⁰ Whereas in the past truth commissions have been set up as a substitute for trials, authoritative sources have made it clear that they are insufficient in themselves to constitute an adequate response by States to serious violations.¹⁵¹ However, there has been a concerted move, headed by the United Nations, towards establishing truth commissions as a *complementary* mechanism for trials, together with a restricted amnesty limited to those “least responsible” for perpetrating the least serious crimes. This development can be seen in the post-conflict measures adopted in Sierra Leone¹⁵² and East Timor¹⁵³ and may well also be applied to Cambodia,¹⁵⁴ Afghanistan¹⁵⁵ and Iraq.¹⁵⁶

¹⁴⁹ Joint Report, *op. cit.* (note 22), Principle 19.

¹⁵⁰ Gavron, *op. cit.* (note 39), p. 111.

¹⁵¹ See, for example, *Garay Hermonsilla et al. v. Chile*, Case 10.843, Report No. 36/96, Inter-Am, C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997); Inter-American Commission on Human Rights, Report No. 26/92 (El Salvador), 82nd Sess., OEA/ser. L/V/II/82 (24 September 1992); Report No. 29/92 (Uruguay), 82nd Sess. OEA/ser. L/V/II.82, Doc. 25 (2 October 1992); Report No. 24/92 (Argentina), 82nd Sess. OEA/ser. L/V/II.82, Doc. 24 (2 October 1992).

¹⁵² See Truth and Reconciliation Commission Act 2000 of 22 February 2000 (Sierra Leone) and Art. XXVI of the 1999 Lomé Peace Agreement. See also *Briefing Paper on the Relationship between the Special Court and the Truth and Reconciliation Commission*, Office of the Attorney General and Ministry of Justice Special Court Task Force, Planning Mission 7-18 January 2002, p. 8.

¹⁵³ Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001.

¹⁵⁴ S. Linton, “KR trials are vital, but won’t solve everything”, *Phnom Penh Post*, Issue 11/26, 20 December 2002 – 2 January 2003.

¹⁵⁵ President Karzai of Afghanistan has pledged to set up a truth commission which would seek to uncover the atrocities committed over two decades of war and to seek accountability for perpetrators of past abuses of human rights. See statement by Mary Robinson, United Nations High Commissioner for Human Rights, at the opening of the 58th Session of the Commission on Human Rights, Geneva, 18 March 2002.

¹⁵⁶ A. Boraine, “Let the UN put Saddam on trial”, *International Herald Tribune*, 21 April 2003.

The introduction of the *gacaca*¹⁵⁷ trials in Rwanda as a way to relieve the overcrowding in jails of those accused of participating in the 1994 genocide and awaiting trial at the ICTR also reflects this approach of combining prosecution with other accountability measures dealing with less serious offences.¹⁵⁸

Validity on the basis of how the amnesty deal is achieved

Where amnesties are granted through non-legitimate means, for example, through a decree of a *de facto* government or a law passed by a non-democratically elected legislature, they may be denied legal force owing to their irregular means of promulgation and may be summarily overturned.¹⁵⁹ In Spain, for example, amnesty laws passed for political reasons by military regimes in Chile and Argentina are not considered to be a bar to the exercise of universal jurisdiction.¹⁶⁰ Furthermore, amnesties which cover crimes committed by the State or its agents allow the State to judge its own case. This result violates the general principle of law forbidding self-judging.¹⁶¹ Self-proclaimed amnesties are therefore unlikely to be considered valid under international law.¹⁶²

157 *Gacaca* is a Kinyarwanda term for the grass on which traditional village assemblies used to be held. In practice, it means that individuals from the communities act as “people’s judges”. The law instituting the *gacaca* was adopted on 12 October 2000 by the National Assembly of Transition. See L. Olson, “Mechanisms complementing prosecution”, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, p. 186.

158 There are approximately 120,000 individuals detained in connection with the 1994 genocide in Rwanda. It is has been estimated that Rwandan national courts and the ICTR would need at least 100 years to try all of them. *Ibid.*

159 See for example *Garay Hermonsilla et al. v. Chile*, *op. cit.* (note 152): “A *de facto* government lacks legal legitimacy (...). It is not juridically acceptable that such a regime should be able to restrict the actions of the constitutional government succeeding it as it tries to consolidate the democratic system, nor is it acceptable that the acts of a *de facto* power should enjoy all those attributes that accrue to the legitimate acts of a *de jure* power.” See also L. Joinet and E. Guisse, “Study on the question of the impunity of perpetrators of human rights violations”, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1993/6, 19 July 1993; W. Burke-White, “Reframing impunity: Applying liberal international law theory to an analysis of amnesty legislation”, *Harvard International Law Journal*, Vol. 42, No. 2, 2001, p. 479.

160 See V. Buck, “Droit espagnol”, in A. Cassese and M. Delmas-Marty (eds), *Juridictions nationales et crimes internationaux*, Presses Universitaires de France, Paris, 2002, pp. 154-155.

161 The Permanent Court of International Justice referred to the “well-known rule that no one can be judge in his own suit” in the 1925 *Frontier between Iraq and Turkey* case. Art. 3, para. 2 of the Treaty of Lausanne (frontiers between Turkey and Iraq), 1925 PCIJ (ser. B), No. 12, p. 32 (Nov. 21, 1925).

162 See Inter-American Commission on Human Rights, Report No. 133/99, Case 11,725 *Carmelo Soria Espinoza* (Chile), 19 November 1999, para. 76; *Case of Barrios Altos*, *op. cit.* (note 15), para. 41: “States parties to the Convention who adopt (...) self-amnesty laws, are in breach of articles 8 and 25 of the Convention. Self-amnesty laws leave victims defenceless and perpetuate impunity and are therefore clearly incompatible with the letter and spirit of the American Convention.”

On the other hand, amnesties negotiated by incoming and outgoing regimes to facilitate the transition, as in the case of South Africa, or those brokered or approved by the United Nations, are more likely to be recognized by foreign or international courts. It is instructive to note, for example, that during the *apartheid* regime the UN General Assembly strongly condemned *apartheid* as a gross violation of human rights and a crime against humanity and called on States to prosecute offenders under the *Apartheid Convention*.¹⁶³ Since the proclamation of the new Constitution containing the amnesty clause in its final section, the General Assembly has adopted resolutions that welcome the transition to democracy and are silent on the duty to prosecute.¹⁶⁴

Validity on the basis of who receives an amnesty

This basis for the validity of limited amnesties derives from the view that amnesties should be applicable only to subordinates, and that those “most responsible” should not be able to benefit from them. Where large-scale violations of the laws of war have been committed, the prosecution of all alleged offenders is neither capable of preventing such crimes in the future, nor would it necessarily have been effective as a deterrent.¹⁶⁵ Furthermore, a requirement that a government should attempt to prosecute everyone who may be criminally liable could be hugely destabilizing for the social structure, as well as placing impossible demands on the judicial system, which is usually weak in transitional societies. It has been strongly argued by a number of commentators that in this situation a limited programme of exemplary punishment could have a significant deterrent effect and thereby achieve the aim justifying the general duty to punish atrocious crimes.¹⁶⁶ This principled/exemplary approach has been adopted in the Statute of the Special Court for Sierra Leone and the Law Establishing the Extraordinary Court of Cambodia, both of which only have jurisdiction over those bearing the most

¹⁶³ E.g. UNGA Res/36/13, 28 October 1981, and A/Res/37/47, 3 December 1982.

¹⁶⁴ E.g. UNGA Res/48/159, 20 December 1993.

¹⁶⁵ See Ratner and Adams, *op. cit.* (note 14), p. 338.

¹⁶⁶ See Orentlicher, *op. cit.* (note 14), p. 2601. Campbell, on the other hand, has argued that since exemplary trials mean only a small number of trials, individual violators will know that the chances of being punished are remote, and the deterrent value will be correspondingly low. C. Campbell, “Peace and the laws of war: The role of international humanitarian law in the post-conflict environment”, *International Review of the Red Cross*, No. 839, 2000, p. 630.

responsibility for crimes committed on their territories.¹⁶⁷ The “jurisdictional threshold” clause in Article 8 of the Rome Statute directing the ICC to focus on war crimes committed as part of a plan or policy could also suggest that the ICC will concentrate mostly on persons responsible for devising and implementing plans for the commission of such crimes. This indicates that amnesties for war crimes could be recognized for persons considered “least responsible”, whereas those in positions of authority should not be covered.

Prosecution of persons who were most responsible for designing and implementing a policy or plan to commit war crimes, together with a limited amnesty for those considered “least responsible”, would fulfil a State’s duty not to condone such violations or recognize as lawful a situation created by the breach of *jus cogens*.¹⁶⁸ This theory is also consistent with the *Restatement* view, according to which customary law would be violated by complete impunity for repeated or notorious instances of human rights violations, but would not require prosecution of every person who committed such an offence.¹⁶⁹

This conclusion has significant ramifications with regard to the international principle of immunity for foreign heads of State and other high-ranking officials. Almost all the special courts set up to deal with war crimes and other serious international crimes exclude immunity for State officials. However, in the light of the ICJ decision in the *Arrest Warrant* case, in which the Court upheld the absolute immunity of incumbent ministers of foreign affairs under customary law,¹⁷⁰ domestic and quasi-international courts may face a further legal obstacle in prosecuting persons most responsible for the commission of war crimes. In some domestic cases dealing with the immunity of foreign States the *jus cogens* nature of war crimes has been used to

¹⁶⁷ Art. 1 of the Statute of the Special Court for Sierra Leone, *op. cit.* (note 140); Art. 1 of the Law on the Establishment of Extraordinary Courts of Cambodia, *op. cit.* (note 142). With regard to the phrase “those bearing the greatest responsibility” in the Statute of the Special Court for Sierra Leone, the UN Secretary-General has stated that it “does not mean that the personal jurisdiction is limited to the political and military leaders only. Therefore, the determination of the meaning of the term ‘persons who bear the greatest responsibility’ in any given case falls initially to the Prosecutor and ultimately to the Special Court itself.” Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40. This clarification is important, as it avoids the criticism that selective prosecutions which elevate official status over traditional understandings of criminal liability vitiate the principle that that the level of fault should determine criminal responsibility. See Teitel, *op. cit.* (note 38), p. 2041.

¹⁶⁸ See notes 112-136 above and accompanying text.

¹⁶⁹ See notes 135-136 above and accompanying text. Orentlicher, *op. cit.* (note 14), p. 2599.

¹⁷⁰ See note 8.

argue the denial of sovereign immunity, mainly on the ground that conduct which is a criminal offence under international law cannot simultaneously be protected by international law.¹⁷¹ This is a cogent argument for denying immunity to authorities or officials of foreign States who are responsible for plans or policies for the commission of war crimes. The consequences of the *jus cogens* nature of war crimes in regard to the principle of immunity was an issue not touched upon in the *Arrest Warrant* case.¹⁷²

It is submitted that there are strong arguments for denying the immunity of former high-ranking State officials on the basis of the *jus cogens* nature of the prohibition of war crimes, which supersedes any other principle of international law, including immunities of foreign heads of State.¹⁷³ Furthermore, to uphold the immunity of a person accused of ordering the commission of large-scale war crimes would arguably amount to recognizing a situation created by the serious breach of a peremptory norm as lawful, a result clearly prohibited under customary international law. Considering that immunities for foreign officials are a privilege deriving from the sovereign independence of States, it is illogical that international law would give protection to State officials for acts deemed so serious that they are prohibited in all circumstances by that same international legal system.

171 For example, Lord Brown-Wilkenson in *Pinochet No. 3*, *op. cit.* (note 127), said: "A former head of state cannot show that to commit an international crime is to perform a function which international law protects by giving immunity." In the Greek case of *Prefecture of Voiotia v. Federal Republic of Germany*, dealing with violations of Articles 43 and 46 of the Hague Regulations which the Court found to be *jus cogens* crimes, the court of first instance found that when a State breaches a *jus cogens* crime, there is a tacit waiver of sovereign immunity. Furthermore, recognition of immunity would amount to collaboration in the crimes. Thirdly, violations of *jus cogens* norms cannot be a source of legal rights. Case No. 11/2000, *Areios Pagos* (Hellenic Supreme Court), 4 May 2000, reported by Gavouneli and Banktekas in the *American Journal of International Law*, Vol. 95, 2001, p. 198.

172 In the possible upcoming case before the ICJ concerning the international arrest warrant issued by the Special Court for Sierra Leone against former Liberian President Charles Taylor, the ICJ will first have to decide whether the nature of the Special Court, based on an agreement between the government of Sierra Leone and the United Nations, is equivalent to that of an international criminal court. According to the ICJ in the *Arrest Warrant* case, "certain international criminal courts" may constitute an exception to the principle of immunity of incumbent high-ranking State officials. *Arrest Warrant* case, *op. cit.* (note 8), para. 61. If the ICJ finds that the Special Court is binding only on Sierra Leone and the United Nations, in spite of the Security Council's support for the Court, the ICJ will then have the opportunity to assess the import of the *jus cogens* nature of the crimes of which Taylor is accused for his possible immunity under customary international law.

173 The fact that the ICJ listed a number of exceptions to the immunities principle in the *Arrest Warrant* case indicates that this customary principle is not a peremptory norm of *jus cogens* and should therefore be derogated from when in conflict with a peremptory norm of *jus cogens*.

This may be contrasted with the argument that certain limited amnesties for *jus cogens* crimes such as war crimes may be recognized because they do not constitute a recognition of the situation created by the breach of the peremptory norm as lawful. In the case of an internationally acceptable amnesty, this bar to prosecution of war crimes is motivated by the need to facilitate the most effective progress towards peace; its purpose is certainly not to protect those most responsible for such crimes. In addition, other accountability measures instituted in conjunction with the amnesty would ensure that the truth about the violations is documented, thereby enabling victims to have some sense of justice being done.

Conclusion

Obligations incumbent on States with regard to the enforcement of rules prohibiting war crimes do not preclude international recognition of restricted amnesties for war crimes which nonetheless enable societies to acknowledge and condemn offences committed during conflict or repressive rule.

Under customary international law, States may be either entitled or obliged to prosecute those accused of war crimes depending on the nature of the offence. The trend towards a customary duty to prosecute all war crimes should not be equated with a total invalidation of amnesties for such offences. What has been rejected by the international community is the culture of impunity, which was seen as an impediment to peace and the antithesis of all notions of justice. Amnesties covering war crimes may be recognized in the limited circumstances where their non-recognition would amount to a threat to peace and security, for example, by undermining a peace agreement or provoking the overthrow of a newly established civilian government. Even in these circumstances, only those amnesties which are limited to internationally acceptable parameters and which are not inconsistent with the fundamental obligations of States under customary law should be accorded international validity.

Résumé

Amnistie pour crimes de guerre: définir les limites de la reconnaissance internationale

Yasmin Naqvi

L'action pénale contre les personnes accusées d'avoir commis des crimes de guerre est un aspect fondamental du droit d'une victime à la justice. Toutefois, dans les conflits armés où des violations graves du droit international ont été perpétrées massivement, il est souvent nécessaire d'établir un équilibre entre le droit des victimes à obtenir justice de manière tangible et le besoin, pour l'État territorial, de traiter les atrocités passées de façon à ne pas engendrer de nouvelles violences et à stimuler le processus de réconciliation. Dans de telles circonstances, une justice réparatrice associant des amnisties limitées à d'autres mécanismes de responsabilité peut constituer un moyen d'assurer l'État de droit tout en tenant compte de la complexité du processus de transition. Quand des États vivant une situation de transition proclament de telles amnisties, il est important d'établir si celles-ci seront reconnues par la communauté internationale.

Cet article analyse les règles et les principes internationaux qui fondent ou étayent la décision que prend un tribunal national ou international de reconnaître ou non une amnistie couvrant les crimes de guerre. L'auteur s'attache d'abord à déterminer s'il existe un devoir coutumier de traduire en justice les personnes accusées de crimes de guerre, quels qu'ils soient. Les effets du caractère de jus cogens de l'interdiction de commettre des crimes de guerres sont également examinés, tout comme la pratique plus récente des États d'établir des tribunaux spéciaux pour juger les personnes accusées de crimes de guerre. L'article fait valoir que le droit international n'interdit pas aux tribunaux nationaux et internationaux d'accorder une amnistie limitée à ceux qui sont considérés comme « les moins responsables » de la commission des crimes de guerre, lorsque l'amnistie est associée à des mesures de contrôle et vise à faciliter l'instauration d'une paix durable.

