Amnesties as a trump to foreign prosecution of international crimes? 
A South African view

Shannon Bosch*
Lecturer in Law: Howard College School of Law, University of Natal

Abstract
This article will begin by setting the background to the South African amnesty process, and examining its application to the individual applicant (Part II). Part III will explore whether the amnesties granted by the TRC for international crimes were, first, legitimate amnesties under international law, and secondly, whether there remains an obligation upon foreign states to prosecute despite the amnesties. The international law obligations upon states will be considered according to the source of the obligations, either in treaty law or customary international law. Part IV will investigate the practical limitations on foreign prosecution in the face of a national amnesty. The focus here will be largely on the concerns of jurisdiction, looking in turn at the state's jurisdiction to prescribe certain criminal conduct, and then at the jurisdiction to enforce its laws. Lastly, Part V will examine the attitude towards amnesties as a defence to prosecutions for international crimes.

Introduction
On 11 April 2002, a ceremony was held to mark the momentous 60th ratification of the Rome Statute, establishing the International Criminal Court (ICC). It was here that the United Nations Secretary-General, Kofi Annan, stated: 'impunity for international crimes has been dealt a decisive blow'. The establishment of a permanent International Criminal Court is a welcome response to a growing call, expressed in fora such as the Security Council (establishing two ad hoc tribunals for Yugoslavia and Rwanda), the International Court of Justice (in the Arrest Warrant case)\(^1\) and the House of Lords (in Pinochet),\(^2\) for greater individual criminal accountability for international
Amnesties and foreign prosecution of international crimes

This crusade for greater prosecution of international crimes is calculated to deter would-be perpetrators, and increase individual criminal responsibility. But what are its effects upon those who might already have received amnesty for international crimes during transitions to democracy?

In South Africa the work of the Truth and Reconciliation Commission (TRC) has been drawing to a close. A crucial part of the TRC's work was undertaken by the Amnesty Committee, which heard applications and granted amnesty from prosecution to several individuals for crimes committed during the apartheid years. Some of the crimes for which amnesty was granted are also categorised as crimes under international law. The question is whether such amnesties are legitimate under international law, and whether they preclude future prosecutions.

Fortunately, South Africa's TRC has been heralded as one of the more legitimate, of a variety of amnesty processes undertaken around the globe. At a political level, South Africa's Truth and Reconciliation process was well received by the international community, and the political will to establish an ad hoc criminal tribunal (akin to those established for Yugoslavia and Rwanda) is clearly lacking. It appears unlikely from a political standpoint that foreign states will seek to extradite and prosecute individuals who received amnesty. And as far as the ICC is concerned, the restriction on its jurisdiction ratione temporis shields these individuals from any retrospective exercise of jurisdiction.

Amnesty recipients could therefore be lulled into a false sense of security when one considers the scarcity of possible sources of foreign prosecution. However, as was vividly illustrated before the ICJ in the Arrest Warrant case, states are taking their international criminal law responsibilities far more seriously than before. It therefore seems appropriate to evaluate South Africa's amnesty process — a process which has been hailed as possibly the most legitimate amnesty processes — against the recent demands made by international criminal law for individual accountability.

The South African amnesty: an historical overview

The 'postamble' to the Interim Constitution, jointly prepared by the African National Congress and the National Party, committed post-apartheid South Africa to a policy of reconciliation. Reconciliation was to be achieved through a conditional amnesty as embodied in the Promotion of National Unity and Reconciliation Act (the Act). The Act established the Truth and Reconciliation Commission, which was to conduct hearings and investigations in order to prepare a complete record of the gross violations of human rights

---

3 Article 11 of the Rome Statute restricts the temporal jurisdiction of the ICC to cover crimes that are committed after the entry into force of the Rome Statute on 1 July 2002.


5 Act 34 of 1995.
committed between March 1960 and May 1994. The TRC was empowered to search for, seize, and subpoena evidence, bolstered by the threat of contempt proceedings for non-compliance.6

In performing its task the TRC appointed a committee to assess applications for amnesty; to recommend reparations for the victims of abuse; and to prepare a report containing recommendations for the prevention of future human rights violations.7 The Amnesty Committee, consisting of three judges and two commissioners, received over 7,000 applications for amnesty, from both officers of the apartheid regime, and members of liberation movements.8 In granting amnesty the Committee had to be satisfied that the applicant had made full disclosure of all relevant facts, that the offence was a crime under the apartheid legal order, and that it was committed in the course of the past conflict, and associated with a political objective.9 The then president, Nelson Mandela, determined whether to accept each individual recommendation for amnesty. Over 5,392 applications were rejected and amnesty was eventually granted in only 849 cases.10 Applicants who were granted amnesty would not be criminally or civilly liable in a South African court, in respect of the particular act in question.11 Those failing to apply for amnesty have faced prosecution, making this procedure effectively a scheme for pardons, distinct from blanket pre-investigation amnesia typified in the South American experience.12

Amnestied crimes and international criminal law obligations

By design, amnesty could only be granted in respect of acts that were already crimes under existing South African law.13 Many of these domestic crimes are also prohibited under international law, in the form of war crimes; crimes against humanity; and torture.14 As international crimes there are specific international law obligations owed by states, quite aside from any domestic

6A Borain A country unmasked (2000) at 269.
7Section 23–27. A five-volume report was submitted to President Mandela in 1998, and was subsequently debated in parliament in 1999. However, no governmental action has been taken with respect to its recommendations, including those regarding reparations. J Klaaren ‘Domestic amnesty and international jurisdiction’ Discussion paper for presentation at the ISRCL conference, School of Law, University of the Witwatersrand, 15 November 2000, at 1–3.
8Klaaren n 7 above at 2.
9Section 19–20. The political objective had to be proportionate to the political goal it sought to advance. K Asmal ‘Truth, reconciliation and justice: the South African experience in perspective’ (2000) 63 MLR 1 at 2.
13For example, murder, abduction, torture and assault.
Amnesties and foreign prosecution of international crimes

decision to amnesty the particular offences. These international law obligations flow from either international conventions, for the states that are party thereto, or international custom. I turn first to the international conventions that deal with the particular international crimes which were amnestyed in South Africa.

Obligations to prosecute in international criminal conventions

A state's prerogative to grant amnesty for an offence is circumscribed by the treaties to which the state is party. States contracting valid international obligations are bound to modify their national legislation to ensure that they fulfil those obligations. States that are party to conventions cannot rely upon insufficiencies in their municipal law to justify non-compliance with their international law obligations. Granting amnesties to persons responsible for committing the offences defined in international conventions would constitute a breach of treaty for which there can be no excuse or exception.

What then is the nature of the obligations that states party to the conventions owe? International human rights bodies suggest that a state is obliged to investigate and proceed against responsible parties, and provide effective and adequate remedies in cases of grave violations. Some international lawyers have suggested that the appropriate approach to amnesties in the arena of international criminal law should follow that offered by these international human rights bodies. While human rights treaties do not impose an express duty on states parties to prosecute alleged perpetrators, they do oblige states to ensure that the human rights obligations are respected, and that redress is provided where violations occur. These obligations have been authoritatively interpreted to preclude states who are party thereto from granting perpetrators absolute impunity. A state party's routine failure to investigate violations, and allow possible prosecution of the alleged offenders, would constitute a breach of its duties.

So, for example, the body created to monitor compliance with the Torture Convention (the Torture Committee) concluded that the Argentine 'due

17 D Orentlicher 'Setting accounts: the duty to prosecute grave human rights violations of a prior regime' (1990-1) 100 Yale LJ 2537 at 2553; N Roht-Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law' (1990) 78 Cal L R 451 at 462, 481-483.
18 Especially those aimed at acts that would otherwise be considered crimes against humanity, but for the diffuse instances of their commission.
20 Scharf n 16 above at 48–52.
obedience' and 'punto final laws,' restricting military prosecutions, were incompatible with the spirit and purpose of the Torture Convention, and urged Argentina not to leave victims of torture without a remedy. Similarly, the Honduran Supreme Court relied on international law obligations to investigate and prosecute human rights violations, in concluding that an amnesty decree could not apply where illegal detention and attempted murder were carried out by security agents in the context of a number of forced disappearances. And both the Inter-American Monitoring Committee and the UN Human Rights Committee found the amnesty laws in El Salvador, Uruguay and Argentina to be incompatible with the right to a remedy and judicial due process, rights which are guaranteed under both the American Convention on Human Rights and the International Covenant on Civil and Political Rights. The denial of these rights is all the more critical when one considers the impact their denial has on the fundamental obligation to ensure the right to life and physical integrity found in both conventions. In the Loayza Tamayo case the Inter-American Court held that the Peruvian general amnesty, and the subsequent laws protecting the amnesty from review, could not cancel the international law obligations to investigate and bring perpetrators to justice. In the Barrós Altas case the Inter-American Court once again held that parties were bound by procedural obligations to protect victims' rights, and that failing to bring the legal system in line with these obligations was a violation of the duty to ensure and respect human rights. A lack of state diligence in preventing or responding to violations was found to constitute a violation of an affirmative duty, and immunity for these crimes was held to constitute an ex post facto derogation of rights that could

22Hernandez Santos y otros Honduras, Corte Suprema de Justicia, Recurso de Amparo en Revisión 60-96, (Tegucigalpa 18.01.96); N Roht-Arriaza ‘Combating impunity: some thoughts on the way forward’ (1996) 59/4 Law & Contemp Probs at 94.
23The body established to ensure compliance with the 1966 American Convention on Human Rights.
24The committee established to ensure compliance with the 1966 International Covenant on Civil and Political Rights.
27Chumbipuma Aguirre et al v Peru; Judgement on the Merits of 14 March 2001 (Series C 75) at par 41-44.
Amnesties and foreign prosecution of international crimes

not have been suspended at the time the acts were committed. Consequently, the Inter-American Court on Human Rights has held that judicial guarantees essential for the protection of non-derogable rights, are also non-derogable. Academics even go so far as to suggest that states ratifying the relevant treaty after atrocities have been committed remain liable for their failure thereafter to investigate and punish the crimes in accordance with their treaty obligations.

Closer scrutiny of the jurisprudence of these human rights monitoring bodies does however suggest that a measure of flexibility is permitted. The use of phrases like 'bring to justice' and 'hold responsible,' suggest that methods aimed at obtaining accountability, short of full criminal prosecution, would satisfy the requirement of 'ensuring rights'. Such methods include investigating the identity and fate of victims and major perpetrators; providing reparation, and the taking of affirmative steps to ensure that human rights abuses do not re-occur. Notably, in the Velasquez Rodrigues decision the Inter-American Court did not refer specifically to criminal prosecution, as opposed to other forms of disciplinary action or punishment in the form of fines; forfeiture of government pension or other assets; removal from office; and reduction of rank. It seems that even if international criminal law were to follow the lead of international human rights law then alternative means of accountability, short of full criminal prosecutions, might be internationally acceptable.

What, then, about South Africa? Did it, after the apartheid era, have an obligation under international law to prosecute perpetrators? For a start, South Africa would only be restricted in its granting amnesty for international conventional crimes where it was a party to the relevant convention. As a non-signatory to the 1973 International Convention on the Suppression and Punishment of the Crimes of Apartheid (the Apartheid Convention) South Africa bore no obligation to refuse to prosecute offences listed in the Apartheid Convention. It must be noted that many of the offences listed in the Apartheid Convention were in fact government policies in South Africa. Accordingly these offences were not criminalised under the South African legal system. Without domestic criminalisation, perpetrators of offences listed in the Apartheid Convention would not have been subject to possible prosecution in South Africa, and accordingly they fall outside of the scope of this paper since these acts would not have qualified for amnesty as defined by the Act.

---

29 Orentlicher n 17 above at 2608; Roht-Arriaza n 12 above at 63; Méndez, J 'Accountability for past abuses' (1997) 19 Human Rights Quarterly 255–82 at 260.
30 Inter-American Court of Human Rights 'Habeas corpus in emergency situations' (Advisory Opinion OC-8/87 30.01.87).
31 Roht-Arriaza n 17 above at 485.
The position is different, however, in relation to other international conventions to which South Africa was signatory. As a party to the 1949 Geneva Conventions and Additional Protocol thereto, South Africa may have been in breach of its treaty obligations where amnesties were offered to perpetrators of grave breaches. Historically humanitarian law enjoyed limited application in conflicts of a non-international character. Article 3, common to all four of the 1949 Geneva Conventions, provides only minimal obligations for states party to the conventions where conflicts are of a non-international nature. In 1977 the first and second Additional Protocol to the 1949 Geneva Conventions sought to extend the ambit of humanitarian law to further protect the rights of victims of armed conflict. Notably the second Additional Protocol sought to extend the minimal protection afforded in times of non-international conflicts. It is generally conceded that the four Geneva Conventions and the first Additional Protocol thereto were not applicable to the South African situation, since it did not constitute an international armed conflict as required by article 2 of the Geneva Conventions. As the situation in South Africa was of an internal nature, the only applicable convention would be the second Additional Protocol to the 1949 Geneva Conventions. South Africa was not a signatory to the second Additional Protocol and accordingly was not bound by its provisions.

The amnestied crimes also correspond to offences set out in various international suppression conventions, such as the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. It is nonetheless the case that suppression conventions do not create international crimes per se, although they can become general international crimes over time through custom. Accordingly this paper will consider torture further under the heading of customary international crimes.

It seems, in summary, that international criminal conventions can offer very little by way of obligation upon South Africa to refrain from granting amnesty for international crimes. And even the authoritative interpretations of multilateral treaties suggesting the obligation to prosecute, allow for appreciation of lesser forms of punishment as discharging the obligation. If there is any real threat to those who have been granted amnesty, it must lie in customary crimes.

Obligations to prosecute customary international law crimes
Customary international law can also be a source of criminal law when state

---

34 Articles 49, 50, 129 & 147 of the I, II, III & IV Geneva Conventions respectively.
35 Article 85.
36 The limited list of so-called grave breaches of humanitarian law are to be found in all four of the Geneva Conventions as well as the first Additional Protocol thereto. Grave breaches give rise, as a matter of treaty law, to individual criminal responsibility at international law. See further n 44 below.
37 Scharf n 16 above at 44. This was reiterated by the South African Constitutional Court in the Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa 1996 4 SA 671 (CC); J Dugard 'Reconciliation and justice: the South African experience' (1998) 8 Transnational Law & Contemporary Problems 277 at 305.
Amnesties and foreign prosecution of international crimes

practice and *opinio juris* demonstrate a consistent criminalisation of certain acts. The distinctive feature of customary international law is that it binds all states without the need to be a signatory to any international criminal convention. A good starting point to identify the crimes that enjoy customary status would be 'the most serious crimes of concern to the international community as a whole' listed in the Rome Statute. These include: war crimes; crimes against humanity; genocide and aggression. The focus of this paper will be on those customary crimes that correspond to possible amnestied crimes. Excluded from this consideration are the international crimes of aggression and genocide, since those receiving amnesty are unlikely to face these charges.

*War crimes*

Given the internal character of the conflict in South Africa the only applicable source of humanitarian law would be common article 3 found in the four Geneva Conventions, and the second Additional Protocol to the Geneva Conventions. Since South Africa is not a signatory to the second Additional Protocol the only grounds for a challenge of the amnesty laws would have to rely on customary status of the second Additional Protocol. While it is widely accepted that the four Geneva Conventions are a part of customary international law, the second Additional Protocol does not yet enjoy customary international law status. Accordingly no argument based on customary international law can challenge the amnesty provisions.

What then of the violations referred to in common article 3 to the four Geneva Conventions, which do enjoy customary status? The answer here lies in the nature of the obligations that article 3 impose upon states. Violations of humanitarian law, collectively referred to as war crimes, can be sub-divided into two further categories: 'grave breaches' of humanitarian law, and all other violations (hereinafter referred to as non-grave breaches). The specific violations which earn the reputation of being grave breaches are listed in a few provisions in each of the 1949 Geneva Conventions and in the 1977 First Additional Protocol to the Geneva Conventions. Whilst the conventions as a rule entail obligations for the states who are party thereto, the very serious nature of the grave breaches gives rise to individual criminal responsibility on the part of offenders, as well as a duty to prosecute or extradite on the part of...
states. All other non-grave breaches will only give rise to obligations on the states to instruct, monitor and discipline their military, without an obligation formally to prosecute or extradite. The body of humanitarian law which is applicable in conflicts of an internal character (common article 3 and the second Additional Protocol) are expressly excluded from the grave breach regime.

Customary international law has, traditionally, adopted a conservative approach to the exercise of universal jurisdiction by states in order for them to impose individual criminal responsibility for non-grave breaches and grave breaches committed during conflicts of a non-international nature. Accordingly, it once more appears unlikely that an amnesty recipient will face calls for his extradition on these grounds since the only customary international law obligations that can bind South Africa are those contained in common article 3 to the four Geneva Conventions, and these obligations do not entail individual criminal responsibility.

However, in a progressive judgement, handed down by the International Criminal Tribunal for the Former Yugoslavia in the Tadić case, the Tribunal concluded that serious violations of the laws of war could constitute war crimes even when committed during wars of an internal or non-international nature. Furthermore, some commentators suggest that the traditional position of not exercising universal jurisdiction over perpetrators of non-grave breaches is no longer tenable. They base this conclusion on the fact that the Security Council empowered the Rwanda Tribunal to try non-grave breaches, and the Yugoslavia Tribunal declared its competence to try non-grave breaches as violations of customary law. Further evidence for this argument can be found in some national military manuals, which impose individual criminal responsibility for non-grave breaches.

The true customary status of these recent trends has been the subject of much debate. The court in Tadić has been highly criticised for its overemphasis on opinio juris and scant attention to actual state practice. State practice in fact provides evidence that customary law is not yet settled on the conclusion that individual criminal responsibility for grave breaches obtains in non-international armed conflicts. Similarly, individual criminal responsibility for non-grave breaches is not yet established in customary international law. The safest conclusion, for the time being, is that there is no mandatory duty placed

---

45Prosecutor v Dusko Tadic ICTY Appeal Chamber (2.10.95) paras 96–119, 126–27.
47ICTR Statute art 4.
48Supra note 45 at paras 98 & 117.
Amnesties and foreign prosecution of international crimes

on states by customary international law to prosecute individuals for non-grave breaches or grave breaches committed during internal conflicts.

Without an explicit mandatory obligation to punish or extradite perpetrators of non-grave breaches, states merely enjoy a permissive right to prosecute perpetrators. The practice of states extending national criminal jurisdiction universally over non-grave breaches, and over the concept of war crimes as embodied in the Rome Statute, is very progressive and cannot yet be said to be customary since state practice lags behind opinio juris.31

Crimes against humanity

Crimes against humanity are a unique list of crimes that do not have any source (as yet) in a specific criminal convention. The label 'crimes against humanity' developed as a matter of customary international law in response to a paucity of protection for civilian populations, and encompasses a collection of crimes which are recognised the world over as being particularly heinous. Crimes against humanity include systematic murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution; enforced disappearance; and apartheid, when directed at a civilian populations and committed as part of a widespread and/or systematic attack with explicit or implicit approval or endorsement by state.32 This definition encompasses many of the acts carried out by the functionaries of the apartheid regime. General Assembly resolutions and conventions have labelled apartheid a crime against humanity,33 and the TRC Report concedes that 'the definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions.34

The nature of state obligations that flow from customary international law are generally less onerous than the obligations found in criminal conventions. Generally, customary international law only affords states a permissive right to exercise universal criminal jurisdiction over customary crimes. However, some international lawyers argue that a case can be made for a mandatory obligation to investigate and prosecute customary crimes. Proponents of this position suggest that widespread representative participation in the criminal conventions may clothe certain of their provisions with customary status.35

Meron, a leading international lawyer, writes that the 'repetition of certain norms in many human rights instruments is itself an important articulation of

31Belgium Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (10.02.99); art 8(2)(b)&(e).
32ILC Draft Code of Crimes against the Peace and Security of Mankind art 18; Rome Statute art 7; Meron n 49 above at 557.
33Apartheid Convention; 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; Dugard n 14 above at 263.
state practice and may serve as a preferred indicator of customary status. The obligation upon states to prosecute and punish perpetrators embodied in *aut dedere aut judicare* provisions can be found in a myriad of human rights and criminal law conventions. These represent a movement from a mere permissive universal jurisdiction towards mandatory action against ‘modern day successors to the pirates of old.’ Furthermore, in both civil and common-law traditions, customary rules regarding crimes against humanity often impose additional penalties on criminal acts carried out by officials. The universality of this practice suggests that any deviation from this practice in the area of international law will require persuasive justification.

Without a specialised convention in respect of crimes against humanity, the duty to prosecute or extradite (which exists in several international criminal conventions), does not exist *qua* treaty law, and must be shown to be part of customary international law. Orentlicher suggests that the duty to prosecute crimes against humanity exists in customary international law. As evidence of state practice she, and others who share this view, highlight General Assembly resolutions that repeatedly call for investigation and prosecution, and conventions providing that crimes against humanity shall not be subject to any statute of limitations. It is argued that in their representa-

---

56Ibid.

57The term ‘*aut dedere, aut judicare*’ refers to the obligations commonly found in criminal conventions that obliges contracting states in whose territory an offender is discovered (regardless of the territory where the offence was committed) to submit the case to its relevant authorities for prosecution. The prosecuting authorities are obliged to take any decisions to prosecute in the same manner as they would any ordinary offence of a serious nature under the state’s municipal law. If the state does not submit the case to the prosecuting authorities they are obliged to extradite the individual to a willing state party to the convention.

58O’Shea n 11 above at 649; Roht-Arriaza n 17 above at 492.

59Roht-Arriaza n 12 above at 26.


61Roht-Arriaza n 12 above at 25.


63Orentlicher n 17 above at 2593–93.

Amnesties and foreign prosecution of international crimes

In sum, no binding instrument prescribes a duty on states to prosecute alleged perpetrators of crimes against humanity. The materials suggesting a duty to prosecute show, at best, that there exists among states *opinio juris* sufficient to create a custom, and international customary law is created only when such *opinio juris* stands alongside uniform practice of states. A study by Amnesty International found that only twenty-four states have enacted legislation enabling their courts to exercise universal jurisdiction over crimes against humanity. Scharf reviewed the practice of states with respect to prosecutions for the crimes against humanity and found that 'to the extent any state practice in this area is widespread, it is the practice of granting amnesties or *de facto* impunity to those who commit crimes against humanity'. That the United Nations itself has felt free of legal constraints in endorsing recent amnesty-for-peace deals, underscores this conclusion.

Scharf argues that since state practice is hardly uniform, it cannot be said that the duty to prosecute the alleged offender for crimes against humanity exists as a matter of customary international law. Accordingly, South Africa's decisions to grant amnesty for any crimes against humanity cannot be challenged without customary international law supporting a mandatory obligation to prosecute these crimes.

**Torture as a customary crime**

There has been much speculation around the possibility that torture might qualify as a customary crime. Lord Millett suggested, in the now famous *Pinochet* case, that customary law had already prohibited torture in 1984 at

---

65Roht-Arriaza n 12 above at 42.
66Orentlicher n 17 above at 2593-94; Scharf n 16 above at 57.
69Scharf n 16 above at 57.
70Id at 56.
71M Scharf 'Swapping amnesty for peace: was there a duty to prosecute international crimes in Haiti?' (1996b) 31 Texas International Law Journal 1 at 38-39.
the time of the adoption of the Torture Convention. The ICTY in Furundzjia held that the 'entitlement of every state to investigate, prosecute, and punish or extradite alleged torturer's found within their territory was as a consequence of the juis cogens character of the prohibition on torture in the international community.' The Committee on Torture in its decision concerning the Argentinean amnesty laws, stated that 'even before entry into force of the convention against torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish state acts of torture.' However, the Committee did not specify that the appropriate remedy should be prosecution, and therefore the decision cannot be read to require states not party to the Torture Convention to prosecute those who commit torture, as a customary obligation. Furthermore, Scharf argues that the aspirational nature of this 'obligation' suggests that amnesty for torture is not in violation of customary law obligations in respect of torture. It is apposite that the 1987 Foreign Relations Law of the United States in its third Restatement did not list torture among the offences subject to universal jurisdiction as a matter of customary international law, and concluded that the exercise of universal jurisdiction over torture by a state not party to the convention, or against the interest of a state not party to the convention, would have uncertain validity. Any customary law obligation to prosecute torture is lacking extensive state practice, and it is not clear that customary international law precludes amnesties for perpetrators of torture. Accordingly, any amnesties South Africa might have granted for torture cannot be challenged by existing customary international law.

It would seem that, at present, state practice is insufficient to conclude a customary obligation to prosecute: grave breaches in non-international conflicts, non-grave breaches, crimes against humanity, and torture (qua customary crime). Since South Africa is not obliged by convention or custom to prosecute the amnestied crimes, the TRC could legitimately grant amnesty for these offences. The real threat, then, of prosecution for offenders who have received amnesties, lies in foreign national courts exercising their permissive jurisdiction. It is to this threat that I now turn.

---

72Note 2 at 276 Filartiga v Penal-Irala 630 F 2d 876 (2nd circ 1982) confirmed that torture was a violation of customary international law. S Ratner & J Abrams (1997) Accountability for human rights atrocities in international law: beyond the Nuremburg legacy at 145.
73Prosecutor v Anton Furundzjia ICTY (10.12.98) at par 156.
74Emphasis added.
76Scharf n 16 above at 48.
77Section 404 Reporters note 1 & cmt; Boed n 67 above at 312.
78Boed n 67 above at 323.
The jurisdiction of foreign national courts to prescribe and enforce international criminal law

The potential for prosecutions of amnestied crimes rests almost exclusively with foreign national courts exercising jurisdiction under international law. In this regard, states are not wholly unfettered in their exercise of jurisdiction. In particular, international law dictates that a state must enjoy the jurisdiction to prescribe behaviour, extraterritorially, before they can exercise any enforcement or adjudicative jurisdiction through police; executive and judicial action. Having extracted a list of international crimes that may have been amnestied, I now turn to focus on whether foreign national courts would indeed enjoy the requisite jurisdiction to prosecute.

Prescriptive jurisdiction

States are permitted, in terms of general international law, to prescribe their criminal law in a discrete variety of situations. Included are those offences which occur on the state's territory (territoriality); offences committed by the state's own nationals (nationality); offences directed at the state's own nationals (passive personality); offences requiring the state's intervention to protect essential state interests (protective principle); extraterritorial offences by non-nationals having an effect within the state's territory (effects doctrine); and offences which are widely regarded as a threat to international public order (universality).

If we evaluate the international crimes that were amnestied against the bases for exercising prescriptive jurisdiction, we find that while some offences were committed in neighbouring territories, the larger portion were committed within South Africa's own territory. The nationality of the amnesty applicants was almost exclusively South African. The victims, while of a variety of nationalities, were in the majority South Africans. As for the protective principle and the effects doctrine, the amnestied crimes and the climate they created in the region could be said to have affected the interests of South Africa's neighbours in a direct and substantial manner. What can be gleaned from the exercise just undertaken, is that the states who would seem to satisfy the required grounds to prescribe criminal jurisdiction in respect of the amnestied conduct, are South Africa's neighbours. Remarkably, they have also been the states that have been the most invested in the TRC process, and accordingly have been reticent to exercise jurisdiction on the basis of territoriality, passive personality, protective principle, or the effects doctrine. The one remaining ground for the exercise of prescriptive jurisdiction, that being universality, might well pose the greatest potential threat of prosecution for amnestied individuals.

Where acts are considered by states to infringe the ordre public of the

---


international community, international law permits states to exercise extraterritorial prescriptive jurisdiction over non-nationals under the principle of universality. The underlying assumption is that the prosecuting state acts on behalf of all states in suppressing conduct deemed abhorrent to the international community. Prescriptive jurisdiction exercised on the premise of universality is generally accepted. While traditionally limited in its application to a small range of offences, recent trends reveal that the legal and political will exists to expand the range of applicable offences.

Traditionally, universal jurisdiction was regarded only as a permissive authorisation. Academics suggest that there has been a trend towards a mandatory obligation on states to either assume jurisdiction, or to extradite the individual to a state that will assume jurisdiction. To support this proposition international lawyers suggest two justifications. First, they argue that the characterisation of certain crimes as *jus cogens* crimes brings with it a duty to prosecute or extradite; to provide legal assistance; to eliminate statutes of limitations; and to eliminate superior immunities. The net result is effectively to oblige states *erga omnes* to denounce measures aimed at securing impunity. Secondly, academics point out that the principle *aut dedere aut judicare* is now a part of customary international law, and being premised on the notion that those who commit international crimes should not be granted safe haven anywhere in the world, this principle makes prosecution mandatory and not merely permissive.

Turning then to actual state practice in regard to universal jurisdiction what is revealed is that more often then not, *jus cogens* crimes are not prosecuted, and universal jurisdiction has only intermittently been recognised and applied.

---

82Boed n 67 above at 302; Joyner n 79 above at 165.
83Although the *Arrest Warrant* case n 1 above, has revealed that universal jurisdiction is not uncontented.
84The ILC’s Draft Code of Crimes lists genocide, crimes against humanity, crimes against United Nations and associated personnel and war crimes as subject to universal jurisdiction.
85The separate and dissenting opinions of the court in the *Arrest Warrant* case supported a more inclusive list of crimes for which universal prescriptive jurisdiction would obtain. Roht-Arriaza n 12 above at 25.
86Examples often cited include crimes against humanity and torture.
87Cherif-Bassiouni n 62 above at 11, 17-18.
88In *Barcelona Traction, Light and Power Co Ltd (Belg v Spain)* 1970 ICJ 3 the court held that obligations *erga omnes* derive from the outlawing of acts of aggression, and of genocide, also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Cherif-Bassiouni n 62 above at 20–21.
89Dugard n 37 above at 281.
90Roht-Arriaza n 12 above at 25. However, Higgins notes that treaty requirements to extradite or prosecute cannot form a foundation for the exercise of universal jurisdiction since it only applies to states that are party to the treaty, have custody of the alleged offender, and lack other jurisdictional bases. R Higgins *Problems and process: international law and how we use it* at 64–65.
Any perceived duty to prosecute or extradite (where no treaty obligation exists) seems more inchoate than established. Domestic courts have, on the whole, shown a reluctance to exercise universal jurisdiction. Belgium’s enthusiasm to exercise universal jurisdiction in the Arrest Warrant case is by far the exception rather than the rule. Even without the added obstacle of national amnesties, municipal courts have been reluctant to initiate criminal proceedings where they have no direct interest. Seldom has the existence of an amnesty been given as a justification for not pursuing prosecutorial options, more often cited are principles of comity and non-interference. Despite a well-established normative framework for the punishment of the crime of apartheid and other crimes against humanity, there have been no calls from the international community for punishment of apartheid’s architects and administrators.

Change is, however, afoot. Ratification of the Rome Statute, and the principle of complementarity contained therein, will provide a suitable incentive for states to review their legislation, and ensure that their courts are empowered to exercise universal jurisdiction in respect of the crimes defined in the statute. Notwithstanding these future imperatives, for the present, the record of universal jurisdiction does not appear to provide the grounds for a real threat of prosecution for those granted amnesty.

**Enforcement jurisdiction**

A state’s jurisdiction to enforce its national criminal law is strictly territorial, although states can conclude treaties consenting to the extraterritorial exercise of jurisdiction. Foreign states wishing to exercise enforcement jurisdiction in prosecuting the perpetrators of amnestied crimes will require the presence of the suspect on their territory (either fortuitously or through extradition proceedings). The TRC Act states that any amnesty would only bar proceedings to determine liability, and would not necessarily extend to

---


92Note 1 above.

93A notable exception was the arrest and conviction by Danish officials in a Danish court of Croat nationals on the grounds of grievous assault of non-Danish nationals in Croatian prisoner of war camps in Dretelj in Bosnia Director of Public Prosecutions v T (E High Ct 3d Div Den 22.11.94); O’Shea n 11 above at 645.

94O’Shea n 11 above at 657.

95Higgins n 90 above at 62.

96The requirements for admissibility before the ICC are set out in art 17 of the Rome Statute. The relationship established between the ICC and national courts is described by the principle of complementarity. In essence the ICC will only step to complement measures taken by national courts where a national justice system is not dealing with a case in an appropriate manner.

97International Law Association n 91 above at 412–414.

98Brownlie n 38 above at 310–314.

99Unless the municipal law permits trials in absentia, but in any event the imposition of any sentence requires custody of the accused.
extradition proceedings.\textsuperscript{100} It seems politically imprudent for an amnesty to bar extradition proceedings, such a step would also directly contradict legal obligations negotiated in extradition treaties.\textsuperscript{101}

Acknowledging the possibility that foreign states may exercise universal prescriptive jurisdiction, and that travel abroad or extradition proceedings could fulfil the territorial requirements of enforcement jurisdiction, one must consider the possibility of raising amnesty as a defence to such prosecution.

\textbf{Amnesty as a defence to prosecution}

\textit{Prosecution in South Africa: the amnesty law challenged}

In \textit{Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa} the relatives of South Africa's best known victims of apartheid sought to set aside section 20(7) of the Act on the grounds that it was inconsistent with the right set out in section 22 of the Interim Constitution to have justifiable disputes settled by a court of law.\textsuperscript{102} The applicants argued that international law obliged the state to prosecute gross human rights violations, and that granting amnesty for such offences, constituted a breach of international law.\textsuperscript{103} The Constitutional Court held that international law, and agreements to which South Africa had pledged itself, were only relevant in the interpretation of the Constitution itself, and that section 231(1) and (4) of the Interim Constitution provided for an Act of parliament to override any conflicting rights under international agreements.\textsuperscript{104} The court concluded that the postamble to the Interim Constitution trumped section 22 thereof, and that section 20(7) of the Act was therefore constitutional.\textsuperscript{105} Policy considerations referring to the importance of amnesty to the political settlement and its incentive to truth telling were heavily weighted in the judgment.\textsuperscript{106}

From an international law perspective the judgement failed to address the question whether conventional and customary international law obliged successor regimes to punish officials of prior regimes for violations of international law.\textsuperscript{107} Dugard concedes that state practice is too unsettled to support a rule obliging states to prosecute those alleged to have committed crimes against humanity under all circumstances. At best there may be an emergent norm in favour of prosecution, but it is not absolute provided the conditional amnesty meets internationally accepted standards.\textsuperscript{108} The end

\begin{itemize}
  \item \textsuperscript{100}Section 20(7); O'Shea n 11 above at 660.
  \item \textsuperscript{101}O'Shea n 11 above at 657–660.
  \item \textsuperscript{102}1996 4 SA 671 (CC).
  \item \textsuperscript{103}Dugard n 14 at 261.
  \item \textsuperscript{105}at 698 A–F.
  \item \textsuperscript{106}Dugard n 14 above at 261.
  \item \textsuperscript{107}O'Shea n 11 above at 662.
  \item \textsuperscript{108}Dugard n 14 above at 267.
\end{itemize}
of the matter appears to be that the decision of the South African government (as reflected in the TRC arrangement) not to effect prosecutions is a decision which cannot, as yet be challenged by international law.

**Foreign Prosecution: in national and international courts**

Exactly whether foreign states are to respect an amnesty granted in another jurisdictions remains contentious. International law has not yet evolved sufficiently to support a conclusion that amnesties are prohibited. In fact, far from outlawing amnesties, international law clearly permits amnesties in the case of returning refugees. The existence of an amnesty may be considered when a foreign court is deciding to initiate a prosecution. A particular discretion exists in respect of customary crimes, since international law does not mandate an obligation to prosecute. This discretion is curtailed where foreign states are party to international criminal treaties containing *aut dedere aut judicare* obligations. Here it is suggested that the *judicare* aspect obliges the state’s competent authorities to take decisions on prosecution in the same manner as they would in the case of an ordinary offence of a serious nature under the law of the state. This obligation would, it seems, be violated where amnestied offences are not prosecuted, while similar offences remain subject to prosecution. Foreign states might even be found in breach of their treaty obligations under international human rights law, by ‘respecting’ amnesties and failing to undertake investigations. Some go so far as to say that awarding amnesties to perpetrators of gross human rights offences is, in itself, prohibited under international law. Joinet, in his capacity as Special Rapporteur on amnesty laws, has been more ambivalent, suggesting that ‘torture, forced disappearances and summary executions — as international crimes and crimes against humanity — might be crimes for which amnesty should not be granted.’ At any rate international lawyers concede that any emerging international law prohibiting blanket amnesties would require consistent application in order to crystallise as law. On this score, state practice is sorely lacking in both domestic transitions, and UN mediation and peacekeeping efforts. Remarkably in Cambodia, El Salvador, Haiti, and South Africa, the United Nations not only helped negotiate, but even endorsed the amnesties as a means of restoring peace and democratic government.

---


110 Scharf n 16 above.


113 Roht-Arriaza n 12 above at 299.

114 Note 91 above at 417.

115 Scharf n 16 above at 41.
In South Africa, the UN Secretary-General's representatives were even willing to contemplate an unconditional amnesty in respect of acts for which Joinet suggests international law might preclude amnesty.\(^{116}\)

As regards prosecution by international tribunals, the statutes establishing the ad hoc tribunals for Yugoslavia and Rwanda are silent on the effect of national amnesties. It is suggested that the primacy of jurisdiction, combined with the principle that national law cannot be relied upon to escape international obligations, effectively means that national amnesties will have no effect on the court's jurisdiction.\(^{117}\) At the preparatory conference for the establishment of the ICC, the US delegation circulated a paper suggesting that the proposed permanent court should take amnesties into account in the interests of international peace and national reconciliation when deciding whether to prosecute.\(^{118}\) Academics suggest that provisions in the Rome Statute might still afford recognition of domestic amnesties.\(^{119}\)

Exactly which international crimes could be amnestied is also an area of heated debate. Short of genocide (which is a crime for which amnesty is inappropriate) Dugard leaves open the question of which international crimes could be amnestied.\(^{120}\) Cassel proposes that crimes against humanity, and treaty crimes where states are party to international criminal conventions, cannot be amnestied.\(^{121}\) Landman adds that amnesties cannot excuse the gravest sorts of crimes including genocide and sustained assaults on the civilian populations of foreign nations.\(^{122}\)

South Africa's amnesty was tied to accountability mechanisms that encompass the fundamentals of any criminal justice system: prevention, deterrence, punishment (removal from office); and rehabilitation.\(^{123}\) Cassese suggests that, despite the fact that these accountability measures are less demanding than formal prosecution, the South African amnesty is deemed by the

---

\(^{116}\) Joinet n 112 above.

\(^{117}\) O'Shea n 11 above at 645.

\(^{118}\) Scharf n 16 above at 41.

\(^{119}\) Articles 16, 17 & 53 requires only investigation and not specifically a criminal investigation (although genuine investigations with an intent to bring the person concerned to justice might be interpreted as requiring criminal proceedings). An accused might argue that his or her confession before a truth commission, and any attendant penalties, is the functional equivalent of having been tried and convicted for the same offence (art 20), although procedures for awarding amnesties may not amount to acquittals within the meaning of 14(7) of the International Convention on Civil and Political Rights as was held in AP v Italy, Comm 204/1986 UN Doc A/43/40; G Hafner 'A response to the American view as presented by Ruth Wedgewood' (1999) European J of Int L 108 at 112-13; Scharf n 33 above at 524.

\(^{120}\) Dugard n 37 above at 289-290; Klaaren n 7 above at 5.


\(^{123}\) Scharf n 33 above at 512.
Amnesties and foreign prosecution of international crimes

States are generally free to grant amnesties without breaching their international law obligations where they are not party to any of the relevant conventions (like South Africa), or where they are party to some treaties but their amnesty measures are coupled with investigations, punishment and compensation. Whatever the nature of the amnesty or its perceived compatibility with international law, one thing is certain: they lack extra-territorial effect. Amnesties cannot diminish existing obligations under treaty and custom to bring gross human rights offenders to justice wherever they are. Provided a foreign state enjoys the jurisdiction to prescribe, and has the required custody to facilitate enforcement jurisdiction, a domestic amnesty measure could not bar the prosecution of international crimes.

Conclusion

The crimes that were amnestied in South Africa fall only within a narrow subset of bona fide international crimes. In respect of treaty crimes, the authoritative interpretations of multilateral treaties that may suggest an obligation on states party to prosecute, do allow for appreciation of lesser forms of punishment as discharging the obligation.

In respect of customary crimes, materials suggesting a duty to prosecute crimes against humanity show, at best, that there exists among states opinio juris sufficient to create a custom. Both individual state practice, and practice of the UN, reveal a mode of granting amnesties or de facto impunity, accordingly it cannot be said that a customary law duty to prosecute crimes against humanity exists. Furthermore, it would seem that at present state practice is insufficient to conclude a customary obligation to prosecute grave breaches in non-international conflicts, non-grave breaches, and torture (qua customary crime).

While the Apartheid Convention does not bind South Africa, this does not preclude municipal prosecution by states who are party to the convention. State practice reveals that, more often than not, jus cogens crimes are not prosecuted and universal jurisdiction has only been intermittently recognised and applied by domestic courts. Even without amnesty provisions, municipal courts have generally been reluctant to instigate national criminal proceedings where they lack direct interest.

Should states acquire territorial custody of those perpetrators who have been granted amnesty in respect of customary crimes, the want of any mandatory obligations to prosecute will permit a state to respect an amnesty. States party

---

125 The aut dedere aut judicare provisions of the pertinent treaties in respect of the international crimes amnestied are of no binding significance for South Africa as a non-party. Dugard n 14 above at 262.
126 Boed n 67 above at 322.
127 International Law Association n 91 above at 417.
128 Ibid.
129 Boed n 67 above at 313.
to the Apartheid convention and subject to its *aut dedere aut judicare* obligations, might be found in violation if treating amnestied suspects in a manner different to the way they would ordinarily pursue perpetrators of similar serious violations. However, amnesties granted by states that are not party to any of the conventions, or state parties whose amnesty measures are coupled with investigations or allegations, imposition of some punitive measures on the perpetrators, and compensation of victims, are valid under international law. While the South African amnesty is tied to accountability mechanisms that are less invasive than domestic or international prosecution, these mechanisms do encompass the fundamentals of a criminal justice system: prevention; deterrence; punishment (removal from office); and rehabilitation.

It is for these reasons that I suggest that, while amnestied perpetrators might be well advised to select their travel destinations with care, there is little prospect of individual criminal prosecution, under international law, for the international crimes that have been amnestied in South Africa.