The Nature, Status and Future of Amnesties under International Criminal Law

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Abstract

The ultimate sovereign prerogative of States to begin and end wars and, in particular, to grant amnesties for crimes committed during those wars, has been significantly eroded by the expanding legal imperative to address crimes whose gravity compels prosecution. As this legal obligation continues to expand, the space for a non-legal accommodation of localised sociopolitical nuances of any given conflict is correspondingly diminished. Nevertheless, a cursory overview of legal and political philosophy challenges the assertion that prosecutions of international crimes are or ever can be exercises of pure, unadulterated legalism, uncontaminated by political influence. We should, on that basis, be willing to accept that there may, in some situations, be legitimate scope for utilising politics to address the perpetration of crimes during conflict beyond the courtroom. Ultimately, then, this article will seek to draw on contemporary legal and philosophical debate to map out the evolving position of international law with respect to amnesties and, on that basis, to identify international criminal law as a form of juridified international politics. This will provide a foundation for justifying recourse to amnesties, albeit in very limited circumstances, and to tentatively outline some practical guidelines for identifying those circumstances.

From such crooked timber as humanity is made of, no straight thing was ever constructed.[1]

It is a very tough call whether to point the finger or try to negotiate with people. As a lawyer, of course, I would like to prosecute everybody who is guilty of these heinous things. As a diplomat or as a politician or as a statesman, I would also like to stop the slaughter, bring it to a halt. You have two things that are in real conflict here ... I don't know the proper mix.[2]

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1 Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose* (Lewis White Beck, trans, 1963) sixth thesis.

2 Morris Abrams, former US Ambassador to the UN Commission on Human Rights, cited in Roy Gutman, 'War Crime Unit Hasn't a Clue: U.N. Setup Seems Designed to Fail', *Newsday*, 4 March 1993, 8.

I Introduction

If we accept the proposition that, at least at its margins, international criminal law (ICL) could be viewed as an attempt to juridify politics, then the next question we must ask ourselves is: where do we draw the boundaries of the ICL project? In other words, it is a fundamental question of identifying the point up to which we impose criminal penalties for abhorrent State behaviour and the point beyond which we allow international politics to operate unfettered by the law. The concept of amnesty for crimes committed by warring parties appears to be located on these boundary lines and so it is an issue to which ICL has not yet given a definitive (or 'juridified') response. In short, this article is an attempt to go beyond the lofty rhetoric that pervades discussion of ICL in order to clarify the nature of amnesties and their status under international law, and to then make some suggestions as to the extent to which ICL should permit their operation as it continues to evolve as a system for addressing conflict-related atrocities.

The ultimate sovereign prerogative of States to begin and end wars (and to utilise long-established protocols of international diplomacy to do so) and, in particular, to grant amnesties for crimes committed during those wars, has been significantly eroded by the expanding legal imperative to address crimes whose gravity compels prosecution. As this legal obligation continues to expand the space for a non-legal accommodation of localised sociopolitical nuances of any given conflict is correspondingly diminished. The notion of justice is inherently constituted not only by legal considerations, but also by moral, social and political imperatives. Consequently, the search for a unifying blueprint for post-conflict justice is unending and futile. The bottom line is that justice is dependent on accountability, the mode of which will, in turn, be determined by the needs and exigencies of each post-conflict situation.

Nevertheless, only rarely, if ever, will justice and the accountability on which it is founded be served by criminal trials *alone*. That is not to deny the legitimacy and effectiveness of the burgeoning body of universal ICL principles and minimal standards that demand accountability for heinous acts of extreme violence. It is, on the contrary, an acknowledgement that if we are to succeed in developing an effective, lasting system of international accountability — and the progression of the international order to this point is far from inevitable — then it is essential for us to both recognise and understand the complacency of ICL's grandiose, universalising moral claims, and to engage directly with the political complexities that make it thus. In short, the project of constructing a sustainable edifice of international criminal justice demands that we resist, as Todorov puts it so succinctly, 'the certainties of people who claim always to know where good and evil are found'.[3]

A cursory overview of legal and political philosophy gives the lie to the assertion that prosecution of international crimes, and the system of ICL that mandates them, are or ever can be exercises of pure, unadulterated legalism, uncontaminated by political influence. We should, on that basis, be willing to accept that there may, in some situations, be legitimate scope for utilising politics to address the perpetration of crimes during conflict beyond the courtroom. This is very much in keeping with the tenor of Beth Simmons' suggestion — made during her keynote address at the ANZSIL (Australia New Zealand Society of

[3] Tzvetan Todorov, *Hope and Memory: Lessons from the Twentieth Century* (Princeton University Press, 2003) 217, cited in Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity Press, 2007) 10.

International Law) Conference in June 2011 — to 'develop peripheral vision' and 'entertain alternative possibilities'.[4]

There is, therefore, significant scope for creative negotiation between the extreme poles fixed by realists' and legalists' antagonistic conceptions of international criminal justice and the manner in which these competing visions might be realised. The dynamism and complexity of this policy space is reified in the range of mechanisms that are available to be applied in a variety of nuanced, interconnected ways in order to fulfill the demands of accountability, while facilitating sustainable peace settlements sensitive to local imperatives. Ultimately, then, this article will seek to draw on contemporary legal and philosophical debate to identify some tentative, practical guidelines and principles for determining when it is appropriate to stay the hand of the law, and cede solutions to politics by respecting amnesties, and when it should intervene, and thereby overrule amnesties. As the international community begins to grapple with allegations of international crimes committed in the Middle East, these issues are now as relevant as ever.

II Amnesties and the duty to prosecute under international law

A What is an amnesty?

The notion of amnesty is derived from *amnestia*, the Greek word for 'forgetting'.[5] Hence, at its most basic, an amnesty can be described as a form of forgiveness granted by the State in respect of criminal acts.[6] *Black's Law Dictionary* explains that, '[u]nlike an ordinary pardon, amnesty is [usually] addressed to crimes against state sovereignty — that is, to political offenses with respect to which forgiveness is deemed more expedient for the public welfare than prosecution and punishment'.[7] In short, amnesties presuppose a breach of the law and provide immunity from the legal consequences of it.[8]

The power to grant amnesties, therefore, lies at the heart of what it means to be a State[9] and, according to political philosophers, a monopoly of the power of whether or not to punish is one of the defining characteristics of statehood.[10] This tenet of the international order comes into direct conflict with the evolving architecture of ICL, which purports to subject sovereignty to respect for human rights and, accordingly, requires the punishment of those acts that violate them in the extreme. ICL is, consequently, highly ambivalent on the issue of amnesty.[11] Nevertheless, it is possible to discern a basic position which dictates

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4 Beth A Simmons 'The Promise and Limits of International Law' (Keynote address delivered at the 19th Annual ANZSIL (Australia New Zealand Society of International Law) Conference, Canberra, Australia, 23 June 2011).

5 Sanford Kadish (ed), *Encyclopedia of Crime and Justice* (Free Press, Vol 3, 1983) 59.

6 Michael Scharf and Nigel Rodley, 'International Law Principles on Accountability' in M Cherif Bassiouni (ed), *Introduction to International Criminal Law* (Transnational Publishers, 2003) 89.

7 Bryan Gardner (ed), *Black's Law Dictionary* (West Group, 8th ed, 2004), 93.

8 Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International & Comparative Law Quarterly* 91, 91.

9 Hence, for example, according to art II of the *Treaty of Westphalia* (1648), 'there shall be on one side and on the other a perpetual oblivion, amnesty, or pardon of all that has been committed since the beginning of these troubles': Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 243.

10 See generally Paul Moyle, 'Separating the Allocation of Punishment from its Administration: Theoretical and Empirical Observations' (2001) 41 *British Journal of Criminology* 77.

11 Lisa Laplante, 'Outlawing Amnesty: the Return of Criminal Justice in Transitional Justice Schemes' (2009) 49 *Virginia Journal of International Law* 915, 931.

that, put simply, 'qualified amnesties' are permissible under international law, while 'blanket amnesties' — that is, those which bar all types of investigation — are not.[12] Hence, the question now ought to focus on what *type* of amnesty is acceptable in a given situation.[13] The answer to this question is, of course, heavily influenced by the specific nature and source of the legal framework within which the issue arises.

B International treaties

Leaving aside the vexed and much exercised issue of whether a crime is one for which universal jurisdiction lies, it is clear, pursuant to the bedrock principle of *pacta sunt servanda* [agreements must be kept], that treaties can and do limit the prerogative of a State to grant amnesties. Hence, article 27 of the *Vienna Convention on the Law of Treaties* stipulates that 'a party may not invoke the provisions of its internal law as justification for failure to perform a treaty'.[14] Treaty-based limitations of the sovereign prerogative to grant amnesties are largely imposed in relation to the duty to investigate and prosecute the particular crimes that are the subject of the treaty, rather than expressly addressing the applicability of amnesties per se.

1 Rome Statute

The *Rome Statute of the International Criminal Court*[15] does not explicitly address the issue of amnesties. The question of whether domestic amnesties would constitute a bar to prosecution at the International Criminal Court (ICC) was raised briefly by the Preparatory Committee prior to the Rome Conference and, subsequently, avoided at the Rome Conference itself.[16] Given the clear legal trend from the 1990s onwards towards criminal accountability, the omission is somewhat surprising.[17] Nevertheless, indications are that this avoidance was deliberate and reflects the recognised, but exceptional, utility of amnesties in peace negotiations within a framework of presumptive accountability.[18] Indeed, this lacuna could more broadly be described as reflecting fundamental debates amongst delegates as to what it is that constitutes law and politics in the first place, and, thus, what ought and ought not to be addressed by the *Rome Statute*.[19] It is also entirely consistent with the underlying rationale of the ICC as an institution of complementarity — that is, one which defers to the legitimate exercise of domestic jurisdiction — rather than primacy, as is the case with the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[20]

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12 Ibid 940–3.

13 Ibid 941.

14 *Vienna Convention on the Law of Treaties*, opened for signature May 23 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 27 ('*Vienna Convention*').

15 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

16 John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese, Paula Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 699–700.

17 Gavron, above n 8, 107.

18 Gerhard Hafner et al, 'A Response to the American View as Presented by Ruth Wedgwood' (1999) 10(1) *European Journal of International Law* 108, 109–13; Michael Scharf, 'From the Exile Files: An Essay on Trading Justice for Peace' 63 (2006) *Washington and Lee Law Review* 339, 372.

19 Simpson, above n 3, 28; see further at Part III below.

20 Gavron, above n 8, 105–7.

In the absence of an express provision, the presumption of the *Rome Statute* is heavily in favour of prosecution, irrespective of the existence of an amnesty. Hence, for example, the Preamble states that 'the most serious crimes of concern ... must not go unpunished', that there must be 'an end to impunity for the perpetrators of these crimes' and that all States are obliged 'to exercise ... criminal jurisdiction over those responsible for international crimes'. Notably, the *Vienna Convention* stipulates that treaties must be interpreted in light of their preambular text.[21] In addition, some of the key crimes set out in the *Rome Statute* — in particular, those of genocide and grave breaches of the *Geneva Conventions* — are treaty-based crimes that states parties are under a duty to prosecute.[22] Nevertheless, several of the *Rome Statute's* provisions afford a 'creative ambiguity' that would potentially supply the prosecutors and judges of the ICC with grounds on which to recognise amnesties or even an amnesty exception, to which the exercise of ICC jurisdiction must be subject.[23] There are three sources of this 'creative ambiguity'.[24]

First, according to article 16 of the *Rome Statute*, investigations or prosecutions are barred for a period of 12 months (which is subject to renewal) following a chapter VII resolution-based 'request' by the United Nations Security Council (UNSC) to that effect. According to Scharf, the UNSC has legal authority to compel respect for an amnesty under article 16 if it has determined that there is a threat to the peace under article 39 of the *UN Charter* and provided also that the resolution giving rise to the request is consistent with the purpose and principles of the UN under article 24 (for example, to maintain international peace and security).[25] It has been submitted, on the other hand, that the respect for an amnesty required by article 16 is only temporary, not permanent (as Scharf implies) and, unless renewed, will lapse after 12 months.[26] Article 16 is, thus, intended more as a delaying mechanism.[27] More broadly, it is a clear manifestation of international politics and arose, in no small part, from the American insistence that 'peace sometimes requires cutting deals with ... war criminals', which in turn requires reservation of power to the UNSC to stay proceedings.[28] There has, for example, been considerable lobbying of the UNSC by numerous States — thus far unsuccessful — to exercise this power with respect to the indictment of Omar Al-Bashir, the President of Sudan.

Second, the prosecutorial discretion enshrined in article 53 of the *Rome Statute* entitles the Prosecutor to refuse to launch an investigation or, subsequently, a prosecution, because, '[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that [it] would not serve the interests of justice'. Furthermore, the Prosecutor may at any time reconsider his or her decision to launch an investigation or prosecution in light of 'new facts or information'.[29] Prosecutorial discretion is, however, subject to the possibility of review by the Pre-trial Chamber of the ICC.[30]

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21 *Vienna Convention* art 31(2).
22 Dugard, above n 16, 701.
23 Scharf, above n 18, 367.
24 Ibid 368–72.
25 Ibid 369.
26 Gavron, above n 8, 109.
27 Ibid.
28 David Wippman, 'The International Criminal Court' in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 151, 167.
29 *Rome Statute* art 53(4).
30 *Rome Statute* art 53(3).

Third, in the absence of a positive act of deferral to an amnesty by either the UNSC or the Prosecutor, the core principle of complementarity enables an amnesty-issuing State to resist ICC proceedings on the basis that the relevant crimes either have been, or are being, investigated. [31] This deference to sovereignty will lapse, however, if the State is deemed to be either 'genuinely' unwilling or unable to prosecute. The added requirement of genuineness broadens the proviso, so that deceitful or insincere actions by a government in relation to investigation and prosecution would be caught.[32] It is notable that the *Rome Statute* refers only to an 'investigation' and not a criminal investigation, making it at least arguable that a truth commission would constitute an adequate investigation.[33] On the other hand, a truth commission would more plausibly be 'inconsistent with an intent to bring the person concerned to justice' and, thus, constitute unwillingness.[34] Ultimately, the question of inability or unwillingness will fall to be determined by the ICC taking into account the complex post-conflict matrix of factors in which the relevant government is trying to construct a durable peace.

Given the high threshold for invoking Chapter VII powers and the difficulty in conceptualising an amnesty as being consistent with investigation or prosecution, prosecutorial discretion is likely to provide the most fertile ground on which to justify deference to domestic amnesties.[35] Ultimately, however, in the final analysis, an amnesty is strictly binding only on the State in which it was issued and does not preclude the ICC's Office of the Prosecutor from exercising its discretion to prosecute.[36]

2 *Convention Against Torture*

States party to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* ('*CAT*') are obliged to investigate, prosecute and punish or extradite all allegations of torture, whether occurring on their territory or in relation to its nationals.[37] Furthermore, the obligation on states parties to prosecute acts of torture is an *ongoing* one. Article 6 requires states parties to arrest suspects within their jurisdiction, investigate alleged acts of torture and 'submit the case to its competent authorities for the purpose of prosecution', even if committed prior to ratification of *CAT* by the State. According to Diane Orentlicher, this 'precludes adherents to [*CAT*] enacting, or at least applying, an amnesty law that forecloses prosecution of torturers'.[38] Thus, it is quite clear that amnesties granted with respect to acts of torture would be invalid pursuant to *CAT*.

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31 *Rome Statute* art 17(1). For a comprehensive exploration of the scope of article 17 and the nature of complementarity, see generally Kevin Heller, 'A Sentence-Based Theory of Complementarity' (2012) 53 *Harvard International Law Journal* 85.

32 Jennifer Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study' (2009) 26 *Arizona Journal of International and Comparative Law* 49, 59–60.

33 Scharf, above n 18, 371.

34 Gavron above n 8, 111; Dugard, above n 16, 702.

35 Dugard, above n 16, 703; Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 14 *European Journal of International Law* 481, 483.

36 Manisuli Ssenyonjo 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and The International Criminal Court' (2005) 10 *Journal of Conflict & Security Law* 405, 433.

37 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 2(1) (('*CAT*'); Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection* (Oxford University Press, 2009), 337.

38 Diane Orentlicher, 'Settling Accounts: the Duty to Prosecute Human Rights Violations of a Previous Regime' (1991) 100 *Yale Law Journal* 2537, 2567; see also Human Rights Committee, *General Comment 20: Article 7*, UN Doc HRI/GEN/1/Rev 1 **(**1994).

3 Genocide Convention

In addition to being an individual crime under customary international law, the prohibition of genocide also imposes obligations on states party to the *Convention on the Prevention and Punishment of the Crime of Genocide*.[39] These include a comprehensive series of obligations not to commit genocide, to prevent it, not to aid or assist in its commission and to punish those responsible for it, or otherwise extradite them.[40] Thus, under both the *Genocide Convention* and customary law amnesties can never act as a bar to prosecution of acts of genocide.

4 International human rights treaties

According to Laplante, while the discipline of ICL continues to support a notion of qualified amnesty as being permissible under international law, in the context of transitional justice schemes, international human rights law (IHRL) dictates that 'no amnesty is lawful in those settings'.[41] The *International Covenant on Civil and Political Rights,*[42] the *International Covenant Economic, Social and Cultural Rights*[43] and regional human rights instruments are silent on the question as to whether there is a duty to prosecute violations, however, there is a growing body of jurisprudence imposing such a duty by necessary implication. Thus, in the landmark decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez*, it was held that the obligation on states party to guarantee enjoyment of the rights recognised in the *American Convention on Human Rights* obliged States to prevent, investigate and punish any violation thereof.[44] Similarly, in the *Barrios Altos* decision, the Inter-American Court of Human Rights held that amnesties issued by Peru's Fujimori regime violated provisions of the *American Convention on Human Rights* guaranteeing the right of survivors and victims' families to the truth, to be heard by a judge, to receive judicial protection and to have the suspected killers in that case investigated, arrested and prosecuted in relation to the extrajudicial executions of which they were accused.[45] On that basis, serious rights violations that do not necessarily trigger the treaty obligations referred to above, do not meet the threshold requirements to constitute a crime against humanity or are not a war crime may, nevertheless, still arguably oblige the State to 'ensure' the protection of treaty-based rights through prosecutions, thereby precluding the operation of amnesties.[46] This may signal the opening salvo of a nuanced 'new legality that limits the possibility of choice' and that goes beyond the tired, sterile binary of the truth versus justice debate.[47]

This view is supported by the UN Human Rights Committee, which has indicated that the grant of amnesties by a state party contravenes treaty-based human rights that have

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39 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951); Kalin and Kunzli, above n 37, 301.

40 Kalin and Kunzli, above n 37, 302.

41 Laplante, above n 11, 918–9.

42 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

43 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

44 *Velásquez Rodríguez v Honduras* [1988] IACHR 1 (ser C no 4) (29 July 1988) [165].

45 *Barrios Altos v Peru* [2001] IACHR 13 (ser C no 83) (3 September 2001) ('*Barrios*'); Laplante, above n 11, 962–3.

46 Laplante, above n 11, 971–2.

47 Ibid 983–4.

been violated by the amnestied acts.[48] The Inter-American Commission on Human Rights has also held that amnesties violate a number of the rights contained in the *American Convention on Human Rights*, including the right to a remedy and to a fair trial.[49]

5 Miscellaneous

There are a number of other international instruments that buttress the duty to prosecute, which is enshrined, albeit in varying terms, in the above treaties. The 1949 Geneva Conventions oblige states party to prosecute or extradite persons responsible for grave breaches and this is reinforced in *Protocol I*.[50] Exceptionally, however, article 6(5) of *Protocol II* states that authorities 'shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict'.[51] This was relied on by the South African Constitutional Court in *AZAPO v President of the Republic of South Africa*[52] as providing grounds for an exception to the prohibition on amnesty.[53] Nevertheless, it is widely accepted that this provision was not intended to preclude prosecution of war criminals. Rather, it was intended to discourage punishment of participants in conflict for the sole reason of their participation and in the interests of promoting post-conflict national reconciliation.[54]

The *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*[55] prohibits States from applying statutory limitations to those crimes, thereby implicitly imposing an obligation to prosecute.[56] The statutes of the ICTY and ICTR similarly compel the full cooperation of States to ensure the trial of all persons accused of committing crimes within their jurisdiction.[57] The International Law Commission's much-anticipated 1996 *Draft Code of Crimes against the Peace and Security of Mankind* reinforces the customary law duty of States to try or extradite persons accused of committing crimes against humanity. Finally, the *Vienna Declaration and Programme of*

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48 *Laureano Atachahua v Peru*, Communication No 540/1993, UN Doc CCPR/C/56/D/540/1993 (16 April 1996).

49 For a brief discussion see, Naomi Roht-Arriaza, 'Truth Commissions and Amnesties in Latin America: The Second Generation' (1998) 92 *American Society of International Law Proceedings* 313.

50 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 49; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 50; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 129; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 146; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I]*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979) arts 48, 85(1).

51 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II]*, opened for signature June 8 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 6(5).

52 *AZAPO v President of the Republic of South Africa* [1996] (4) SA 672.

53 Kate Allan, 'Prosecution and Peace: A Role for Amnesty before the ICC?' (2010) 39 *Denver Journal of International Law & Policy* 240.

54 Anja Seibert-Fohr, 'Amnesties', in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2nd ed, 2012) <http://www.mpepil.com>.

55 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, opened for signature 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970).

56 Dugard, above n 16, 696.

57 *Statute of the International Tribunal for the Former Yugoslavia*, SC Res 827, UN Doc S/RES/827 (25 May 1993), art 7; *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UN Doc S/RES/955 (8 November 1994), art 6.

Action urged States to prosecute persons guilty of 'grave violations of human rights such as torture'.[58]

C Customary international law

The erection of a new system of international criminal justice in the second-half of the 20th century, and the elaboration of that system in recent years, has collided head on with the formerly expansive sovereign prerogative to grant amnesties and is having an increasingly restrictive effect on that prerogative as a result.[59] Hence, while there is a discernable trend towards their restriction, the position of amnesties under customary international law is unsettled and contentious, and can best be summarised by stating that their grant may be legal in some situations and illegal in others. This is reflected in the divergent state practice on the issue.[60] It is helpful to address the complex, thorny question of amnesties by distinguishing on the basis of the forum in which it is being enforced.

First, at the national level, it is clearly within the sovereign power of a State to grant amnesties to its own citizens, or to citizens of another country, and those amnesties will be valid within the granting State's territory unless that State decides otherwise (for example, as a result of a regime change).[61] According to Cassese, this would militate against the existence of a customary rule prohibiting amnesties for crimes of universal jurisdiction.[62] Given the number of States that have granted amnesties for serious crimes in recent years, this would also tend to be supported by state practice.[63] Second, at the transnational level, as a matter of domestic municipal law, a State is entitled to disregard an amnesty granted in another State and prosecute the beneficiary of that amnesty in accordance with its own domestic laws (as demonstrated, for example, in the prosecution of Pinochet in the United Kingdom).[64] Third, at the supranational level, ICL embodies a number of peremptory, or *jus cogens*, norms of international law from which no derogation is permitted, whether by treaty, under customary international law or otherwise.[65] International crimes of a *jus cogens* character inhere a concomitant international duty that they be prosecuted, a duty for which there is an increasing number of international enforcement mechanisms (for example, the ICC).[66] The category of *jus cogens* crimes is not fixed or determinate, however, it would arguably include war crimes, genocide, crimes against humanity[67] as well as piracy, slavery,

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58 *Vienna Declaration and Programme of Action 1993*, A/CONF.157/23 (12 July 1993), [60].

59 Leila Nadya Sadat, 'Exile, Amnesty and International Law' (2006) 81 *Notre Dame Law Review* 955, 959.

60 For a summary of state practice supporting and opposing amnesties for international crimes see Karim Khan and Rodney Dixon, *Archbold: International Criminal Courts Practice, Procedure and Evidence* (Sweet & Maxwell, 2nd ed, 2005) 766–7.

61 Sadat, above n 59, 102; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3.

62 Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003) 314.

63 Charles P Trumbull IV, 'Giving Amnesties a Second Chance' (2007) 25 *Berkeley Journal of International Law* 283, 295–7.

64 Ibid 304–6; Robinson, above n 35, 503–4.

65 Sadat, above n 59, 970–1.

66 Ibid 971. It should be noted, however, that the ICC is a creature of statute. Thus, its jurisdiction is prescribed by the *Rome Statute*. Nevertheless, 'the most serious crimes of concern' to which the ICC's jurisdiction is limited arguably reflect crimes established under customary international law.

67 Sadat, above n 59, 974; Bassiouni, above n 6, 172; International Human Rights Law Institute, 'Chicago Principles on Post–Conflict Justice (2005), principle 10; Orentlicher, above n 38, 2593 (crimes against humanity); Laplante, above n 11, 941–2 (crimes against humanity); cf Michael Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59(4) *Law and Contemporary Problems* 41, 59. The question of whether or not customary international law imposes a duty to prosecute crimes against humanity is the subject of much scholarly debate amongst idealists and realists alike — which, according to

crimes against peace and torture.[68] In a series of decisions on the validity of amnesties the Special Court of Sierra Leone has also expressed the view that a blanket rule prohibiting amnesty for all international crimes is crystallising into a customary norm (although the reasoning of these decisions has been called into question).[69] There is, therefore, an emerging body of international practice that would tend to support a norm prohibiting amnesty for international, *jus cogens* crimes for which universal jurisdiction lies[70] on the basis that one State could not deprive other States or international tribunals of jurisdiction to try international crimes through the simple expedient of a domestic amnesty.[71]

The validity and enforceability of an amnesty will also depend to a large extent on whether or not it was granted conditionally and as a result of a comprehensive investigative process leading to some form of accountability (consisting in the case of South Africa, for example, of a truth and reconciliation mechanism); or unconditionally and without proper investigation, that is, as a blanket amnesty.[72] Further support can be found in the *Impunity Principles*, which effectively prohibit the grant of amnesties, unless there has been a proper investigation and prosecution of the offence.[73] Hence, according to Cassese:

> These innovative manifestations of international practice find their rationale in the notion that, as international crimes constitute attacks on universal values, no single state should arrogate to itself the right to decide to cancel such crimes, or to set aside their legal consequences.[74]

In short, there is an 'emerging custom of permitting amnesties while demanding some degree of accountability…'.[75] Thus, it could not be said that the international legal order has reached a point at which the prohibition of amnesties for international crimes has crystallised into a customary norm, although there is a definite trend in that direction.[76] Nevertheless, the underlying motivation for this article is to question the extent to which it might ever be feasible or desirable to evolve towards an absolute international legal

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Jackson, is 'suffering under the constraints of unwarranted, self-imposed rigidity' and is less nuanced than ought to be the case: Miles Jackson, 'The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework' (2007) 16 *Tulane Journal of International and Comparative* Law 117, 119.

68 Sadat, above n 59, 974; Stephen Macedo and Mary Robinson, *The Princeton Principles on Universal Jurisdiction* (Program in Law and Public Affairs, Princeton University, 2001) 23–7, principle 2(1); Bassiouni, above n 6, 172.

69 *Kallon* (SCSL-04-15-AR72(E)) and *Kamara* (SCSL 04-16-AR72(E)) — Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (13 March 2004); Sarah Williams, 'Amnesties in International Law: the Experience of the Special Court for Sierra Leone' (2005) 5 *Human Rights Law Review* 271, 307–8.

70 According to Lord Millett in the *Pinochet No 3* case, in order for universal jurisdiction to lie with respect to an international crime under customary international law, it must be contrary to a *jus cogens* norm: *R v Bow St Metro Stipendiary Magistrate, ex parte Pinochet* (No 3) [2000] 1 AC 147, 275.

71 Cassese, above n 62, 314–5.

72 Dugard, above n 16, 699.

73 *Updated set of principles for the protection and promotion of human rights through action to combat impunity*, Addendum to the Report of the independent expert to update the Set of principles by Diane Orentlicher, E/CN.4/2005/102/Add.1 (8 February 2005) ('*Impunity Principles*'). According to principle 24 (a):

> The perpetrators of serious crimes under international law may not benefit from such [amnesty] measures until such time as the State has met the obligations to which principle 19 refers [to prosecute suspects] or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question.

74 Cassese, above n 62, 315.

75 Trumbull, above n 63, 304.

76 Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Springer, 2002), 265; Dugard, above n 16, 698; cf Sadat, above n 59, 1021–2 (arguing that this prohibition may have already crystallised into a customary norm).

prohibition of amnesties for crimes in general. It could be said that the state of flux and evolution that exists at the level of customary international law reflects uncertainty within the international community as to the extent to which ICL should regulate and restrict the freedom to negotiate political solutions to conflict.

III Amnesty and the limits of a juridified politics: A critique of ICL

In his influential treatise on the political nature of humankind and the State, German legal theorist and political philosopher Carl Schmitt warns of the dangers inherent in claims purporting to speak in the name of universal humanity, so that all those by whom one is opposed are seen as speaking *against* humanity and must be exterminated on that basis.[77] For that reason, Schmitt thought it desirable to remove from politics any potential for the justification of one's actions by reference to universal moral claims, the end result of which would be an unlimited scope of operation for all claims to do good and, ultimately, 'wars for the domination of the earth'.[78] Schmitt's conception of the political has important implications for our understanding of a juridified politics. If we acknowledge amnesties (somewhat simplistically) as a form of resistance to a universalist juridification of politics, and recognise that there is significant support for the selective use of amnesties (even amongst some human rights advocates), universal moral claims for an absolute legal rule of prosecution incapable of exception give cause for concern. This is particularly the case given the extreme gravity of international crimes, and the potentially extreme consequences that might flow from their prosecution.

A Understanding ICL: A critique

The field of ICL is beset with a prevailing rhetoric of and pretension to legalistic certainty, which belies both its relatively recent origin and the nature of the international legal order through which it has emerged. Thus, ICL has been described as 'a philosophically conflicted area',[79] a fragmented and 'unorganized system full of intra-systematic tensions, contradictions and frictions' consisting of 'erratic blocks and elements'.[80] Ratner and Abrams summarise the tension between universalist legal principle and localised, expedient political practices under ICL thus:

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77 Carl Schmitt, *The Concept of the Political* (University of Chicago Press, 2007), xxii. According to Schmitt, 79:

> Modern means of annihilation have been produced by enormous investments of capital and intelligence, surely to be used if necessary. For the application of such means, a new and essentially pacifist vocabulary has been created. War is condemned but executions, sanctions, punitive expeditions, pacifications, protection of treaties, international police, and measures to assure peace remain. The adversary is thus no longer called an enemy but a disturber of peace and is thereby designated to be an outlaw of humanity. A war waged to protect or expand economic power must, with the aid of propaganda, turn into a crusade and into the last war of humanity. ... But this allegedly non-political and apparently even antipolitical system ... cannot escape the logic of the political.

78 Ibid xxii.

79 Dwight Newman, 'The Rome Statute, Some Reservations Concerning Amnesties, and A Distributive Problem' (2005) 20 *American University International Law Review* 293, 294.

80 Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849, 850.

> Although arguments based on legal duties in treaties or custom should and do influence decision-makers, they hardly determine the policies of states and international organizations regarding accountability, criminal or otherwise.[81]

Ultimately, their responses to various atrocities will rely principally on independent, moral, social, and political considerations. This is instantiated in, among other things, the yawning gap that exists between state practice in permitting amnesties and repeated, absolutist assertions at the international level of their prohibition under international law. As such, even the most ardent supporters of the international criminal justice framework would concede that the enforcement of international criminal law is usually influenced by the foreign policy agenda of powerful States.[82] As Ian Brownlie bluntly put it, '[p]olitical considerations, power, and patronage will continue to determine who is to be tried for international crimes and who not'.[83]

Inquiry into the nature of ICL leads inevitably to broader questions as to the nature of international law and, ultimately, of the concept of law itself. Hence, in order to challenge the legal certitude with which the staunchest advocates of trial-based international criminal justice insist on prosecution and thereby oppose the use of amnesty as an inappropriately political solution, it is essential to challenge prevailing assumptions as to the intrinsic character and function of law. Judith Shklar challenged the unquestioned, axiomatic certainties of legalism — 'the ethical attitude that holds moral conduct to be a matter of rule following' — in her classic exegesis on the relations of law to politics and morality.[84] According to Shklar, legalism is, in actuality, an impeachable *political ideology* that clashes with other, competing policies, and whose adherents 'in their determination to preserve law from politics, fail to recognize that they too have made a choice among political values'.[85] It is, thus, a doctrine that produces in its practitioners, namely lawyers, an unshakeable conviction that non-legal responses to sociopolitical issues (for example, a sociologist's understanding of a family's behaviour) must inevitably succumb to the self-evident truth of the *legal* response to those same issues (for example, a family lawyer's legal appraisal of that same behaviour).[86] As such, legalism produces an instinctive reliance on 'judicialization' to resolve disputes in preference to the distasteful 'politics of negotiation, expediency and arbitrariness'.[87]

Moving with greater specificity from law to international law, and to ICL in particular, Gerry Simpson questions the extent to which law can ever completely displace or 'juridify' politics in order to achieve international criminal justice.[88] On that basis, he questions 'a particular sensibility that equates justice with forms or places ... that justice is a matter of

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81 Stephen Ratner and Jason Abrams, *Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy* (Oxford University Press, 2nd ed, 2001), 155.

82 Sadat, above n 59, 994.

83 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 575.

84 Judith Shklar, *Legalism* (Harvard University Press, 1964), 1.

85 Ibid 3, 8.

86 Shklar also cites the observations of an English lawyer, who states that '[A lawyer] will fight to the death to defend legal rights against persuasive arguments based on expediency or the public interest or the social good ... He distrusts them ...': ibid 9.

87 Ibid 17. Relevantly for the purposes of this article, Shklar goes on to focus in particular on the International Military Tribunal at Nuremberg as the reification of the legalist policy of justice: ibid 122–3.

88 Simpson, above n 3.

place rather than practice or outcome, or that trial must always trump negotiation'.[89] ICL is, therefore, not merely influenced by, but is constituted by, the ongoing, uncertain flux within and between a series of relationships: law's place, and the underlying relationship between competing demands for cosmopolitan and local justice; law's subjects, and the underlying relationship between individual and collective criminal responsibility; law's promise, and the underlying relationship between the didactic and the juridical; law's anxieties, and the underlying relationship between show trials and genuine proceedings; law's hegemony, and the underlying relationship between law in war and the law of war; and finally, law's origins, and the underlying relationship between legal sanction and extra-legal action.[90]

Understanding and acknowledging the dynamic mutability of these constituent relationships — and of ICL as a result — provides us with a platform for developing a richer, more nuanced understanding of amnesties and of the notion that they may have a legitimate function to play in mediating the uncertainties of international criminal justice. Thus, on that basis, and along the lines of Shklar's critique of legalism, 'war crimes trials are best understood as a form of legalistic politics, a law in the midst of politics and not detached from them'.[91] This was reified for example, in the series of initiatives that led, ultimately, to the ratification of the *Rome Statute* and the creation of the ICC, initiatives that were both political and legal — a clear attempt to expand the reach of IHRL and international humanitarian law and, thereby, to achieve political goals through law.[92] Amnesties can, on that basis, be viewed as a relaxation of the strictures of ICL and the preservation of space for the operation of a less legalistic form of politics. This returns us to the fundamental question: when, in what circumstances and to what extent should law yield to politics? This is a question that has exercised jurists and philosophers since time immemorial and could not possibly be answered in this article. In more recent years, the conundrum has become captured within the simplistic, facile binary of 'peace versus justice', expressed more clearly in the clarion call insisting that there will be 'no peace without justice' or, conversely and less commonly, 'no justice without peace'. A little-scrutinised assumption underlying the precision of this dichotomy is that there is a clear consensus as to what constitutes justice, which, as we will see, is clearly not the case.

In sum, therefore, if we accept that war crimes trials are political trials,[93] and not an exercise in pure, unadulterated legalism (as idealist proponents would have it), then we should be equally willing to accept that there can, should be and is space for utilising politics to address war crimes outside of the courtroom and beyond trials.

B The mechanisms for post-conflict justice: A brief overview

There is significant space for creative negotiation in the field of international criminal justice between the realists' critique of the institutionalised legalism of ICL as utopian, and therefore 'bad', politics,[94] and the meta-narrative of transcendental legalism, whose

89 Ibid 10.
90 Ibid 29.
91 Ibid 14.
92 Wippman, above n 28, 160.
93 Simpson, above n 3, 11.
94 Ibid 20–1.

proponents advocate a just international criminal order founded purely on objective laws uncontaminated by political influence.[95] As alluded to above, ICL is perhaps best understood as 'instrumentalising' politics, rather than being entirely displaced by it, on the one hand, or transcending it, on the other.[96] To put it simply, the demands of ICL can arguably be met through deployment of a combination of political, legal and politico-legal mechanisms and initiatives.

According to Alvarez, the alternatives to international criminal justice include national courts, truth commissions, non-criminal sanctions (for example, prohibiting impugned individuals from holding public office), reparations and other forms of redress for victims (for example, official acknowledgement, full and public disclosure of the truth, memorialisation) and amnesties.[97] Hence, the question of international criminal justice is not a simple dichotomous choice between criminal accountability and total amnesia.[98] In a much-cited article, Snyder and Vinjamuri convincingly demonstrate that the use of both domestic and international criminal trials as a means of securing justice is, to say the least, fraught with difficulty and invariably fall far short of these expectations.[99] Hence, even vociferous supporters of individual accountability acknowledge the limitations of criminal trials and the need to consider a variety of creative solutions in order to effectively respond to mass atrocity.[100] This is reflected, for example, in the drafting negotiations for the *Rome Statute*. Even the delegations that were most committed to prosecution of all international crimes did not insist on an iron rule mandating prosecution as the only legitimate response to international crimes.[101] Accordingly, '[t]he lawyerly view that equates "accountability and justice" uniquely with criminal punishment is untenable and may be detrimental to fulfilling Nuremberg's legacy'.[102] An unwavering insistence on prosecutions may unnecessarily prolong conflict as regimes facing the prospect of future punishment will be less likely to expose themselves to the criminal accountability that peace ordinarily demands.[103]

Consequently, the path to post-conflict justice, while well-trodden, is not easy to navigate, and the variety of frameworks that have been designed and applied to that end in recent decades have arguably fallen short of their objectives to varying degrees. These frameworks utilise a variety of combinations of the mechanisms described by Alvarez. A prominent approach is the 'two-track model', which has been applied in Timor-Leste and Sierra Leone. Essentially, this model rests on simultaneous, mutually reinforcing

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95 Ibid 19–20.

96 Ibid 23–4.

97 See generally José Alvarez, 'Alternatives to Criminal Justice' in Cassese (ed), *The Oxford Companion to International Criminal Justice*, above n 9, 25. It is beyond the scope of this article to explore each of these mechanisms in depth and the possible permutations of arrangements between them and so the focus will be on criminal trials, truth commissions and the use of amnesties in that regard.

98 Ibid 37.

99 Jack Snyder and Leslie Vinjamuri, 'Principle and Pragmatism in Strategies of International Justice' (2003) 28 *International Security* 5.

100 See for example Sadat, above n 59, 999. Similarly, in 2011 Professor Philippe Sands warned that the ICC Prosecutor's opening of an investigation into crimes committed in Libya would encourage Qadaffi to dig his heels in and prolong the conflict: Philippe Sands, 'The ICC arrest warrants will make Colonel Gaddafi dig in his heels', *The Guardian* (online), 4 May 2011 <http://www.guardian.co.uk/commentisfree/2011/may/04/icc-arrest-warrants-libya-gaddafi>.

101 Robinson, above n 35, 483.

102 Alvarez, above n 97, 38.

103 Thomas Hethe Clarke, 'The Prosecutor of the International Criminal Court, Amnesties, and The "Interests Of Justice": Striking A Delicate Balance' (2005) 4 *Washington University Global Studies Law Review* 389, 404.

truth-seeking and prosecutorial processes, the latter conducted by 'hybrid courts' that operate within the domestic legal system, but receive international support and apply aspects of international law.[104]

Nevertheless, the relationship between truth-seeking institutions and the courts can create significant problems for this approach. For example, in Timor-Leste, the UN established the Special Panels for Serious Crimes to try 'serious crimes'; that is, war crimes, genocide, and crimes against humanity. At the same time the Commission on Reception, Truth and Reconciliation was given the broad mandate to establish the truth regarding human rights violations in Timor-Leste between 1974 and October 1999. Comprehensive surveys of Timorese citizens' attitudes to and perceptions of this framework indicated that people were satisfied with the process only to the 'extent that it was matched by a serious crimes process'.[105] In short, under this two-track model, victims only accepted low-level offenders' immunity from prosecution on the basis that perpetrators of serious crimes would be prosecuted and imprisoned.[106] Consequently, the failure of the serious crimes process[107] significantly undermined the achievements of the Commission's 'Community Reconciliation Procedures'.[108]

Rather than adapting and improving on existing models, it is argued here that the persistent gap between expectations of justice and the realisation of that justice would be significantly reduced by rigorously applying a nuanced, sophisticated use of a combination of alternative accountability mechanisms. On a case-by-case basis, these would ultimately be better adapted not only to securing a sustainable peace, but also to delivering a more holistic conception of justice.

1 Truth commissions

The UN has defined truth commissions to be 'official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years'.[109] Nevertheless, the characterisation of an institution as a truth commission does not, as yet, depend on fixed, universally binding or accepted criteria: they 'can be created in almost any shape or size, and to fit any number of agendas, depending on the circumstances and who holds the most influence over their design and operation. … [but] there must be minimal standards for such a body to be considered a serious, good faith effort ...'.[110] Hence, widely agreed standards of international practice are now emerging in relation to the design and creation of truth commissions. The *Impunity Principles* represent the closest thing that there is to a codification of these standards.[111] It must be

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104 Anita Roberts, 'The Two-Track Model of Transitional Justice in Timor-Leste: is it Working?' (2003) 5 *Australian Journal of Asian Law* 260; Laplante, above n 11, 982.

105 Megan Hirst and Howard Varney, International Center for Transitional Justice, 'Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor' (2005) 25–6.

106 Robin Perry, 'The Commission of Truth and Friendship and Justice for East Timor' (2009) 34 *Alternative Law Journal* 199, 200.

107 See generally Caitlin Reiger and Marieke Wierda, International Center for Transitional Justice, 'The Serious Crimes Process in Timor Leste: In Retrospect' (2006).

108 Ibid 34–5.

109 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 3 August 2004, 17.

110 Priscilla B Hayner, 'International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal' (1996) 59(4) *Law and Contemporary Problems* 173, 173.

111 *Impunity Principles*, E/CN.4/2005/102/Add.1.

stressed, however, that the *Impunity Principles* were not drafted specifically with truth commissions in mind. They are founded first and foremost on the obligation of States to 'take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished'.[112]

Nevertheless, having established prosecution as the presumptive standard against which to gauge accountability measures, the *Impunity Principles* go on to flesh out the concept of 'a right to know',[113] thereby introducing the possibility of a more nuanced, variegated response to atrocity that goes beyond the narrow framework of trials. Thus, truth commissions, or 'commissions of inquiry', are specifically dealt with in part II under the 'The Right to Know' while parts III and IV address the rights to justice and to reparations respectively. This points to the overarching significance of revelation, knowledge and understanding of mass atrocity as a key instrument for addressing mass atrocity. [114] The right to know is itself founded on four key principles, namely, an inalienable right to the truth,[115] a duty to preserve memory,[116] a victims' right to know[117] and a guarantee of measures for the realisation of the right to know (prominent among which are truth commissions).[118] Furthermore, and crucially, the *Impunity Principles* implicitly acknowledge that, subject to restrictions, amnesties may have a legitimate role to play in securing the right to justice, the right to know and the right to reparations and, ultimately, the notion of national reconciliation identified in the Preamble. In short, it is arguable that in the *Impunity Principles*, the UN recognises that the battle against impunity can potentially be won through limited recourse to amnesties, among things. It could, therefore, be said, for

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112 *Impunity Principles*, E/CN.4/2005/102/Add.1, principle 1.

113 *Impunity Principles*, E/CN.4/2005/102/Add.1, part II.

114 See further part IV C below: 'The transitional justice framework must promote disclosure of the truth'.

115 According to principle 2:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

116 According to principle 3:

> A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

117 According to principle 4:

> Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.

118 According to principle 5:

> States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.

example, that the objectives of the ICC and of domestic truth and reconciliation initiatives are not intrinsically inimical.[119]

Broadly speaking, the primary focus of truth commissions is to learn from the past and to produce recommendations aimed at preventing the recurrence of further abuses.[120] Put simply, the hope is 'that an honest understanding and recognition of the extent of past abuses will help to strengthen societal resistance to allowing such events to take place again'.[121] Nevertheless, it is important to emphasise that truth commissions' recommendations are rarely mandatory and, consequently, are often not implemented by governments.[122] Although the use of truth-oriented processes began to emerge in the 1970s, the first well-known truth commission was established in Argentina in 1983 in response to the end of seven years of military dictatorship.[123] Perhaps sparked in part by the perception that South Africa's Truth and Reconciliation Commission was an unmitigated success (although there are many stakeholders in South Africa who would dispute this), recourse to truth commissions sharply increased during the 1990s, and has continued to increase in the new millennium, so that as of 2004 over 30 commissions had been established in various regions of the world.[124] This trend is likely to continue, as is the use of the amnesties, which so often play such a critical role in the design and operation of truth commissions.

2 *Amnesties*

A State's prerogative to use amnesties dates to antiquity and it is only in recent years that the evolving jurisprudence of IHRL has begun to chip away at the sovereignty from which this prerogative stems.[125] Thus, irrespective of prevailing human rights treaty obligations, according to Gavron:

> The attitude of the international community to amnesties and impunity varies according to which period, which international interpretive body, subsidiary organ, even which international treaty is under consideration, as well as the political justification, if any, given for amnesties.[126]

All States emerging from conflict are confronted with the extremely difficult dilemma of deciding whether to bury the past, and thereby incentivise wrongdoers to commit to peace; or to confront the crimes of the wrongdoers, while risking the perpetuation of conflict.[127] Amnesties have been described as the most consistently used alternative to criminal accountability in that context (although, some would contend that it is one of the most important tools in the 'accountability toolbox').[128] It is, however, a common, but fundamental misconception that amnesty programmes preclude accountability and

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119 Robinson, above n 35, 484.

120 Priscilla Hayner, 'Truth Commissions' in Dinah Shelton (ed), *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference, vol 3, 2004) 1045, 1047.

121 Ibid.

122 Ibid.

123 Ibid 1046.

124 Ibid 1045.

125 Dugard, above n 16, 695; Laplante, above n 11, 917–8.

126 Gavron, above n 8, 93.

127 Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (Routledge Press, 2001) 10.

128 Alvarez, above n 97, 34.

redress.[129] On the contrary, amnesties can in fact create critical negotiating value and multiply the accountability options on the negotiating table.[130] Hence, amnesties have been described as a potential 'midwife for peace'.[131] They raise a wide range of complex legal, political and even psychological questions.[132] According to Richard Goldstone, former Chief Prosecutor of the ICTY:

> Certainly there is no one simple solution capable of addressing the complexities and subtleties inherent in a range of different factual situations. The peculiar history, politics, and social structure of a society will always inform the appropriate approach to this question in any given context.[133]

Consequently, there never has been (and insofar as no conflict or society in which it takes place is ever exactly the same), nor will there ever be a discrete formula or blueprint by which to address this age-old conundrum. As Orentlicher asks, '[g]iven the extra-ordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?'[134] There was very little development of international law in relation to amnesties, beyond the imposition of treaty-based duties, after Nuremberg and during the Cold War.[135] Accordingly, notwithstanding the unprecedented expansion of ICL in this period, the past three decades have witnessed the deployment of amnesties in at least 16 post-conflict peace processes[136], with five of these processes endorsed by the UN.[137] The use of amnesties was, for example, instrumental in the transition from dictatorship to democracy in countries such as Argentina, Chile and Brazil (although it must also be noted that these were, in some instances, later annulled, facilitating the prosecution of key perpetrators).[138]

Nevertheless, the cynical, disingenuous exploitation of amnesties that arose in Latin America during the 1970s and 1980s arguably helped to stigmatise and trigger a growing aversion to their use as a tool for securing peace. As a result, the 1990s and the new millennium have been characterised by a 'steady erosion of realpolitik',[139] an increasingly strong conviction that crimes of a certain gravity must be addressed and that impunity is no longer acceptable.[140] There is broad variation in both the objectives of, and mechanisms for, responding to past abuses — judicial and non-judicial. However, as evidenced by the *Impunity Principles*, for example, there is now widespread insistence on minimal standards of

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129 Michael Scharf, 'No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and Other Human Rights Courts' (2009) 9 *Chicago Journal of International Law* 573, 584.

130 Ibid 585; Orentlicher, above n 38, 2550.

131 Jack Snyder and Leslie Vinjamuri, 'A Midwife for Peace', *International Herald Tribune*, 26 September 2006.

132 Hayner, above n 110, 11.

133 Cited in Laplante, above n 11, 927.

134 Diane Orentlicher, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1 *International Journal of Transitional Justice* 10, 18.

135 Gavron, above n 8, 93.

136 Angola, Argentina, Brazil, El Salvador, Cambodia, Chile, Guatemala, Peru, Sierra Leone, South Africa, Haiti, Honduras, Ivory Coast, Nicaragua, Togo, Uruguay.

137 Alvarez, above n 97, 34–5.

138 For example, the amnesty that was granted to former Argentinian President General Jorge Rafael Videla was withdrawn following an Argentinian Supreme Court decision to overturn the amnesty laws, paving the way for his prosecution and conviction in 1985.

139 Sadat, above n 59, 987.

140 Hayner, above n 110, 11; Gavron, above n 8, 103.

accountability.[141] Prosecutions are regarded as one, albeit critical, tool for promoting this accountability. The dilemma persists, however. Hence, the fundamental question and lightning rod around which debate continues to converge is whether it is 'helpful for international law to mandate particular responses to past atrocities and thereby narrow the scope of local variation in responding to similar atrocities ...[or] is the best response invariably particular to each society?'.[142] In keeping with the particularity of conflicts and the societies seeking to resolve them, there is considerable diversity in the types of amnesty programmes that have been, and can be, constructed in the aftermath of conflict.[143] Nevertheless, it is possible to broadly distinguish between amnesties on the extent of the conditionalities to which they are subject.

(a) Truth-based, conditional amnesties

Truth commissions and prosecutions are not mutually exclusive, as is commonly presumed to be the case. Indeed, as demonstrated in the 'two-track model' of transitional justice adopted in East Timor, for example, these processes can be mutually reinforcing and together contribute to a more holistic, dynamic conception of justice.[144] Criminal trials alone, however, perform a very limited, narrow function. Trials are principally aimed at establishing the guilt of the accused for acts arising from a very specific and narrowly framed set of facts and are poorly adapted to explaining culpability in relation to broader patterns of abuse or repression.[145]

Consequently, even amongst non-governmental human rights activists, amnesties are recognised as a legitimate tool in the menu of options available to secure justice during times of transition, if subjected to appropriate conditions. For example, according to human rights advocate Rob Weiner (then of Lawyers Committee for Human Rights), recourse to amnesties ought to be permissible provided that there is publication of the relevant facts and identification of the perpetrators by the authorities; amnesties are only provided to those who individually petition for it; applicants make full disclosure of their role in the acts or omissions in respect of which amnesty is sought; and, victims remain entitled to seek reparations from the State.[146] If these criteria are not met, then prosecution ought to be obligatory. Similarly, Amnesty International has indicated that its policy on accountability is ultimately subject to what it perceives to be the expressed desires and needs of victims in any given situation.[147] Hayner has described the prevention of further violence and rights abuses as perhaps the most important aim of truth commissions.[148] The same or a very similar objective could arguably be ascribed to the transitional justice process in general and amnesties in particular.

The paradigm example of a truth-based, conditional amnesty model is that which was established pursuant to South Africa's Truth and Reconciliation Commission. This model

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141 Hayner, above n 110, 11–2.
142 Orentlicher, above n 134, 11.
143 Scharf, above n 18, 372; Gavron, above n 8, 112.
144 Anita Roberts, 'The Two-Track Model of Transitional Justice in Timor-Leste: Is it Working?' (2003) 5 *Australian Journal of Asian Law* 260; Hayner, above n 110, 87–90; Laplante, above n 11, 982.
145 Hayner, above n 110, 101.
146 Robert Weiner, 'Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties' (1995) 26 *St Mary's Law Journal* 857.
147 Hayner, above n 110, 183.
148 Ibid 154.

has drawn very little criticism, in part because it was arguably a popularly created process (rather than imposed from above), the admissions of responsibility on which amnesty grants were conditional were perceived to constitute a form of accountability and it was adapted to the unique sociopolitical challenges that South Africa was facing at the end of apartheid.[149]

(b) Blanket amnesties

A blanket amnesty is, to put it simply, an amnesty granted without conditions.[150] Whereas a genuine, conditional amnesty could be viewed as a quasi-contractual exchange of benefits, blanket amnesties can be analogised with the notion of a gift, the conferral of something for nothing. There is widespread agreement amongst scholars that 'blanket amnesties' are illegitimate and ought not to be recognised.[151] The proliferation of amnesties that characterised Latin American democratisation (or at least the removal of dictatorships) in the 1980s was invariably of the blanket kind. They went hand in hand with the emergence of the then novel concept of truth commissions, which mandated admission of crimes or 'truth-telling' by perpetrators in exchange for amnesty for crimes to which the admissions related. However, the extent of these admissions varied widely from country to country and deponents' testimonies were commonly made without the threat of prosecution to compel honesty and thoroughness. In the absence of the robust kinds of conditions imposed by South Africa's Truth and Reconciliation Commission, for example, these processes offered little more than 'forgive and forget' tokenism that entrenched impunity, rather than facilitating reconciliation through penance.[152] This has, in turn, coloured contemporary perceptions and understandings of the concept of amnesty.[153] A good example of this kind of blanket self-amnesty is that enshrined in Chile's *Amnesty Decree Law of 1990* and issued under the Presidency of Augusto Pinochet who benefited the most from it.

IV Should ICL prohibit amnesty absolutely or with exceptions? Developing a body of appropriate principles

Part II of this article outlined the *current position* of international law with respect to amnesties. This Part will attempt to draw some tentative conclusions as to *what it should be*.

It would now be plain from the discussion above that there is no clear answer as to when foreign and international courts should launch prosecutions and when they should refrain from prosecutions in deference to amnesties.[154] Nevertheless, as Claus Kreß emphasises, '[p]roviding legal certainty through the development of criteria is … an urgent challenge for the international community and for the ICC in particular … [even if] this is a daunting task'.[155] It could be argued that, if the international community endeavoured to develop

149 Alvarez, above n 97, 36.
150 Christopher D Totten, 'The International Criminal Court and Truth Commissions: A Framework For Cross-Interaction in the Sudan and Beyond' (2009) 7 *Northwestern University Journal of International Human Rights* 1, 54.
151 Alvarez, above n 97, 36.
152 Laplante, above n 11, 934.
153 Orentlicher, above n 134, 11–13.
154 Easterday, above n 32, 58.
155 Claus Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice' in Cassese (ed), *The Oxford Companion to International Criminal Justice*, above n 9, 143, 158.

appropriate policy guidelines and criteria for determining when amnesties should and should not be accepted, it would lead to greater scrutiny of transitional justice mechanisms, and of amnesties in particular. This would engender a body of practices that would help to stigmatise and, thereby, reduce recourse to illegitimate amnesties. In other words, this gap in the law should be filled constructively by informed advocates, rather than being left exposed to manipulation and exploitation by others for illegitimate ends.[156] Ultimately, the determinant ought to be, as Otto Kirchheimer put it in relation to the Nuremberg trials, to 'define where the realm of politics ends or, rather, is transformed into the concerns of the human condition, the survival of mankind in both its universality and diversity'.[157]

While there are no clearly elucidated, fixed rules as to when an amnesty should or should not be recognised, there is an emerging body of adaptable principles offering guidance to help navigate this complex question as and when it arises. The efficacy and legitimacy of an amnesty programme can and should depend on its relationship with the mechanisms that collectively comprise the framework for transitional justice and on the nature of the broader post-conflict environment in which it is situated. The touchstone ought to be the existence of mechanisms for providing genuine accountability and redress as opposed to merely forgetting, and wiping the slate clean.[158] In keeping with its characterisation in Part III of this article, international law can offer guidance here. As Diane Orentlicher argues:

> the policy debate has tended to view the imperatives of the rule of law as somehow fundamentally at odds with political reality. This approach is unwarranted. The law itself can accommodate the constraints surrounding transitional societies while securing crucially important values. Addressing the dilemma of tenuous democracies through law assures that an appropriate balance is struck between the demands of justice and potentially conflicting values, such as political stability.[159]

Hence, the starting point should be to generally require prosecutions to ensure that governments do not forego trials just because it is politically expedient to do so, but this should not be an absolute prescription.[160] Challenges that pose a genuine, serious threat to national life must be distinguished from the mere potential for military insubordination or discontent and governments should be expected to assume reasonable risks in order to proceed with prosecutions.[161] Again, what is 'reasonable' is obviously context-dependent and determined by the interplay of a variety of factors.

Although it represents a strong decision in favour of prosecution-based accountability for rights violations, the *Barrios Altos* decision nevertheless endorses the use of amnesties as a means of securing the peace.[162] The key distinction to be made is between those amnesties issued by and for those in power and those which: are the result of a peace process; have a democratic base and are reasonable in scope; and preclude prosecution of acts of rival factions, but preserve the possibility of trial for 'the kind of very egregious acts

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156 Laplante, above n 11, 943.
157 Otto Kirchheimer, *Political Justice* (Princeton University Press, 1961) 341.
158 Scharf, above n 18, 372.
159 Orentlicher, above n 38, 2546–7.
160 Ibid 2548.
161 Ibid 2548–9.
162 *Barrios* (2001) [2001] IACHR 13 (ser C no 83) (3 September 2001).

that no faction either approves or views as appropriate'.[163] Thus, Judge Garcia-Ramirez recognised 'the advisability of encouraging civic harmony through amnesty laws that contribute to re-establishing peace and opening new constructive stages in the life of a nation'.[164]

There is widespread acceptance that the theoretical objectives of international criminal justice include retribution, deterrence, expressivism,[165] restorative justice and reconciliation.[166] Thus, if alternative justice mechanisms could be said to further a number, or even all, of the objectives of international criminal justice in a broadly similar way then this provides a compelling basis on which to defer to them.[167] It is possible to apply a flexible test for determining whether the balance that an amnesty strikes between the competing interests of justice and peace is appropriately adapted to the pursuit of justice by taking into account: the *process* by which the amnesty was enacted; the *substance* of the amnesty legislation; and the domestic and international *circumstances* in which it was enacted.[168] Darryl Robinson has also identified numerous widely accepted criteria for determining whether a deferral to amnesty is appropriate and these pertain to similarly broad questions of process, substance and circumstance.[169]

In sum, therefore, drawing on the extensive academic literature on this subject, it is possible to distil a number of flexible, interconnected guidelines that can be applied on a contextual, case-by-case basis to the process of designing a transitional justice framework in order to determine if and how amnesty should be available for perpetrators of conflict-related crimes. Although the application and development of these guidelines may, in the long term, help to generate consensus on and crystallisation of several key, customary norms pertaining to validity of amnesties, it must be reiterated that, for the reasons discussed throughout this article, they will defy attempts at exhaustive legislative or treaty-based codification. Thus, while it may be desirable for key international actors to collaborate in reducing these factors into a basic set of flexible guidelines similar to the *Impunity Principles* (while focusing in much greater detail than the broad question of impunity to which the *Impunity Principles* are directed), attempts to create positive law out of this should be discouraged.

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163 Laplante, above n 11, 967. Similarly, according to Williams, the validity of an amnesty should be determined on a case by case basis by assessing the nature of the conflict and subsequent peace process, the terms of the amnesty, if there have been any violations of the peace agreement, the types of crimes committed and the availability of alternative mechanisms for justice (for example, truth commissions): Williams, above n 69, 309.

164 Laplante, above n 11, 967–8. For example, it would be appropriate to grant and respect amnesties for acts committed by child soldiers press-ganged into service by the Lord's Resistance Army in Northern Uganda: Ssenyonjo, 421.

165 Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 149.

166 Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 531.

167 Linda Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International Law* 209, 279.

168 Trumbull, above n 63, 318.

169 These include: Was the measure adopted by democratic will? Is the departure from the standard of criminal prosecution of all offenders based on necessity, ie irresistible social, economic or political realities? Is there a full and effective investigation into the facts? Does the fact-finding inquiry 'name names'? Is the relevant commission or body independent and suitably resourced? Is there at least some form of punishment of perpetrators (are they identified, required to come forward, required to do community service, subject to lustration)? Is some form of remedy or compensation provided to victims? Does the national approach provide a sense of closure or justice to victims? Is there a commitment to comply with other human rights obligations? (Robinson, above n 35, 497–8).

A The transitional justice framework must be established through informed public consent

According to Thomas Buergenthal, one of three UN-appointed Commissioners on El Salvador's Commission for Truth, '[u]ltimately, the decisions whether to grant amnesty was one for the people of El Salvador to make after an appropriate dialogue on the subject'.[170] Similarly, the UN Secretary-General indicated that the Salvadoran amnesties might have been legitimised if based on 'a broad degree of national consensus'.[171] This was reinforced by declarations by the UN Mission in Guatemala stating that the decision as to the proper scope of amnesties in that country was for the citizens to decide upon.[172] Thus, any instrument authorising the use of amnesties must be passed by genuinely democratic procedures and fully explained to the populace through public access to unbiased information which enables it to weigh the pros and cons of recourse to amnesties.[173] As a result, popular, informed support for amnesties should be deemed to be a necessary, but not sufficient condition for the valid enactment of amnesties.

B The transitional justice framework must focus on victims' interests

According to the *Impunity Principles*, '[a]mnesties and other measures of clemency shall be without effect with respect to the victims' right to reparation ... and shall not prejudice the right to know'.[174] Victims' interests are, therefore, paramount, and are principally oriented around the availability of appropriate of remedies and full disclosure of facts pertaining to the commission of crimes by which they are affected.[175] Consequently, an amnesty initiative that has popular democratic support should not ordinarily be accepted if it is enacted against the wishes of a victimised minority group. For example, this may require the government to facilitate greater victim participation in public and electoral debates, which might belie their minority status.[176] Similarly, victim support for an amnesty initiative ought to be accorded greater weight than would be the case if the same number of non-victims supported it.

The primacy of victims' interests requires more than mere respect for their views. It compels government to provide them with an opportunity to play an active role in both the design and implementation of transitional justice frameworks.[177] Victims' support for an amnesty mechanism is likely to be premised on the formulation of nuanced, complex links with other components of the transitional justice architecture, which addresses their actual needs and which can only be realised with their close and active cooperation and participation in the design process. This may also give scope for the expression of customary, non-Western justice processes that the victims feel are more delicately adapted

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170 Cited in Gavron, above n 8, 94.
171 Ibid.
172 Ibid.
173 Trumbull, above n 63, 320.
174 *Impunity Principles*, E/CN.4/2005/102/Add.1, principle 24(b).
175 This is also reflected in art 53, which subjects the exercise of prosecutorial discretion to an accounting of the interest of the victim.
176 Trumbull, above n 63, 320–1.
177 Orentlicher, above n 134, 19.

mechanisms for addressing grievances in the sociocultural and political context in which they live than Western accounts of justice.[178]

C *The transitional justice framework must promote disclosure of the truth*

It has been suggested that 'an honest accounting of past injustices is essential before shattered societies can start to rebuild'.[179] Disclosure of the truth can, on that basis, offer a form of national catharsis for traumatised populations, trigger a process of 'moral reconstruction' in which society passes judgment on what has been disclosed, and provide political choices as to what ought to be done with the fruits of the truth-seeking process.[180] Hence, the imperative of disclosing the truth is a core focus of the *Impunity Principles* and is expressed as the 'the right to know'. There is a vast and ever-expanding body of literature on the subject of 'truth-seeking' and the role it plays in promoting post-conflict justice and reconciliation. Although there is considerable dispute as to the extent to which it achieves this, there are strong grounds for believing that the disclosure of the facts surrounding the commission of atrocities can be a critical tool in securing a broader conception of accountability. Disclosure of the truth flows from a genuine, comprehensive investigation of the factual matrix within which crimes were committed, a function ordinarily, but not necessarily, performed by truth commissions. Nevertheless, as experience has demonstrated, discovery of the truth is 'a surprisingly elusive goal'.[181]

The risk that truth-seeking institutions might be coopted, or even established, by elites to deflect demands for genuine accountability and then subverted to political objectives is high and all too commonly realised. This is exemplified in the creation of the Indonesian-Timorese Truth and Friendship Commission in 2006.[182] The deployment of the 'truth commission' appellation masked what was, in truth, a bilateral political initiative between the governments of Timor-Leste and Indonesia designed to 'resolve once and for all the events of 1999' (or bury them), which had become a festering sore in their relations. They purported to do so by granting the Commission very limited investigative powers, while authorising it to recommend amnesty for those who 'cooperate fully in revealing the truth' without specifying any process or even basic criteria by which to measure the quality of supposedly 'true' testimony. Unsurprisingly, this resulted in a series of absurd hearings at which senior Indonesian military officers, including General Wiranto, blamed the UN for atrocities committed in 1999, while insisting that Indonesia deserved appreciation and gratitude, not 'senseless and crazy' accusations, for a successfully implemented referendum. It is, therefore, crucial that all truth-seeking processes be carefully scrutinised to ensure that they do not merely reproduce dominant narratives intended to support established power structures, but are instead wide-ranging, unimpeded by political interests and reveal facts that are genuinely capable of leading to broad-based recognition and reconciliation.

Hence, according to Dugard, amnesties granted by a quasi-judicial or judicial body in respect of criminal acts of which there has been a full disclosure could be seen as

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178 Ibid. For eg, the Acholi people and the Lord's Resistance Army in northern Uganda; Gacaca courts in Rwanda; the Community Reconciliation Process in Timor-Leste.

179 Jonathan Tepperman, 'Truth and Consequences' (2002) 81(2) *Foreign Affairs* 128, 140.

180 Henry J Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3rd ed, 2007) 1351.

181 Tepperman, above n 179, 140.

182 Perry, above n 106.

legitimate, as opposed to the grant of a 'self-amnesty' by the perpetrating regime prior to the establishment of a truth-seeking process, or pursuant to an illegitimate or partial truth-seeking process.[183]

D *The nature of the accountability mechanisms is dependent on the gravity of, and responsibility for, crimes*

It is important to reiterate that the ICC deals only with the most serious international crimes for which there is a profoundly important deontological justification for punishment.[184] Despite the lack of widely agreed principles or practices in relation to criteria for accepting amnesties, there is a clear tendency in recent international criminal practice to insist on investigation and trial of those alleged to bear the greatest responsibility for commission of mass atrocities.[185] For example, when addressing the crimes committed in East Timor in 1999, the UN-supported Special Panels for Serious Crimes was charged with prosecuting high-level offenders, while the Commission for Reception Truth and Reconciliation addressed crimes committed by low level offenders and granted amnesties where appropriate.

This suggests a willingness on the part of the ICC to defer to amnesties granted for low to mid-level perpetrators and also reflects an emerging consensus that the duty to prosecute international crimes is restricted to the most responsible persons holding, as a general rule, senior leadership positions.[186] The ICC was designed as an institution of last resort, whose deference to national judicial systems is only to be suspended: first, in respect of 'the most serious crimes of concern', namely, genocide, crimes against humanity and war crimes;[187] and, second, if those systems demonstrate an inability or unwillingness to prosecute those crimes.[188] Hence, contrary to popular belief, and without undermining its momentous importance, there is potentially a significant number of international crimes over which the ICC will not ordinarily exercise jurisdiction. Nevertheless, the *Rome Statute* does provide some guidance as to the types of crimes that the international community feels it is appropriate to reserve for resolution exclusively in the domestic sphere on the one hand and, on the other, those which 'must not go unpunished'.

A basic summation of Robinson's approach to the question of ICL and amnesties is that, in short, '[t]here is *practical*, *legal* and *moral* justification for dealing with lesser offenders through truth commissions and conditional amnesties, whereas the persons most responsible — ie planners, leaders and those committing the most notorious crimes — should still be held criminally accountable'.[189] This is based on practical considerations, in that it would be logistically impossible to prosecute thousands of perpetrators (as was the case in Rwanda, for example); on legal considerations, in that the customary law duty to bring perpetrators to justice arguably applies 'only to persons most responsible'; and on the

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183 Dugard, above n 16, 700.

184 Robinson, above n 35, 489.

185 Kreß, above n 155, 158 (citing the ICC's Pre-Trial Chamber Decision of 10 February 2006 in *Lubanga* (ICC-01/04-01/06), P-TC I.

186 Ibid; Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695, 707.

187 *Rome Statute* art 5.

188 *Rome Statute* art 17.

189 Robinson, above n 35, 494.

moral distinction between those who are merely swept up in an orgy of violence and those who enthusiastically lead it.[190]

Nonetheless, the emerging insistence on the trial of those bearing the greatest criminal responsibility reinforces, rather than resolves, the conundrum that is at the heart of this article: namely, that justice might, in some circumstances, be best served by permitting amnesties for international crimes. How, then, does the imperative to prosecute leaders in pursuit of the ICL objectives of retribution and deterrence sit with the idea that those same prosecutions might simultaneously undermine the competing ICL objectives of restorative justice and reconciliation?

As would now be clear, there is no formula or blueprint for determining when significant gravity of, and responsibility for, crimes ought to preclude the grant of amnesties, and thereby trump other considerations. Instead, this is a factor to be taken into account alongside the other factors discussed in this Part when determining the unique combination of mechanisms on which the calculus of accountability for a particular international crime should be based. Hence, in some circumstances it may be possible to negotiate a peace agreement that avoids a commitment to prosecutions, or even contemplates the possibility of amnesties, but does so broadly in a way that preserves interpretive scope for narrowly defining the entitlement to receive an amnesty at a later date, when the political landscape has shifted. In particular, the risk of prosecutions undermining the fragile stability of a country might diminish with time or with the transformation of political interests (as was the case in relation to the prosecution of General Pinochet in Chile, for example). In short, political change opens up space for the law to assume a greater role in the transitional justice framework.

E Necessary for stability

Citing the examples of democratisation in Chile and Argentina, Sadat has suggested that 'it may be that amnesties are acceptable within a society only so long as they are needed to provide stability, after which time their beneficiaries need to "repay" the liberty they received under duress'.[191] Similarly, but more specifically, Robinson supports the notion that the ICC must be able to defer to truth commission initiatives if they are '*legitimate* and *necessary* ... for a transition from repression or violence to a stable democracy'.[192] Legitimacy connotes something that has popular support.[193] The question of necessity is equally if not more contextualised, and is, in many ways, at the crux of this article. Nevertheless, the 'necessity exception' must be extremely carefully and narrowly construed, and all claims to it must be subjected to intense scrutiny.

As would be clear from the foregoing discussions throughout this article, in certain, exceptional cases the demands of stability may require a postponement of accountability, but not necessarily impunity. Irrespective of the immediate practical effect of an initial amnesty grant, there is an apparent trend indicating that, in general, amnesties merely delay, rather than extinguish, the opportunity for litigation and prosecution.[194] Jackson offers

190 Ibid.
191 Sadat, above n 59, 1022.
192 Robinson, above n 35, 482; Keller, above n 167, 262 (applying the test of legitimacy and necessity to measure alternative justice mechanisms to prosecution in the context of Uganda).
193 Ibid.
194 Sadat, above n 59, 969.

further guidance. In challenging the idealists' notion that there is a clear customary duty to prosecute crimes against humanity and the realists' opposing contention that there clearly is not, he asserts that it is, in fact, possible to discern a far more nuanced and less rigid position that authorises States to derogate from the putative duty in certain circumstances.[195] In particular, he argues that, drawing on human rights treaty law, there is a basis on which to carve out a derogation exception that suspends the duty '[i]n time of public emergency which threatens the life of the nation'.[196] According to European Commission human rights jurisprudence, an emergency will only trigger the exceptional threshold if it: is actual or imminent; involves the whole nation; threatens the organised life of the community; and is such that normal restrictions justified for the maintenance of public safety, health and order are clearly inadequate.[197] Consequently, '[w]hen a grant of amnesty falls within the terms of derogation, this practice is removed from the pool of state practice, which is seen to prevent the duty to prosecute from congealing. Instead, it starts to constitute the bounds of the exception to the duty'.[198]

Taking into account these kinds of factors, it is possible to hypothesise as to the kinds of situations in which the ICC would and would not defer to national justice processes. Hence, by way of illustration, the ICC would: clearly accept and, thus, defer to credible domestic prosecutions leading to conviction; be likely to accept traditionally based justice processes that hold lower- to mid-level perpetrators accountable (albeit not necessarily by conventional criminal trial); be unlikely to accept the grant of sweeping amnesties to military officers as a class of people, despite conviction and imprisonment of a several senior military leaders; and clearly not accept trials conducted pursuant to a peace agreement between warring ethnic groups under which only low-level perpetrators are tried before a patently inept, corrupt tribunal, while the most responsible perpetrators are amnestied.[199] Nevertheless, ultimately, '[w]hether [an] amnesty may be granted on grounds of a burning necessity is probably the toughest question to answer'.[200]

V Conclusion

International law, and ICL in particular, has undergone a momentous transformation in the last decade in subjecting national sovereignty to supranational obligations of respect for human rights. Thus, insofar as perpetrators have not been, or are unlikely to be, held domestically accountable for their crimes, the response to mass atrocity is no longer considered to be a purely internal matter of exclusive concern to the States in which they occurred. This represents a watershed in the history of international relations and in the progression towards a system of enforceable respect for human rights. Furthermore, there is nothing in the human condition that makes it inevitable or axiomatic that people be grouped together within the near-impenetrable polities that we term 'States'. It is, after all, a relatively modern conception for arranging societies that arose from the *Treaty of Westphalia* in 1648. Nevertheless, at the end of the day, the international system is still

195 Jackson, above n 67, 135.
196 *ICCPR* art 4(1).
197 Jackson, above n 67, 136.
198 Ibid.
199 Clarke, above n 103, 411–3.
200 Kreß, above n 155, 159.

essentially ordered around state-based sovereignty, a system that recognises that (absent an agreed viable alternative) States are ordinarily better placed than the international community at large to address the needs of their own populations and the particular demands of peace made by the unique amalgamation of social, cultural and political arrangements that they must govern.

It is, therefore, submitted that while the increasing international penetration of national sovereign boundaries for the purpose of human rights protection is a most welcome development, there are limits to what these purportedly legal interventions can achieve; limits that go to the root of international law and its role in the world today. Specifically, it is essential to preserve space for the operation of politics as a means of building peace in post-conflict environments, and to not assign this responsibility *exclusively* to the juridical sphere. Nevertheless, the process of answering the exceedingly complex and age-old question of how to achieve accountability while establishing a sustainable peace can be assisted by flexibly applying a number of recognised principles (the scope of which will evolve over time) on a case-by-case basis. There is no fixed formula or methodology dictating *how* they should be applied, however, at a minimum, these principles require consideration of: the likelihood of further instability, and the ability of the State to endure it; the gravity of, and responsibility for, crimes; victims' interests; the benefits that truth disclosure might bring, and the extent to which processes for disclosure are adapted to these ends; and, finally, the need for the framework that responds to these issues to have received the genuine democratic approval of the populace. To quote again from Simmons' keynote address at the 2011 ANZSIL Annual Conference, these kinds of considerations demand 'systematic empirical research at the local level of analysis'.[201]

In the final analysis, however, attempts to precisely delineate for all time the boundaries between legal accountability and legitimate political negotiation are likely to prove as Sisyphean as attempts to definitively answer ancient jurisprudential questions on the distinction between politics and law. These are questions that go well beyond the narrow field of ICL and that will continue to exercise the minds of scholars for as long as there is conflict.

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[201] Simmons, above n 4.