Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?*

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Abstract: From time immemorial amnesty has been employed as a means of promoting a political settlement and advancing reconciliation in societies that have emerged from repression. At present there is a trend in support of prosecution of those who have committed international crimes, such as torture and crimes against humanity, which excludes the possibility of amnesty. That amnesty is no longer favored is illustrated by the failure of the Rome Statute of the International Criminal Court to recognize amnesty as a defence to prosecution. While there is no place for unconditional amnesty in the contemporary international legal order an intermediate solution such as a Truth and Reconciliation Commission with power to grant amnesty after investigation, of the South African kind, may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution.

1. INTRODUCTION

How to deal with the crimes of removed repressive regimes is now a principal preoccupation of international law. Amnesty is no longer accepted as the natural price to be paid for transition from repression to democracy. Inspired by the establishment of *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, and the prospect of a permanent International Criminal Court, prosecution has become the preferred choice. Whether it is the wisest course to pursue remains a matter of debate. In some situations amnesty may still offer the best prospect for peace – if not for justice. In others an intermediate course may be more suitable. The Truth and Reconciliation Commission, of the kind established in several Latin-American countries and South Africa, may serve the interests of peace and justice better than prosecution or amnesty. In this article I shall examine this debate in the context of contemporary international law, with special reference to the case of Augusto Pinochet.

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2. AMNESTY, PROSECUTION OR TRUTH COMMISSION?

Amnesty is a practice that has its roots in the early history of mankind. From time immemorial successor regimes have sought to secure peace through the pardoning of their enemies. The sole alternative, until present times, was brutal punishment without trial. Consequently, human rights advocates pleaded for amnesty for political prisoners, even for those from fallen regimes.

The past decade has seen a change in attitude. There is now a demand for prosecution of the villains of past regimes. There are many reasons for this. The abuse of amnesty by military dictatorships that have enacted 'self-amnesty' laws before surrendering power is an obvious reason. Perhaps the most important reason, however, is the internationalization of crime in the global village. Most of the atrocities committed by dictators today are not merely national crimes. They are frequently international crimes – genocide, crimes against humanity, torture, hostage-taking and apartheid – which concern the international community as well as the national state. Moreover, international criminal courts have been, and are being, established to punish the perpetrators of such crimes. In these circumstances the international community has an interest in the treatment of human rights violations, and sees punishment before national courts or international courts as the best solution.

Consequently successor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.

Support for this argument is to be found in the Genocide Convention of 1948, which contains an absolute obligation to prosecute offenders;[1] in decisions of the Inter-American Court and Commission of Human Rights[2] holding that amnesties granted by Argentina and Uruguay were incompatible with the American Convention on Human Rights; in the decision of the American Court of Human Rights in the *Velasquez Rodriguez Case*[3] holding, in respect of Honduras, that Article 1 (1) of the Convention, requiring states to "ensure the rights set forth in the Convention", obliged states to investigate and punish any violation of the rights recognized by the American Convention of Human Rights; in a comment by the UN Human Rights Committee that amnesties covering acts of torture are "generally incompatible with the duty of states to investigate such acts";[4] in the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, which obliges states to try or extra-

1. Art. 4 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1951).
2. Inter-American Commission on Human Rights, Report No. 29/92 (Uruguay) 82nd session OEA/LV/11.82.Doc. 25 (2 Oct. 1992); *id.*, Report No. 24/92 (Argentina), Doc. 24.
3. 1988 IACHR (Ser. C), No. 4, para. 165.
4. General Comment No. 20 (44), (Art. 7), UN Doc. CCPR/C21/Rev. 1/Add 3., para 15 (1992).

dite those alleged to have committed crimes against humanity;[5] in the Final Declaration and Programme of Action of the 1993 World Conference on Human Rights[6] calling on states to prosecute those responsible for grave human rights violations, such as torture, and to abrogate legislation leading to impunity for such crimes; in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968;[7] and in the Statutes for the International Criminal Tribunal for the Former Yugoslavia (ICTY)[8] and the International Criminal Tribunal for Rwanda (ICTR)[9] which require prosecution of those responsible for the crimes punishable under these statutes. Support for prosecution is also derived from the obligation to prosecute or extradite those guilty of grave breaches of the 1949 Geneva Conventions.[10] Here it is argued that the distinction between international and non-international armed conflicts has largely disappeared and that the obligation to prosecute grave breaches or similar war crimes extends to internal conflicts. Finally, of course, there is a substantial body of academic writing to support this argument.[11]

The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija*[12] which held that amnesties for torture are null and void and will not receive foreign recognition.

It is, however, doubtful, whether international law has reached this stage. State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution.[13]

The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of

5. Art. 6 Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission of the Work of its Forty-eighth Session, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1966).
6. Part II, para. 60, UN Doc. A/Conf/57/24 (1993); 32 ILM 166 (1992).
7. 8 ILM 68 (1969).
8. Security Council Resolution 827 (1993); 32 ILM 1192 (1993).
9. Security Council Resolution 955; 33 ILM 1598 (1994).
10. *See, for example*, Arts.146 and 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1950).
11. *See, for example*, M Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 Law and Contemporary Problems 9 (1996); D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537, 2568 (1991); C. Edelenbos, *Human Rights Violations; A Duty to Prosecute?* 7 Leiden Journal of International Law 5, 15 (1994).
12. Case No. IT-95-17/1-T (10 December 1998); (1999) 39 ILM, at paras. 151-157 (1999).
13. *See* M. Scharf, *The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 Law and Contemporary Problems 41, 47 (1996).

South Africa[14] and El Salvador,[15] expressing the view that international law not only fails to prohibit amnesty but rather encourages it. These courts have invoked Article 6 (5) of Additional Protocol II of 1977 which on the face of it, although this is disputed by the International Committee of the Red Cross,[16] encourages amnesty by providing that at the end of hostilities in internal conflicts the authorities "shall endeavour to grant the broadest possible amnesty to persons who have participated in the conflict."

Of the twelve Law Lords who heard the *Pinochet* case, only one commented on the question of amnesty. Although he was one of the minority judges (in the first *Pinochet* case), few would disagree with Lord Lloyd's statement that:

> Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity including torture. Chile was not the first in the field. There was an amnesty at the end of the Franco-Algerian War in 1962. In 1971 India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have also become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government [...] It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.[17]

Although international law does not – yet – prohibit the granting of amnesty for international crimes it is clearly moving in this direction. The Statute of the International Criminal Court (ICC),[18] adopted in Rome in 1998, makes no provision for amnesty. Moreover, the adoption of the principle of 'complementarity' in the Rome Statute,[19] which gives both national courts and the ICC jurisdiction over war crimes, crimes against humanity and genocide, suggests that national courts will assert their permissive jurisdiction over such crimes with more enthusiasm than in the past. Moreover, it can confidently be expected that NGO's will, in future, bring pressure on both national and international courts to prosecute international criminals and that the granting of amnesty will be challenged with new vigor.

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14. Azanian Peoples Organization (AZAPO) *v.* President of the Republic of South Africa, 1996 (4) SA 671 (CC), at 691, para. 32.
15. Proceedings No. 10-93 (May 20, 1993); *reprinted in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, 549, 555 (1995).
16. *See* D. Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities,* 59 Law and Contemporary Problems 196, 212 (1996).
17. R. *v.* Bow Street Metropolitan Stipendiary Magistrate. *Ex Parte* Pinochet [1998] 4 All ER 897 (HL), at 929 h-i.
18. The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), *reprinted in* 37 ILM 999 (1998).
19. Preamble, para. 10, Art. 17.

Strangely, at the very point in time that international opinion is moving towards prosecution and away from amnesty, a new institution has appeared on the scene which challenges prosecution as the only option. This is the truth or truth and reconciliation commission.

Since 1974 some seventeen truth commissions have been established to enquire into the past of particular societies, to "tell the truth" of what happened.[20] Probably the best known are those of Chile, Argentina, El Salvador, South Africa and Guatemala. There are now proposals to establish truth commission for Cambodia and Bosnia.

Truth commissions vary considerably in respect of composition, independence and mandate, although they are all committed to healing by means of truth telling. They are not, *in theory*, antithetical to prosecution. Thus Louis Joinet in his 1997 Report on the "Question of the Impunity of Perpetrators of Human Rights Violations" to the Sub-Commission on Prevention of Discrimination and Protection of Minorities[21] recommends that an extrajudicial commission of enquiry into the events of the past should go hand in hand with prosecution and punishment of human rights violators. *In practice* the position is very different. In most cases a truth commission is established because the new regime lacks the power to embark on prosecution – as in the case of Chile where President Aylwin's democratic government operated in the shadow of the Pinochet-led military; or because the political compact that has produced democracy is premised on a compromise between old and new regimes which precludes prosecution – as in the case of South Africa, whose democracy was founded on an agreement between the National Party apartheid regime and the African National Congress (ANC) based on conditional amnesty. In her study of fifteen truth commissions Priscilla Hayner states that prosecutions are "very rare" after a truth commission report even where the identity of the perpetrators is known. She adds "[i]n only a few of the fifteen cases looked at [...] was there an amnesty law passed explicitly preventing trials, but in most other cases there was in effect a *de facto* amnesty – prosecutions were never seriously considered."[22]

So in practice truth commissions and prosecutions are competing mechanisms for dealing with crimes of the past. Blanket, unconditional amnesty, unaccompanied by a truth commission is no longer an acceptable option. The choice is between prosecution or amnesty accompanied by a truth commission.

Each has its merits. Prosecution emphasizes the right to justice, and society's demand for retribution. The truth commission seeks to satisfy the right to know and understand the past, and aims at reconciliation rather than retribution. Which course is most likely to heal a divided society is unclear. While interna-

20. P Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study,* 16 Human Rights Quarterly 600 (1994).
21. UN Doc. E/CN, 4/sub.2/1997/20/Rev 1 (1997).
22. *Supra* note 20, at n. 4.

tional opinion increasingly demands prosecution and justice, domestic opinion has other priorities. One has only to read the eloquent judgment of South Africa's present Chief Justice, Ismail Mahomed, in the challenge to the constitutionality of South Africa's amnesty legislation in *Azapo v. President of the Republic of South Africa*[23] to understand why societies prefer truth to prosecution:

> Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously, and most of them no longer survive to tell their tales. [...] Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The [Promotion of National Unity and Reconciliation] Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible.
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> That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth which persons in the positions of the applicants so desperately desire [...]

International opinion, often driven by NGO's and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution; and to the argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals.

23. 1996 (4) SA 671, at 683-685.

3. THE *PINOCHET* CASE

What are the lessons to be learned from the *Pinochet* case – comprising two judgments[24] of the House of Lords – for the purpose of the present thesis?

Augusto Pinochet was granted amnesty by a military decree of 1978, which granted unconditional, total amnesty for crimes committed between 1973 and 1978.[25] He was also entitled to immunity from prosecution in Chile by virtue of his office of senator. Yet neither his lawyers nor the Chilean government raised this amnesty in the legal proceedings. No doubt, this was because it was realized that a foreign court was unlikely to give serious consideration to an amnesty decree in effect granted by Pinochet to himself.

The Law Lords, with two exceptions,[26] failed even to mention the question of amnesty. This does not, however, mean that they were unsympathetic to the view that the treatment of a former head of state is best left to the territorial state, the state in which the crimes were committed. Although there is no express approval of this view, it may be suggested that support for such a solution is implicit in the reasoning and decision of the House of Lords. Two reasons may be advanced for this proposition.

First, although both judgments may be labelled as progressive by reason of their refusal to accord immunity to a former head of state in respect of international crimes (*in casu* torture), the second and decisive judgment was hardly progressive in its reasoning or effect. Only one judge (Lord Millett) was prepared to accept that torture was an international crime with universal jurisdiction under customary international law before 1988, with the result that the double criminality requirement was met in respect of acts of torture committed from 1973 onwards.[27] The other judges insisted that only the enactment of the Torture Convention of 1984 into English law in 1988 made the international crime of torture punishable under English law in fulfilment of the double criminality requirement.

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24. R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte, [1998] 4 All ER 897 (HL) and R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No. 3), [1993] 2 All ER 97 (HL). The rehearing was occasioned by the fact that the first judgment was set aside on the ground of irregularity because one of the members of the House of Lords (Lord Hoffmann) was found to have close ties with Amnesty International, an intervening party in the proceedings: reported in R. *v.* Bow Street Metropolitan Stipendiary Magistrate, *Ex Parte* Pinochet Ugarte (No 2), [1999] 1 All ER 577 (HL).
25. *See* N.J. Kritz (Ed.), Transitional Justice. How Emerging Democracies Deal With Former Regimes, Vol. 2, at 500 (1995).
26. Lord Lloyd in the first judgment, [1998] 4 All ER, at 929, h-i. Lord Goff in the second judgment, [1999] 2 All ER, at 127-128.
27. [1999] 2 All ER, at 178 b-c.

The concept of double criminality too was restrictively interpreted. Instead of following the normal practice, supported by the Netherlands,[28] of requiring the extraditable crime to be a crime in the requested state (the United Kingdom) at the time of the extradition request, it held that it should be a crime in the United Kingdom at the time the alleged offence was committed in the foreign state.[29] This finding was based on a highly restrictive interpretation of the Extradition Act of 1989, which reads a requirement under the old Extradition Act of 1870 into treaty arrangements between European states, which finds no basis in the European Convention on Extradition of 1957.[30] This is not to suggest that it is an untenable interpretation. However, it is not the only possible interpretation, as is shown by the fact that the Chief Justice, Lord Bingham C.J., and Lord Lloyd had rejected this interpretation in earlier judgments in this matter,[31] in which they relied on the plain language of the extradition statute.

The judicial decision is an exercise in choice, particularly in the field of statutory interpretation. It is trite that the judges are frequently influenced by extra-legal factors in their choice – and properly so because judges are not bricklayers of the law but architects. They must interpret the law in its political and social context. In the *Pinochet* case it is not improbable that judges were influenced by the argument strongly advanced by the government of Chile in its public utterances that it should be left to Chile to deal with Pinochet, if necessary by trying him itself, and that the extradition of Pinochet to Spain would endanger the fragile peace between army and civilian government in that country.

This view receives support from the second reason for suggesting that the judgment gives implied support to the view that Pinochet should be returned to Chile. Five judges (all except Lords Goff and Phillips) attached a codicil to their speeches exhorting the Secretary of State to reconsider his decision to allow the extradition hearing to proceed in the light of the substantial reduction in the number of charges against Pinochet. This recommendation, which is more political than judicial in character, strongly suggests that the House of Lords was of the mind that the extradition proceedings should be discontinued. (On 15 April the Secretary of State decided that the extradition proceedings should continue.)

This assessment of judicial behaviour in the realist tradition is not intended to imply a lack of integrity on the part of the Law Lords. Like many they seem to have been unsure about the best way to deal with an ex-dictator whose pun-

28. *See* the decisions of the Hoge Raad of 16 Januari 1973 (*NJ*, 1973, no. 281) and 28 June 1977 (*NJ*, 1978, no. 438). This is also the position in Germany, *see* W. Schomberg & O. Lagodny, Internationale Rechtshilfe in Strafsachen 52 (1998).
29. *See* the speech of Lord Browne-Wilkinson, [1999] 2 All ER, at 104-107.
30. Art. 2 European Convention on Extradition 1957, (ETS No. 24), opened for signature 13 December 1957, entered into force 18 April 1960 (ECEx).
31. [1999] 2 All ER, at 105.

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ishment abroad might disturb the peace at home. Their judgment, which some may interpret as Solomonic in effect, provides testimony of their doubts.

4. PERMISSIBLE AND IMPERMISSIBLE AMNESTIES. THE CASE OF SOUTH AFRICA

A solution must be made to reconcile the competing needs and interests of the territorial state and the international community. In practice this means that an attempt must be made to provide for the legitimation of amnesty, and for its recognition by foreign and international courts.

Obviously not all amnesties should be recognized abroad. The kind of blanket, unconditional amnesty given by Pinochet and his regime to themselves cannot hope to receive international recognition. But does this apply to conditional amnesty, accompanied by a thorough investigation by a truth and reconciliation commission, of the South African kind? The South African Truth and Reconciliation Commission (TRC) obviously believed it was entitled to more favourable treatment as in its final Report it appealed to the international community for recognition of its process. The Report states:

> The definition of apartheid as a crime against humanity has given rise to a concern that persons who are seen to have been responsible for apartheid policies and practices might become liable to international prosecutions. The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies.[32]

Reconciliation between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can best be achieved by drawing a distinction between permissible and impermissible amnesties, and by limiting international recognition to the former.

Here it is instructive to compare and contrast the experiences of Chile and South Africa.

The *Reports* of the Chilean National Commission on Truth and Reconciliation (1991)[33] and the South African Truth and Reconciliation Commission (1998)[34] have much in common. This is no surprise as the South African process was inspired by and modelled on that of Chile. Both *Reports* seek to provide a full picture of the gross violations of human rights that occurred in their countries; both examine the role of the judiciary, media and churches; both list the

32. Truth and Reconciliation Commission Report, Vol. 5, at 349 (1998).
33. Report of the Chilean National Commission on Truth and Reconciliation, translated by P.E. Berryman (1993); excerpts *in* N.J. Kritz (Ed.), Transitional Justice, Vol. 3, at 105 (1995).
34. *Supra* note 32.

names of victims; both recommend reparations and measures to prevent a recurrence of the past.

But there are important differences:

1. The Chilean Commission confined its investigations to the dead; the South African TRC investigated all gross human rights violations, involving killing, abduction, torture or severe ill-treatment, even where death did not result. Thus the former did not investigate torture where the victim had survived; the latter did.
2. The Chilean Commission had no subpoena powers to compel witnesses to testify, which meant in practice that members of the security forces refused to co-operate. The South African TRC had such powers and used them to ensure that reluctant witnesses testified.
3. The Chilean Commission had no power to name the names of perpetrators. The South African TRC had such a power, to be executed after giving notice to the person to be named, and in its final report it makes important findings on individual responsibility. Thus it finds that former State President P.W. Botha facilitated gross violations of human rights and was accountable;[35] that P.W. Botha, Magnus Malan (Minister of Defence) and Chief Mangosuthu Buthelezi were accountable for the gross human rights violations committed by paramilitary units in KwaZulu;[36] and that Winnie Madikizela-Mandela was accountable for the acts of murder, torture and assaults committed by the Mandela Football Club.[37]
4. In Chile the National Commission operated in the shadow of its former dictator, Augusto Pinochet, who remained Commander-in-Chief of the Army. No such threat existed in South Africa and many members of the security forces testified before the TRC.
5. The most important difference related to amnesty. The Chilean National Commission was bound by the 1978 Amnesty Decree in which the armed forces under Pinochet had given themselves immunity from prosecution for crimes committed between 1973 and 1978. The Commission therefore had no competence to pronounce on matters of amnesty. In contrast amnesty was (and still is) an integral part of the South African truth and reconciliation process.

Amnesty was one of the most difficult issues that faced negotiators after the abandonment of apartheid. Prosecution *à la* Nuremberg that had been threatened by the African National Congress (ANC) while engaged in the armed struggle was clearly impossible in a situation in which there was no victor. On the other

35. *Supra* note 32, Vol. 5, at 225.
36. *Id.*, at 235.
37. *Id.*, at 243.

hand, absolute, unconditional amnesty, of the kind favoured by the retiring apartheid regime, was unacceptable to the ANC. The compromise was conditional amnesty on application. This was given legislative effect by the 1993[38] and 1996[39] Constitutions and the Promotion of National Unity and Reconciliation Act of 1995.[40]

The Promotion of National Unity and Reconciliation Act established a Truth and Reconciliation Commission with a dual task: the compilation of a complete picture of the human rights violations of the past; and the facilitation of amnesty. For the latter purpose a quasi-judicial Amnesty Committee was established comprising judges and senior lawyers. Although this Committee – later extended to several committees to cope with an expanded workload – operated (and still operates) separately from the TRC, it was part of the TRC structure.[41]

An Amnesty Committee considers applications for amnesty and may grant amnesty if it is satisfied that the applicant has committed an act constituting "a gross violation of human rights", made "a full disclosure of all relevant facts", and that the act to which the application relates is "an act associated with a political objective committed in the course of conflicts of the past".[42] The criteria to be employed for deciding whether the act is one "associated with a political objective" are drawn from the principles used in extradition law for deciding whether the offence in respect of which extradition is sought is a political offence. These criteria include, *inter alia*, the motive of the offender; the context in which the act took place and, in particular, whether it was committed "in the course of or as part of a political uprising, disturbance or event";[43] the gravity of the act; the objective of the act, and in particular, whether it was "primarily directed at a political opponent or State property or personnel or against private property or individuals";[44] and the relationship between the act and the political objective pursued, and "in particular the directness and proximity of the relationship and the proportionality of the act to the objective pursued".[45] A person granted amnesty shall not be criminally or civilly liable in respect of the act in question.[46] Amnesty Committees conduct their hearings in public; and both applicants and victims are permitted legal representation.

While the TRC has completed its work the Amnesty Committees are unlikely to complete their task before the end of 1999. Of the over 7000 applications received, 150 have been granted, almost 5000 dismissed and 2000 remain to be

38. Act 200 of 1993.
39. Act 108 of 1996.
40. Act 34 of 1995.
41. Sections 10(1), 19(3)(b)(iii) of Act 34 of 1995.
42. Section 20 of Act 34 of 1995.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*

dealt with. These applications, mainly from members of the police force, and not the army, have provided, and continue to provide, a horrifying picture of brutality by the security forces, involving torture, murder, disappearances and repression.

Those who have failed to obtain amnesty from an amnesty committee, or who failed to apply for amnesty, are exposed to prosecution. Some prosecutions have been completed, others are under way, and no doubt there will be more to come as evidence of complicity in human rights violations becomes available. A special unit within the Prosecutor's office has been established for this purpose. This serves to emphasize that amnesty in South Africa is conditional.

At present, there are serious attempts to prepare guidelines[47] for the operation of truth commissions, which will provide assistance in determining the minimum requirements for acceptable truth commissions. On the basis of these guidelines and the experience of truth commissions from different parts of the world, it is suggested that the following minimum requirements be met:

1. The Commission should be established by the legislature or executive of a democratically elected regime;
2. The Commission should be a representative and independent body;
3. The Commission should have a broad mandate to enable it to make a thorough investigation. It should not, for example, be restricted to deaths and disappearances (as with Chile) but should be permitted instead to investigate all forms of gross human rights violations;
4. The Commission should hold public hearings at which victims of human rights abuses are permitted to testify;
5. The perpetrators of gross human rights violations should be named, provided adequate opportunity is given to them to challenge their accusers before the Commission;
6. The Commission should be required to submit a comprehensive report and recommendations within a reasonable time;
7. The Commission should be empowered to recommend reparations for victims of gross human rights violations; and
8. Amnesty should be denied to perpetrators of gross human rights abuses who refuse to co-operate with the Commission or who refuse to make a full disclosure of their crimes.

47. *See* the Report by Louis Joinet on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1997/20/Rev 1 (1997); N.J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights,* 59 Law and Contemporary Problems 127 (1996); P. Hayner, *International Guidelines for the Location and Operation of Truth Commissions: A Preliminary Proposal, id.*, at 173; S. Landsman, *id.*, at 81.

If a state follows these guidelines – as has South Africa – will its amnesties receive recognition by foreign courts? Or will its amnesties be ignored, as has happened in the case of Augusto Pinochet?

5. THE INTERNATIONAL CRIMINAL COURT AND AMNESTY

Amnesty was on the agenda of the Rome Diplomatic Conference as it had been considered in the *travaux préparatoires*.[48] The final text of the Rome Statute is, however, silent on the subject.

How is this silence to be interpreted? One view[49] holds that the omission of amnesty is deliberate. Support for this position is to be found in the Preamble which affirms that "serious crimes of concern to the international community as a whole must not go unpunished" and expresses the determination "to put an end to impunity for the perpetrators of these crimes".[50] Moreover genocide and 'grave breaches' of the Geneva Conventions, which feature prominently among the crimes falling within the jurisdiction of the Court, are crimes in respect of which states are obliged to prosecute. Had the Rome Statute intended amnesty to be a defence, it is argued, special provision would have been made for it in the clauses dealing with the defence of *ne bis in idem* and surrender to the Court (extradition). However, Article 20 on *ne bis in idem* allows this defence only where a person has been 'tried' by another court, and the *travaux préparatoires* show that the exclusion of amnesty and pardon was deliberate.[51] "Surrender" to the Court is to be distinguished from 'extradition'.[52] Consequently the fact that amnesty may be a bar to extradition between states[53] is irrelevant in respect of 'surrender' to the Court.

48. Both amnesty and pardon were considered and rejected in the context of the defence of *ne bis in idem*: *see* Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, at 40 (para. 174) (Proceedings of the Preparatory Committee during March-April and August 1996) GAOR, 51st Session, Supplement No 22 (UN Doc. A/51/22); UN Doc. A/CONF./283/2/Add. 1 (1998), Art. 19. Ruth Wedgwood reports that in August 1997 the United States circulated a 'non paper' to the Preparatory Committee suggesting that a responsible decision by a democratic regime to allow an amnesty should be taken into account in judging the admissibility of a case, *see* R. Wedgwood, *The International Criminal Court: An American View,* 10 European Journal of International Law 93, at 96 (1999).
49. *See* G. Hafner, K. Boon, A. Rubesame & J. Huston, *A Response to the American View as Presented by Ruth Wedgwood*, 10 European Journal of International Law 108, at 109-113 (1999).
50. Paras. 4 and 5.
51. *Supra* note 44.
52. Art. 102.
53. The 1990 UN Model Treaty on Extradition lists amnesty granted by either requesting or requested state as a mandatory ground for the refusal of extradition: General Assembly Resolution 45/116 of 14 December; 30 ILM 1407 (1991). Art. 3(e). The 1996 European Union Extradition Agreement allows the requested state to refuse extradition where it has granted amnesty and was competent to prosecute the offence under its own criminal law, *see* OJEC, No. 313/12 of 23 October 1996.

Another view[54] holds that the Rome Statute contains provisions which allow amnesty to be recognized indirectly.

First, it is suggested that the Security Council, acting under Article 16, may order the deferral of a prosecution for twelve months (or more) where amnesty has been granted. This is difficult to accept, however, as such a deferral must be made in a resolution under Chapter VII and it is difficult to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.

Secondly, it is argued that Article 17(1)(b) of the Rome Statute contemplates recognition of amnesty. It provides that the International Criminal Court will declare that a case is inadmissible where

> the case has been investigated by a State which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

While the first part of the provision might be imaginatively interpreted to cover South Africa-style amnesty – that is the decision not to prosecute and instead to grant amnesty after an investigation – it is difficult to maintain such an interpretation against the qualification as in such a case the amnesty will result from an 'unwillingness' on the part of the State to prosecute.

Thirdly, and more plausibly, it is suggested that amnesty may be dealt with by prosecutorial discretion. Article 53(2)(c) allows the Prosecutor to refuse prosecution at the instance of a state or the Security Council where, after investigation, she or he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'. This decision is subject to review by the Pre-Trial Chamber. Similarly the Prosecutor may decline to exercise her or his direction to prosecute *proprio motu* under Article 15 on the ground that the suspect has been granted amnesty.

Finally it may be suggested that the Court itself might have regard to an amnesty, if only as a factor in mitigation of sentence.

From the United States come pleas for a re-opening of the Rome Statute, which might allow reconsideration of the question of amnesty. This is highly unlikely. The Rome Statute is a compromise package of provisions reached after intense negotiations. There is no serious prospect of the Statute being re-opened for amendment or for an Amending Protocol. In these circumstances it seems clear that amnesty can only be accommodated within the existing text. Prosecutorial discretion alone offers a real opportunity for the recognition of amnesty. If a set of guidelines is drawn up for the exercise of prosecutorial discretion – as

54. M. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell International Law Journal (1999) (not yet published).

has been proposed – it is suggested that amnesty should be addressed in these guidelines. This would go some way towards curing an omission in the Statute.

What such guidelines to the Prosecutor might include is another matter. Some international crimes, notably genocide, are not appropriate for the grant of amnesty and this should be made clear. War crimes or 'grave breaches' of the Geneva Conventions committed in international armed conflicts are also not capable of amnesty as they have an international dimension that demands extradition or prosecution. Difficulties arise in respect of torture and crimes against humanity committed by a repressive regime or in the course of an internal conflict. Ideally the perpetrators of such crimes should be tried before a national or international court, as stressed by the ICTY in *Furundžija*.[55] Where, however, a state opts for amnesty in order to achieve reconciliation and requires amnesty seekers to undergo the type of screening process involved in the South African model, it is difficult for foreign and international courts simply to ignore these amnesties.

6. CONCLUSION

The present state of international law on the issue of amnesty is, to put it mildly, unsettled. While amnesty is prohibited in the case of genocide and war crimes committed in international armed conflicts, there are no clear rules prohibiting amnesty in the case of other international crimes. This uncertainty has a major advantage: it allows prosecutions to proceed where they will not impede peace, but at the same time permits societies to 'trade' amnesty for peace where there is no alternative. Unconditional amnesty for atrocious crimes is, however, no longer generally accepted by the international community. Here the Truth and Reconciliation Commission may serve as a useful compromise to ensure that justice is not entirely sacrificed to the cause of peace.

55. *Supra* note 12.