

DOMESTIC AMNESTY FOR INTERNATIONAL CRIMES AND THE ICC PROSECUTOR: WHEN TO EXERCISE RESTRAINT IN THE ‘INTERESTS OF JUSTICE’?

Abstract

The provisions of the preamble and article 17(1)(a) of the Rome Statute imply that the Statute excludes national amnesties for international crimes and that, accordingly, such amnesties do not bar the jurisdiction of the ICC over a crime. From a practical point of view, however, a difficulty may arise when the ICC wants to exercise jurisdiction and bring perpetrators of international crimes to justice while an amnesty law has been passed in the country where the crimes were committed and the prevailing political situation in that country is that any foreign interference is likely to destabilise a transition in the affected State. In these situations the ICC Prosecutor may be required to exercise restraints in order to allow the territorial State to move forward. This article suggests new guidelines which the ICC Prosecutor should take into account when deciding whether or not to institute a prosecution in relation to a person who has benefited from an amnesty law in his home State.

Keywords: *Amnesty, international crimes, ICC, Rome Statute, interests of justice*

1. Introduction

The Rome Statute is silent on the question of national amnesty laws for international crimes over which the International Criminal Court (ICC) has jurisdiction. No provision is made for lack of jurisdiction, or otherwise, by the ICC over a case in the event that a person has been granted amnesty under the domestic law of a State.¹ Nevertheless, the provisions of the preamble² and article 17(1) (a)³ of the

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¹J. Dugard, ‘Possible Conflicts with Truth Commissions’, in A. Cassese, P. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court: A Commentary* Vol I (2002), 693, 700; G. Werle *Principles of International Criminal Law* (2009) 78 and P.T.K. Rakate *The Duty to Prosecute and the Status of Amnesties Granted for Gross and Systematic Human Rights Violations in International Law: Towards a Balanced Approach Model* (2004) 191.

²Paragraph 5 of the Preamble to the Rome Statute states that State Parties are “determined to put an end to impunity for the perpetrators” of international crimes as defined in the Statute, that “the most serious crimes of concern to the international community as a whole must not go unpunished”, and that “their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. The Vienna Convention on the Law of Treaties provides that a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (art 31(1)). Since the object and purpose of the Rome Statute are obviously to end impunity for the gross violations of human rights, it seems quite clear that the above provisions of the Preamble are incompatible with national amnesties (M.P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 32 *Cornell International Law Journal* (1999) 507, 522). The Vienna Convention on the Law of Treaties also provides that treaties must be performed in good faith (art 26: *Pacta sunt servanda*). In light of this provision and of the overall purpose of the Rome Statute (to end impunity for gross human rights violations), adopting an amnesty for the ICC crimes would be contrary to the duty of good faith performance with regard to the duty stated in the Preamble (R. Bellelli, ‘The Establishment of the System of International Criminal Justice’, in R. Bellelli (ed), *International Criminal Justice: Law & Practice from the Rome Statute to its Review* (2000) 5, 38). Accordingly, it must be concluded that amnesties are contrary to State Parties’ obligations under the Rome Statute and that this places amnesties for international crimes outside the realm of State Parties’ sovereignty.

³Article 17(1)(a) of the Rome Statute sets out the conditions for the admissibility of a case before the ICC. If one of these conditions is not met, a case will be declared inadmissible by the ICC Pre-Trial Chamber. Under this article, a case will not be admissible if it 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. This provision embodies the principle that, on the one hand, the ICC is not meant to replace national courts, but that, on the other hand, in order to end impunity of gross violations of human rights, the ICC will take over a case, where the State’s authorities are unwilling or unable to genuinely investigate and prosecute a case (A. O’Shea, *Amnesty for Crime in International Law and Practice* (2002) 257). It has been argued that since amnesty laws preclude the possibility

Rome Statute imply that the Statute excludes national amnesties and that, therefore, such amnesties do not bar the jurisdiction of the ICC over a crime.

From a practical point of view, a difficulty may arise when the ICC wants to exercise jurisdiction and bring perpetrators of international crimes to justice while an amnesty law has been passed in the country where the crimes were committed and the prevailing political situation in that country is that any foreign interference is likely to destabilise a transition in the affected State from, for example, an authoritarian or minority regime to democracy or majority rule. In these situations a consensus seems to exist among legal scholars that the ICC Prosecutor may be required to exercise restraints in order to allow the territorial State to move forward. This paper challenges the guidelines which have been suggested for the ICC Prosecutor thus far and recommends new factors that should guide him in this delicate exercise.

2. Policy arguments in favour of domestic amnesties

Experience has shown that criminal justice is not always the only consideration in peace-making and building of democratic institutions. Under certain extreme circumstances, it may be necessary to sacrifice the pursuit of justice for other social and political imperatives. For example, rebel groups or entrenched oppressive regimes may be reluctant to cease hostilities or relinquish power if they know that they will face prosecution thereafter.⁴ During such politically sensitive times, the international community's interest in bringing the perpetrators of serious violations of human rights to book should be reconciled with the equally compelling needs of the territorial State which is trying to move on from the past towards peace, democracy and stability.⁵ Despite the strong message that the ICC would send to the rest of the world that perpetrators of international crimes would no longer escape accountability, respecting a national amnesty might, under the circumstances, best serve the interests of the affected populations.⁶ If pursuing justice before the ICC may cause more bloodshed and suffering in the affected State, the quest for justice may yield to the quest for peace. In fact, this reality is recognised in the Rome Statute. Although no express provision for amnesty is made in the Rome Statute, the fact that provision was made that the Security Council may determine that intervention by the ICC may jeopardize peace and security,⁷ indicates that States Parties contemplated the possibility that criminal justice may imperil

for national authorities to investigate a case for the purposes of trial and punishment, such amnesties cannot bar a case from being admissible under article 17(1)(a). Instead, amnesties ought to be regarded as evidence of inability or unwillingness of national authorities to prosecute (Rakate, *supra* note 1, 94). Given this interpretation, it is clear that the drafters of the Statute did not consider amnesty as a bar to the exercise of the ICC's jurisdiction (Rakate, *supra* note 1, 197; C. VandenWyngaert and T. Ongena, 'Ne bis in idem Principle, including the issue of Amnesty' in A. Cassese, P. Gaeta and J. Jones *The Rome Statute of the International Criminal Court: A Commentary* Vol I (2002) 705, 727 and M.M. Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law* (2002) 869, 941.

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

⁵Y. Naqvi, 'Amnesty for war crimes: Defining the Limits of International Recognition', 85 *International Review of the Red Cross* (2003) 583, 586. See also J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008), 463-464 and Trumbull, *supra* note 4, 314.

⁶See also Stigen, *supra* note 5, 463-464.

⁷Art 16 (titled "Deferral of investigation or prosecution"): "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". See also Stigen, *supra* note 5, 427 and Naqvi, *supra* note

peace and security. Furthermore, under article 53 of the Rome Statute, the ICC Prosecutor has discretion not to initiate an investigation or prosecution if, having regard to the interests of victims, he determines that an investigation would not serve the interests of justice. This gives the ICC Prosecutor a measure of prosecutorial discretion which allows him to take cognizance of the prevailing political situation in a particular State and to exercise that discretion in favour of differing to an amnesty process in the affected State.⁸

It is important to note, however, that the above provisions of the Rome Statute that allow the Security Council and the ICC Prosecutor to defer in favour of national amnesties are delaying mechanisms only, not means to achieve a permanent recognition of domestic amnesties in international law. What these articles say is that if a choice has to be made between peace and criminal justice, peace may be given priority.⁹ That does not make amnesties for international crimes lawful. It simply means that impunity can be temporarily tolerated where the quest for justice would prolong the agony of the populations in the affected State.¹⁰ But that is only a temporal measure, once the internal situation has improved, the ICC Prosecutor can proceed with investigation and prosecution.¹¹ In light of this consideration, it must be clear that although the Rome Statute permits the Prosecutor to disregard domestic amnesties, a decision by the Prosecutor to initiate a prosecution should be taken with some level of political judgement and a degree of flexibility of approach. It would, for example, not be wise for the Prosecutor to request the Pre-Trial Chamber to issue an arrest warrant against a member of a rebel group who would be in a foreign country for peace negotiations which are being conducted under the auspices of the government of that country in an attempt to end a protracted and bloody civil war. In a situation such as this, arresting the delegate would be irresponsible because that could disrupt the mediation process and cause people living in the State where the crimes occurred to bear extended hostilities. By pursuing this course of action, the Prosecutor would be saying: '[W]e are not willing to risk the loss of our own soldiers' to rescue the victims in the war-torn state, but 'we are willing to allow more people

5, 592: "This provision signals that peace and justice do not always coincide and that where they appear to be in conflict, the objective of securing or maintaining peace will prevail".

⁸Dugard, 'Possible Conflicts with Truth Commissions', *supra*, note 1, 702. See also O'Shea, *supra* note 3,317: "A flexible understanding of justice, as employed in article 53 of the Rome Statute, might afford the Prosecutor a broad political decision-making power. This might include the ability to refrain from prosecuting where it would not in his or her view be in the overall interests of the international community or the collective needs of a state". See also H.J. Lubbe, *Successive and Additional Measures to the TRC Amnesty Scheme in South Africa: Prosecutions and Presidential Pardons* (2012), 32: "Despite the fact that it is silent on amnesty in that it does not recognise amnesty as a defence against prosecution, the provisions that were adopted at the Rome Conference have been held to reflect "creative ambiguity" which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the ICC". See further Rakate, *supra* note 1, 120.

⁹O'Shea, *supra* note 3, 83.

¹⁰In particular, although article 53 allows the ICC Prosecutor to take cognizance of a national amnesty process (Rakate, *supra* note 1, 120 and J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', 51 *International and Comparative Law Quarterly* (2002) 91,110), it must be kept in mind that this article only creates discretionary power that the Prosecutor may exercise at will. It does not create any right for the state that granted the amnesty for the accused who benefited from it to challenge a case from being admissible before the ICC.

¹¹Gavron, *supra* note 10, 109: "I disagree with the reasoning that equates requiring the court to defer (post-pone) its jurisdiction for 12 months to requiring it to defer (submit) to a national amnesty. Deferring to a national amnesty implies (since amnesty laws are rarely overturned) a permanent respect for that amnesty. While it is true that the Security Council may renew this provision, it is unlikely to be renewed more than a few times (if at all). In my opinion Article 16 was intended as a delaying mechanism only, to prevent the Court intervening in the resolution of an ongoing conflict by the Security Council. It would be an unwieldy provision to invoke to achieve permanent respect for an amnesty law". For a contrary view, see Lubbe, *supra* note 8, 32: "Clearly there is a place for (permissible) amnesty in international law today. The *Rome Statute* can be used as support for this view".

in the conflict-ridden state to die in order to preserve the right to seek justice on behalf of mankind'.¹² Such a position would clearly be a selfish one as it would only be considering the interests of the international community at the expense of the more compelling interests of the people living in the State in transition. That clearly is not desirable. The different situations in which prosecutorial discretion should be exercised in favour of domestic amnesties are immediately discussed below.

3. Suggested guidelines for the ICC Prosecutor

The suggestion that some amnesties may deserve international recognition raises the question about drawing a line between 'permissible and impermissible amnesties'.¹³ This section suggests situations that should prompt the ICC prosecutor to recognise amnesties passed by affected States and factors that should not matter in this regard.

3.1. Situations where restraint should be exercised in favour of amnesties

Amnesty for ending a rebellion

One of the responsibilities of a government is to protect its citizens against violence and atrocities.¹⁴ Thus, for many years, amnesties have been used as incentives to quell rebellions by encouraging combatants to leave their organizations and end war.¹⁵ For example, between 1992 and 1999 Algeria experienced a civil war between government forces and the banned Islamist movement, the *Front Islamiste du Salut* (FIS). The violence started in 1992 after the country's first democratic multi-party elections to elect a Parliament.¹⁶ Preliminary reports from the election indicated that the FIS, an Islamic party that had declared its opposition to democracy, was set to win a majority of seats in Parliament. The military annulled the elections, declared martial law, established a transitional government and banned the FIS from all political participation.¹⁷ A bloody civil war ensued in which between 100,000 and 200,000 people died.¹⁸ In July 1999, in an attempt to bring the rebellion to an end, President Abdelaziz Bouteflika passed the *Civil Concord Law*¹⁹ which granted amnesty to perpetrators of the acts of rebellion against the government on condition that they surrender and hand over their weapons to the government within a specified period.²⁰ However, since the amnesty provision of this law did not apply to those who had committed acts of murder, rape, grievous bodily injuries resulting in permanent infirmity and those who had used explosives in public places, the amnesty offer was seen as insufficient by most insurgents and only a very few of them surrendered themselves to the government.²¹ As a response, a presidential decree of 12 January 2000 extended the amnesty to all combatants, regardless of the nature of the crimes they had committed.²² Subsequent to the promulgation of this amnesty

¹²Trumbull, *supra* note 4, 319.

¹³Dugard, 'Possible Conflicts with Truth Commissions', *supra* note 1, 699.

¹⁴Stigen, *supra* note 5, 421.

¹⁵Rakate, *supra* note 1, 41 and Reisman, *supra* note 4, 78.

¹⁶Trumbull, *supra* note 4, 327.

¹⁷Trumbull, *supra* note 4, 327.

¹⁸Algeria-Watch, 'Algerian amnesty draws in Islamists' (2006), available at http://www.algeria-watch.org/en/articles/2006/algerian_amnesty.htm (last visited 28 Jan 2018)

¹⁹Art 3 Loi no 99-08 du 29 Rabie El Aouel 1420 Correspondant au 13 juillet 1999 Relative au Rétablissement de la Concorde Civile (Official Journal of the Republic of Algeria No 46 of 13 July 1999).

²⁰Art 3. See also Rakate, *supra* note 1, 42-43.

²¹Algeria-Watch 'Algérie: Concorde Civile, Impunité et Droit International' (2001), available at <http://www.algeria-watch.de/farticle/kettani.htm> (last visited 4 Feb 2018).

²²Articles 1 and 2 Décret Présidentiel no 2000-03 du 4 Chaoual 1420 Correspondant au 10 Janvier 2000 Portant Grace Amnistiante (Official Journal of the Republic of Algeria No of 12 January 2000).

decree, the vast majority of militants laid down their weapons and Algeria is now a stable State.²³ This experience of Algeria shows that where insisting on prosecuting the perpetrators of past crimes may prolong the suffering to the local populations and cause more crimes, the State should prioritise the safety of the citizens and forego criminal justice.²⁴ Insisting on criminal accountability for the crimes committed by the FIS fighters would have prolonged the agony and suffering of innocent civilians. No responsible government can take that option. Criminal justice, as important as it may be, must be secondary to the search for peace.²⁵ As one commentator has remarked ‘the quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow’.²⁶

Amnesty for maintaining peace and stability after a fragile democratic transition

In addition to being used as a means of ending a civil war, amnesties have also been used as a means of ensuring the survival of newly-established democratic civilian governments. This has occurred in Latin American countries in the period when democracies replaced dictatorships where the successor governments failed to prosecute the members of the security apparatuses for the crimes committed during military rule. The most telling example is the experiences of Argentina in the 1980s. Between 1976 and 1983, Argentina experienced seven years of military dictatorship after a coup deposed President Isabel Peron.²⁷ When he was democratically elected in 1983, President Raul Alfonsin issued a decree ordering the arrest and prosecution of high-ranking military officers for crimes committed during the so-called ‘war against subversion’ in the late 1970s and early 1980s.²⁸ Some five senior former members of the army were prosecuted.²⁹ However, later larger efforts to prosecute active lower and mid-level officers stoked discontent among the soldiers, some of whom started a mutiny against Alfonsin’s government.³⁰ When the rest of the soldiers refused to move against the rebel units, President Alfonsin convinced the parliament to pass the Due Obedience Law (*Ley de Obediencia Debida*),³¹ on 4 June 1987, which created an irrebuttable presumption that military officials, with the exception of certain high-level commanders, committed human rights abuses under coercion, and rendered them immune from prosecution on this basis.³² Although this law did not employ the word ‘amnesty’ it had the same effect of ensuring that the lower and mid-level soldiers were granted impunity.³³ The above experience in Argentina illustrates the dilemma that a new democratic government can face when choosing between justice and its own survival. If the new government insisted on criminal accountability for the crimes committed by security forces during the previous regime, they would have been overthrown. For realists, the choice should be clear: the priority of the new government must be to ensure its further existence. No government can be required to commit political suicide.³⁴

²³Perspective Monde, ‘19 septembre 1999: Tenue d’un référendum sur la politique d’amnistie en Algérie’(1999), available at <http://perspective.usherbrooke.ca/bilan/servlet/BMEve?codeEve=932> (last visited 5 Feb 2018).

²⁴Stigen, *supra* note 5, 421.

²⁵Stigen, *supra* note 5, 421.

²⁶Anonymous ‘Human Rights in Peace Negotiations’, 18(2) *Human Rights Quarterly* (1996) 249, 258.

²⁷O’Shea, *supra* note 3, 56.

²⁸Decree 158/83 of 12 December 1983 (Official Gazette of 15 December 1983). See O’Shea, *supra* note 3, 57.

²⁹N. Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, 78(2) *California Law Review* (1990) 449, 459.

³⁰Roht-Arriaza, *supra* note 29, 459.

³¹Law No 23.521 of 4 June 1987.

³²D.F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100(8) *Yale Law Journal* (1991), 2539, 2597.

³³O’Shea, *supra* note 3, 58.

³⁴Orentlicher, *supra* note 32, 2541. See also at 2548 where the author says that no governments should “press prosecutions to the point of provoking their own collapse”. See also and Naqvi, *supra* note 5, 624.

Amnesty for regime change

Achieving a better society may require a process of transition from one type of government to another, which may only be possible with the consent of the officials of the former regime.³⁵ The granting of amnesty for the crimes committed by the agents of the oppressive government, rather than prosecution, may be the only peaceful means of securing such consent.³⁶ The threat of prosecution might cause the perpetrators to cling to power, possibly resulting in more bloodshed.³⁷ The amnesties provided by the South African Truth and Reconciliation Commission feature prominently in this category. Before 1994, South Africa was ruled on the basis of racial discrimination under the Apartheid system of government. The unbanning of the African National Congress (ANC) in 1990, the release from prison of Nelson Mandela and other political prisoners, and the lifting of the state of emergency paved the way for a negotiated peace settlement between the apartheid regime and those who opposed it.³⁸ The negotiations resulted in the establishment of a date for the country's first democratic elections and for an interim constitution to be enacted.³⁹ A major obstacle to finalizing the interim constitution and the holding of the elections was the question of accountability of those guilty of gross human rights violations during the years of apartheid.⁴⁰ Many of the members of the security forces had committed crimes during the apartheid era and were afraid that without an amnesty clause in the interim constitution, they risked ending their lives in prison. They thus demanded that an amnesty clause be included in the interim constitution. On the other hand, the representatives of the liberation movements believed that there should be accountability for past crimes, along the lines of the Nürnberg trials.⁴¹ This posed a major threat to stability in the country.⁴² Many believe that, if not addressed, the issue of amnesty could have impeded the whole transition process and would have ended in bloodshed.⁴³ Intense political consultations ensued, resulting in the inclusion of the amnesty clause in the *Interim Constitution*,⁴⁴ which was confirmed in the 1996 final *Constitution*,⁴⁵ and was given effect by the *Promotion of National Unity and Reconciliation Act 34 of 1995*. Under this Act, the Truth and Reconciliation

³⁵O'Shea, *supra* note 3, 24.

³⁶J Dugard *International Law: A South African Perspective* 4thed (Cape Town: Juta, 2011), at 192; Rakate, *supra* note 1, 40-41 and Orentlicher, *supra* note 32, 2547.

³⁷Stigen, *supra* note 5, 422.

³⁸O. Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process* (2009), 8.

³⁹*Encyclopædia Britannica* 'Truth and Reconciliation Commission, South Africa (TRC)', available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (accessed 18 August 2016).

⁴⁰Bubenzer, *supra* note 38, 11.

⁴¹Bubenzer, *supra* note 38, 12 and *Encyclopædia Britannica* 'Truth and Reconciliation Commission, South Africa (TRC)', available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (accessed 18 August 2016).

⁴²Trumbull, *supra* note 4, 322 and Rakate, *supra* note 1, 288 & 303.

⁴³Trumbull, *supra* note 4, 322 and Rakate, *supra* note 1, 288 & 303.

⁴⁴The Preamble to the *Interim Constitution* (National Unity and Reconciliation) provided that: "In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed".

⁴⁵Section 22 (Transitional arrangements) of the *Constitution*: "(I) Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading "National Unity and Reconciliation" are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity".

Commission (TRC)⁴⁶ could grant amnesty for any crime committed with a political motive between 1 March 1960 (the month of the so-called ‘Sharpeville massacre’)⁴⁷ and 10 May 1994.⁴⁸ The Commission received more than 7,000 amnesty applications and granted 1,500 amnesties.⁴⁹ Without an amnesty clause in the 1993 *Interim Constitution* the transition would have failed.⁵⁰ The amnesty helped avoid a looming civil war, and the transfer of power was accomplished with little bloodshed.⁵¹ Bishop Desmond Tutu was once quoted as saying that without the amnesty clause in the post-apartheid constitution, the ‘reasonably peaceful transition from repression to democracy would instead have become a bloodbath’.⁵² The South African experience thus makes evident the fact that in exceptional cases the granting of amnesties may be the wisest course of action to take. On this note, it is concluded that although the ICC has a right to disregard domestic amnesty laws in case of gross human rights violations, a decision by the ICC Prosecutor to initiate prosecutions ought to be taken after careful consideration of the political situation in the concerned State and the interests of the victims.⁵³ It is important to note, however, that in exercising such discretion, the Prosecutor, should exercise a ‘serious scrutiny’ of the claims of necessity to ensure that they do ‘not give in to the easy temptation of concluding that an amnesty is unavoidable’.⁵⁴ Factors that should not matter are discussed next.

3.2. *Factors that should not matter*

Commentators on international criminal law have proposed a number of factors which the Prosecutor should take into account when deciding whether a domestic amnesty should be accorded extraterritorial recognition. Dugard⁵⁵ has suggested that international recognition might be accorded where amnesty has been granted:

- (1) As part of a truth and reconciliation commission which was established by a democratically elected government or an international organisation;
- (2) The commission functions in accordance with due process of law requirements;

⁴⁶The Commission consisted of three committees: a committee on human rights violations (sections 12-15), a committee on reparations (sections 23-27) and a committee on amnesty (sections 16-22).

⁴⁷On 21 March 1960, around 69 black protesters were shot dead by police officers. The protesters were demonstrating against pass laws which required black South Africans to carry passbooks with them any time they travelled out of their designated home areas. Although it is acknowledged the protesters were not peaceful and were attacking the police with stones, it is generally accepted that the police response was disproportionate. Today, 21 March is celebrated as a public holiday in honour of human rights and to commemorate the “Sharpeville massacre”.

⁴⁸10 May 1994 is the date on which Nelson Mandela was inaugurated as president. This is the date that officially marks the end of Apartheid and the struggle between, on the one hand, the apartheid government and the white right-wing (the Afrikaner Weerstandsbeweging (AWB) and Afrikaner Volksfront) which opposed the elections by violent means and, on the other hand, black groups such as the Pan Africanist Congress (PAC) and Azanian People’s Liberation Army (APLA), which had continued the “armed struggle” during the negotiation process. Truth and Reconciliation Commission of South Africa “Report” Vol I (29 October 1998). Available at <http://www.justice.gov.za/trc/report/> (last visited 12 Jan 2018), at 120.

⁴⁹*Encyclopædia Britannica* ‘Truth and Reconciliation Commission, South Africa (TRC)’ (2016), available at <http://www.britannica.com/EBchecked/topic/607421/Truth-and-Reconciliation-Commission-South-Africa-TRC> (last visited 18 Jan 2018).

⁵⁰Trumbull, *supra* note 4, 322, Rakate, *supra* note 1, 288, Scharf, *supra* note 2, 510; O’Shea, *supra* note 3, 295, J. Varushka *The Truth and Reconciliation Commission: success or failure?* (LLM-dissertation: University of Pretoria, 2008), 1 and Dugard, ‘Possible Conflicts with Truth Commissions’, *supra* note 1, 694.

⁵¹Trumbull, *supra* note 4, 314 and Scharf, *supra* note 2, 510.

⁵²Trumbull, *supra* note 4, 322.

⁵³In support of this argument see D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ 14(3) *European Journal of International Law* (2003) 481, 504. Here, the author mentions, as a precedent the fact that “up to the present date, states have declined to initiate prosecutions for crimes against humanity committed under apartheid regime in South Africa, which likely reflects the higher level of international regard for the reconciliation measures adopted in the unique circumstances of South Africa”.

⁵⁴Robinson, *supra* note 53, 496. See also Stigen, *supra* note 5, 452.

⁵⁵Dugard, ‘Possible Conflicts with Truth Commissions’, *supra* note 1, 700.

- (3) Each person granted amnesty has been obliged to make a full disclosure of his criminal acts as a precondition for amnesty;
- (4) The crimes were politically motivated.

It is submitted that these guidelines have weaknesses. The proposition that the amnesty be granted by a truth commission established by a democratically elected government is solely concerned with 'how' the amnesty was granted but ignores the most fundamental question of 'why' the amnesty was granted in the first place. In the context of South Africa for example, the amnesties granted to the apartheid criminals were not so much 'accepted' by the international community because they were granted by a truth and reconciliation commission, but solely because such amnesties were required as a precondition for the apartheid regime to hand over the reins of power to the majority black population of the country. Whether the TRC functioned in accordance with due process of law requirements and whether the beneficiaries of the amnesty process were required to disclose the truth about the apartheid era crimes do not also matter at all. The matter is that without amnesty, there would have been no regime change in South Africa and the confrontation between the apartheid government and the black population would have continued, causing more bloodshed and destruction.⁵⁶ The same can be said of the criteria set out in point n^o 4 above, namely that the crime must have a political character. The issue is not how and under which circumstances the crimes were committed, but why amnesty is needed.⁵⁷

Identifying guidelines that include the consideration of the underlying purpose of the amnesty should thus be the proper focus of a study of this kind. Stigen⁵⁸ has proposed the following guidelines to assist the ICC Prosecutor in deciding whether or not he should give a chance to a national amnesty process:

- (1) Were there compelling reasons to grant amnesty?
- (2) Is the amnesty adopted and implemented democratically and in good faith?
- (3) Has the amnesty-granting body proceeded in an effective manner?
- (4) Does the mechanism provide some measure of accountability or compensation?
- (5) Is amnesty granted to the most responsible perpetrators?
- (6) Has the amnesty had positive effects and has it been internationally recognised?
- (7) Do the involved parties perceive the amnesty as fair?

Of all the above guidelines, only the first one seems to be appropriate because it emphasises the importance of looking at the reasons that pushed the State to grant amnesty. The guidelines proposed in (2) and (3) above relate to the question of 'how' the amnesties were granted instead of 'why', as already discussed.

⁵⁶Another justification that has been attributed to the post-apartheid amnesty process in South Africa is that it could help to achieve reconciliation between the different groups in South African society. See Truth and Reconciliation Commission of South Africa, *supra* note 48, para 68-73. However, as reconciliation should occur among the people themselves not the government with the people, some commentators argue that the power to forgive is not that of the governments but of the victims. Only the victims can do that. See Rakate, *supra* note 1, 130: "Forgiveness is essentially a private matter, a person-to-person thing, not a public catharsis as the TRC and politicians would have us believe". See also M.C. Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' 59 *Law and Contemporary Problems* (1996) 63, 19: "But how can governments forgive themselves for crimes they have committed against others? And how can governments forgive crimes committed by some against others? The power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the governments but of the victims". Thus, it seems that the element of reconciliation cannot be taken seriously to justify the TRC amnesties. The only relevant justification is that the TRC amnesties were a necessary component of the political settlement for the "handing over of the reins of power". O'Shea, *supra* note 3, 24.

⁵⁷However, since genocide, crimes against humanity and war crimes are naturally committed in pursuance of a political motive, this criterion would virtually always be met.

⁵⁸Stigen, *supra* note 5, 452-463.

The weakness of guideline n° (4) is that it seeks to substitute ‘some’ other ‘measure of accountability’ or ‘compensation’ for criminal punishment. This is clearly not an acceptable guideline because without criminal punishment the international criminal justice system is deprived of its deterrent function. Disciplinary and administrative sanctions or ordering the perpetrators to compensate victims cannot deter future perpetrators of serious crimes such as genocide, crimes against humanity and war crimes. In order to ensure deterrence for future offenders,⁵⁹ States are required to impose not ‘some measure of accountability’ or compensation of victims, but an ‘appropriate punishment’,⁶⁰ which, given the serious nature of the human rights violations that constitute international crimes, cannot be something less than criminal punishment.⁶¹

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

As for the criteria set out in point (6) that an amnesty should have positive effects and be internationally recognised, it seems that this criterion contains two elements that should be analysed separately: the effect that the amnesty has had and the way the amnesty has been perceived internationally. Regarding the effects of the amnesty, Stigen⁶² says that if interfering with a national amnesty would ‘set back an improved situation’, such interference ought to be avoided. This argument is true because it underlines the reason why the amnesty was given and the possible negative impact that interference may bring about. However, one may never know if an amnesty process will bring about positive results if that process is not implemented and supported in the first place. If the amnesty has recently been implemented and no tangible progress has

⁵⁹On the relationship between the duty to prosecute gross human rights violations and deterrence for future violations, see R.C. Slye, ‘The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?’ 43 *Virginia Journal of International Law* (2003), 173, 197; J.M. Dyke & G.W. Berkley, ‘Redressing Human Rights Abuses’ 20 *Denvil Journal of International Law & Policy* (1992), 243, 244. See also Roht-Arriaza, *supra* note 29, 452-453: “To avoid the continuing cycle of repression, the only remedy must be the recognition of an affirmative obligation on governments to investigate and prosecute gross state-attributed human rights abuses”. See also at 461: “With no fear of retribution, each new regime can again succumb to the same repressive behaviour. These problems can only be remedied by placing an affirmative obligation on the state to investigate and prosecute past rights violators”. See further N.J. Kriz, ‘Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights’ 59 *Law and Contemporary Problems* (1996), 127, 129: “Although a variety of factors may ultimately require limiting prosecution to senior key individuals or certain categories of perpetrators, total impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is immoral, injurious to victims, and in violation of international legal norms. It can be expected not only to encourage new rounds of mass abuses in the country in question but also to embolden the instigators of crimes against humanity elsewhere. In short, criminal prosecution in some form must remain a threat and a reality”.

⁶⁰Orentlicher, *supra* note 32, 2600-2601. See also D. Cassel, ‘Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities’ 59 *Law and Contemporary Problems* (1996), 197, 210.

⁶¹Cassel, *supra* note 60, 217: “It is now clear that nothing less than judicial investigations designed to identify perpetrators, name names, and punish the guilty will suffice”.

⁶²Stigen, *supra* note 5, 460.

been made, for example the rebels have not yet surrendered their arms, the Prosecutor ought still to assess whether instituting a prosecution does not risk shutting the door of negotiations and cause the rebels to renege to war. Conversely, if the amnesty has been in place for a long time and has had no effect, a decision by the Prosecutor to institute a prosecution ought to have any negative impact on the political situation in the country where the crimes were committed. The relevant consideration should therefore be the effect that the interference by the Prosecutor would have in the affected State, not the effect that the amnesty has already had.

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

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

Ultimately, it is suggested that the Prosecutor should exercise his discretion not to institute a prosecution when the accused person has been granted amnesty in the State where the crime was committed, and:

- (1) the amnesty was absolutely needed in order:
 - (i) to end a civil war; or
 - (ii) to allow change in government from oppressive rule to a democratic rule; or
 - (iii) to protect a newly democratically elected government from the threat of a coup by the members of the security forces; and
- (2) at the time of investigation and prosecution, there are serious reasons to believe that the institution of proceedings before the ICC would impede the realisation of the objectives for which the amnesty was implemented.

4. Conclusion

When the ICC Prosecutor contemplates exercising jurisdiction, considerations of peace and democratic transition in the territorial State may have to be carefully considered and, in doing so, he may need to give a chance to an amnesty process in the troubled country. This paper has suggested that only the amnesties designed to further the purposes of ending a civil war or necessary for a political transition from minority regime to a majority government, or from a repressive regime to one that promises respect for human rights in the future or an amnesty for maintaining peace and stability after a fragile democratic transition should be supported by the ICC Prosecutor by exercising his prosecutorial discretion to not institute an investigation or prosecution 'in the interests of justice'. It was argued that such factors as how and by whom the amnesty was granted should not matter but that the proper focus by the ICC Prosecutor should be about 'why' the amnesty law was passed and the effect that foreign interference would have on the transition in the concerned State.