AN INVESTIGATION OF THE DUTY OF STATES TO PROSECUTE INTERNATIONAL CRIMES AND THE QUESTION OF AMNESTY

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A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS IN INTERNATIONAL CRIMINAL JUSTICE (LLM-ICJ) OF THE OPEN UNIVERSITY OF TANZANIA

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CERTIFICATION

We, the under designed, certify that we have read and hereby recommend for acceptance by The Open University of Tanzania, a Dissertation entitled: *"An Investigation of the Duty of States to Prosecute International Crimes and the Question of Amnesty",* in partial fulfillment of the requirements for the Award of Master of Laws in International Criminal Justice [LLM-ICJ] of The Open University of Tanzania.

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DEDICATION

I would like to dedicate this work to my beloved parents, Mrs. Natalia Martin Mlwilo and Mr. Jonas Alfred Kazimbili Mhagama. The two tirelessly laid down the foundation which enabled me to recognize the importance of education. **I** really enjoy the abundant love and care they laid as a very vital foundation to my life.

Thanks and may the Almighty God bless your life.

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ABSTRACT

This study investigated the duty of States to prosecute international crimes and the question of amnesty, with a focus on Africa as a case study. The study focuses specifically on the controversial question of granting amnesty to perpetrators of international crimes. Principally, international law both customary and conventional, imposes on states the duty to prosecute and punish international crimes while amnesty does not bar the prosecution of persons responsible for international crimes. The obligation to prosecute accused persons and punish those found guilty for international crimes arise from International Conventions to which a state is party. These include the 1949 Geneva Conventions and 1977 Additional Protocols, the Conventions on the Crime of Genocide and Convention against Torture and Other Cruel. Others are the Inhumane or Degrading Treatment or Punishment, The Rome Statute of the ICC and Human Rights Conventions like International Convention on Civil and Political Rights. States' obligation to prosecute and punish those responsible for committing certain violations establishes a minimal requirement of accountability from the idea that prosecution tied to punishment is the best method in all circumstances for achieving the legitimate goals of a criminal justice system. On the other side of restorative justice, only those amnesty laws which are promulgated for the purpose of ending or preventing a war or a protracted period of serious violence or otherwise to facilitate social transition and reconciliation and not those granted in order merely to shield former leaders from criminal liability have been considered as legitimate. It is now apt to conclude that amnesty cannot prevail over prosecution particularly where international crimes are involved.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
AFRC	Armed Forces Revolutionary Council
AHRLR	African Human Rights Law Report
AU	African Union
AZAPO	The Azania Peoples Organization
CCPR	Convention on Civil and Peoples Rights
CDF	Civil Defence Force
CHR	Charter on Human Rights
CIPEV	Commission of Inquiry into Post -Election Violence
DCI	Deputy Commissioner of Immigration
EAC	East African Community
ECCC	Extra-Ordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
ECOMOG	Economic Community of West African Monitoring Group
ECOWAS	Economic Organization of West African States
ET	Ethiopia
EU	European Union
FRY	Former Republic of Yugoslavia
GAOR	General Assembly Official Records
IACTHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IT	International Tribunal
KIA	Kilimanjaro International Airport
KLA	Kosovo Liberation Army
MP	Member of Parliament
NATO	North Atlantic Treaty Organization
NGOs	Non Governmental Organizations
OUT	Oxford University Press
PTC	Pre- Trial Chamber
Res	Resolution
RUF	Revolutionary United Front
SADC	South African Development Community
SCSL	Special Court for Sierra Leone
SCU	Serious Crimes Unit (in the court of DiIi)
SIT-Iraq	Special International Tribunal for Iraq
SRSG	Special Representative of the Secretary- General
SS	Schutz Staffel (Nazi elite corps)
ST	Lebanon Special Tribunal for Lebanon
TC	Trial Chamber

UDHR	Universal Declaration-for Human Rights (1948)
UK	United Kingdom
UN	United Nations
UN SCOR	United Nations Security Council Official Records
UNTAET	United Nations Transitional Administration in East Timor
UN-Doc	United nations Documents
UN-GA	United Nations General Assembly
UNISA	University of South Africa
UN-MIK	United Nations Missions in Kosovo
UN-SC	United Nations Security Council
UNITA	Uniao Nacional para a lndependencia Total de Angola
W.D.C	Washington D.C
WWI	World War One
WWII	World War Two
YJIL	Yale Journal of International Law

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Problem

Once a crime has been identified as having a peremptory norm (*jus cogens)* status, it inevitably imposes obligation of a state towards the international community as a whole *(erga omnes),* or obligation owed to all mankind. These obligations include the duty to prosecute accused perpetrators and to punish those found guilty. A *jus cogens* norm is a rule which cannot be set aside by a treaty or acquiescence by State but only by the formation of a subsequent customary rule with contrary effect[1]. As example of *jus cogens* Ian Brownlie lists the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting the trade in slaves and piracy[2]. And, obligation *erga omnes* amounts to 'the obligations of a State towards the international community as whole', as explained by the International Court of Justice (ICJ). [3] The ICJ proclaimed as follows:

> "*By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligation erga omnes,"*[4]

However, on the other side, from the time immemorial amnesty has been employed as a means of promoting political settlement and advancing reconciliation in societies that have emerged from repression. Most national courts; which have

[1] Article 53 of the Vienna Convention on the Law of Treaties of 1969
[2] Ian Brownlie, *Principles oj Public International Law* s" ed. (Clarendon Press, 1998), p.515
[3] Barcelona Traction, Light and Power Co. Ltd. *(Belgium v. Spain), 1970 ICJ Reports,* p.32.
[4] Ibid

adjudicated the validity of their own amnesty laws have found them to be valid; The countries include Argentina (1970s), Chile (1980s), South Africa (1995), Sierra Leone (1996), and Uganda (2010), to mention a few. Amnesty is therefore a sovereign act of forgiveness or general oblivion for past offences, often granted before a trial or conviction by a head of state, an executive or a legislative body, to a large group of persons guilty of specific conduct or crimes.

The emergence of an international system of prosecution for international crimes dates back from the World War One (WWI) and gained its momentum during the World War Two (WWII) with the establishment of the International Military Tribunal (IMT) and Tokyo Tribunals, followed by the International Criminal Tribunal for Yugoslavia (ICTY) 1993, the International Criminal Tribunal for Rwanda (ICTR) 1994, and the Special Court for Sierra Leone (SCSL) 2002. Despite these efforts, the reasons for offering amnesties have not diminished and some states in the midst of violence have continued to rely on promises of non-prosecution as a means to bring all parties to a conflict to the negotiating table or begin a process of demobilization, reintegration or reconciliation.

The Special Court for Sierra Leone is the only international criminal court which has directly faced the question of amnesty to date, as it was held in *Prosecutor v Kallon et al,* in 2004 that the Lome Amnesty had no effect *vis-a-vis* its jurisdiction. Likewise, there is no provision which recognises amnesty under the ICTY and the ICTR Tribunals as well as the Rome Statute of the International Criminal Court (ICC). This study will examine the duty to prosecute international crimes on the one hand, and granting of amnesty on the other. In particular, the study aims to examine

the reasons behind the conflict existing between Prosecution and Amnesty, in an attempt to propose the best practices.

1.2 Statement of the Problem

There are conflicting views on the duty to prosecute perpetrators of international crimes and the duty to recognize and grant amnesty. For instance, Article 6(5) of the Additional Protocol II of 1977 to the Geneva Conventions requires parties to the conflict to negotiate peace treaty to end hostilities. This means that amnesty can be granted even for international crimes as recently applied in Uganda 2010 in the *Thomas Kwoyelo alias Latoni vs Uganda, Constitutional Petition No. 036/11,* arising out of HCT/OO/1CD/Case No. 02/10, Twinomujuni, Byamugisha, Nshimye, Arach-Amoko and Kasule, JJA (Constitutional Court of Uganda), 22 September 201l.

Equally, laws at national levels also allow for amnesty to be granted to persons who may commit international crimes, as the cases in Zimbabwe, South Africa and Uganda from Africa and Latin American countries including Argentina, Chile etc. However, this seems to be contrary to certain international law standards imposing obligations on states to prosecute international crimes. For instance, Article 10 of the Statute of the SCSL does not allow amnesty.

In this regard, states has resulted into practicing amnesty consequently brought about conflicting views on the two mechanisms to justice in one hand, while in the other states continues to practice amnesty to international crimes as contrary an obligation which needs states to prosecute. Indeed, even in those situations

whereby amnesty has been applied as a mechanism to justice still it has faced challenges in the courts of law. For instance, in the *Azania People's Organisation vs the President of the Republic of South Africa, et ol*, Case No CCT17/96, paras 1- 66 (AZAPO Case)

In South Africa as well as in Argentina amnesty was challenged in court based on the constitutionality grounds. In short, in most if not all places in which amnesty has been applied it has still been followed by prosecution as a doubt rose by victims of international crimes.

In this standpoint, the study aims to examine the contexts in which the controversy between prosecution and amnesty emerge with a view to proposing the best alternative which can offer justice and also do away with the conflicting views.

1.3 Research Questions

This investigation will be guided by two questions corresponding to the specific tasks identified in 1.3 above as follows:

i) Should amnesty prevail over the duty to prosecute perpetrators of international crimes?
ii) What is the practice of national and international courts on the status of amnesty granted to persons responsible for international crimes?

1.4 Objectives of the Study

1.4.1 General Objective

The main objective of this study is to examine the context in which prosecution and amnesty as mechanisms to justice are applicable to international crimes.

1.4.2 Specific Objectives

Specifically, the study seeks to:

i) To study the jurisprudence of international and national courts on the question of amnesty in the context of international crimes.

ii) To examine the duty imposed on States in prosecuting of international crimes by analysing customary international law and international law duty to repress such crimes as found in various treaties.

iii) To examine international legal basis for amnesty.

1.5 Research Methods

This research is deskwork as it largely draws from the review of research existing in this field based on Statutes, International Conventions, Cases and academic publications. Moreover, in-depth information was also drawn from interviews and informal discussions with experts and victims of international crimes. Similarly, a questionnaire was used to collect information from relevant institutions, including the ICTR and the High Court of Tanzania, Civil society organizations (Legal and Human Rights Centre, Amnesty International (Tanzania Chapter), International Committee of the Red Cross and individual experts in the fields of international law and human rights.

Purposeful and stratified sampling techniques were used to draw individuals from the relevant positions and status to ensure representativeness. The number of individuals in each category depended on the sampling frame for individual categories as well as the sample size required for the study, which ranged between

25 and 30. Data was analysed descriptively in relation to the specific objectives while statistical procedures was used to establish frequencies and percentages relative to responses.

1.6 Significance of the Study

This study is significant in a number of ways; first, it provides knowledge and understanding to the general public on the mechanisms in offering justice to the victims of international crimes. Under this respect, this study found .out the procedures and contexts in which prosecution and amnesty are effected. This is important in incorporating international treaties and agreements particularly in Africa and to explore the factors that have caused states to domesticate certain international treaties and agreements in its municipal law while refusing to domesticate others. For example, Tanzania till to-date has not domesticated the Rome Statute of the International Criminal Court in its municipal law, although the country has ratified the treaty.

In this respect, ideally it exposes the duty of a State to fulfill its obligation of prosecuting perpetrators of international crimes specifically when other mechanisms are inefficient to bring justice to victims. For example, when a matter arises, it is the duty of the state to prosecute the perpetrators in a competent national court or extradite perpetrators of international crimes to another state for trial. Second, this study also highlights the importance of putting in place a mechanism which makes justice to be attained properly to victims of international crimes through prosecution and amnesty that ought to be fairly applied at international, regional and national

levels. Lastly, this study enables the general public to know about treaties ratified by states which to- date remain unincorporated and take the necessary measures to make sure that, those treaties are incorporated, so that the general public, especially the ordinary individuals can participate in scrutiny on how their state fulfill the duty to deal with international crimes.

1.7 Hypothesis of the Study

The main assumption of this study is that, Prosecution is the better mechanism to offer justice to the victims of international crimes than amnesty based on the experience where the two mechanisms have been used, particularly in Uganda, South Africa and the Amnesty decision by the Special Court for Sierra Leone. This is because wherever amnesty has been applied, it still needs to be complemented by prosecution for justice to the victims. Further, this assumption is premised on customary international law and treaties imposing express obligations on states to prosecute perpetrators of international crimes.

1.8 Literature Review

Obura [5]states that, “the reality presented by States practices on granting of amnesties has made some scholars question the existence of the erga *omnes* duty to prosecute and punish international crimes." However, he further argues that, the granting of amnesties by state cannot negate the existence of this duty which exists both in treaty and customary law[6]. Both treaty and customary obligations to punish

[5] Ken Obura 'The Duty to Prosecute International Crimes Under InternationalLaw' in Chacha Murungu and Japhet *Begon,Prosecuting International Crimes in Africa(2011)* pll.

[6] C. Edelenbos 'Human Rights Violatibns:A Duty *to Prosecute'(1994)7Leiden Journal of International* Law 5 21.

atrocious crimes recognize this and are consistent with a limited program of prosecution, but would be breached by wholesale impunity[7].

However, many scholars have argued that, where the substantive right is non-derogable, it carries attendant remedial obligations that are equally non-derogable[8]. Similarly, some national courts, as in the case of the courts of Uganda (in *Kwoye/o* case), South Africa[9]" and EI Salvador[10], express the view that the international law not only fails to prohibit amnesty but also encourages it[11]. These courts cite article 6(5) of Additional Protocol II of 1977 which 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[12]. This is unsettled position which this study will try to find the truth about.

Like, the IMT, IMTFE, ICTY, ICTR and the SCSL; the ICC Rome Statute similarly lacks any provision on amnesties, despite the issue being on the agenda of the Rome Diplomatic Conference and having been considered in the *travaux pre 'paratoires* (drafting history of the treaty), leaving the text in a state of 'creative ambiguity'.[13] This is a controversy which this study will try to highlight the possible contexts underlying the problem and come up with a reasoned conclusion on how and why prosecution or amnesty is a better mechanism to offer justice.

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[7] ibid
[8] Ken Obura 'Prosecuting International Crimes in Africa'(2011) p29.
[9] *Azania Peoples Organization(AZAPO) v President of the Republic of South Africa* 1996(4) SA 671(CC)691 para32
[10] Proceedings 10-93 (May 20, 1993); reprinted in NJ Kritz (ed) *Transitional Justice* (1995) 549 -555.
[11] op cit, Ken Obura, p.30.
[12] Article 6(5) of Additional Protocol II of 1977 to the Geneva Conventions.
[13] Yasmin Q. Naqvi 'Impediments to Exercising Jurisdiction over Internatianal Crimes' (2010) p 86.

On the other hand, some commentators like Sherrif Bassioun and Yasmin Naqvi say that, an 'amnesty exception' may be inferred from several provisions of the Rome statute[14]." They further point out three different ways that have been identified under the ICC Statute to provide such leeway [15]as follows:

(1) By reason of admissibility of a case due to an amnesty following an investigation by the state of territoriality or nationality;

(2) By the prosecutor deciding not to proceed to an investigation in the 'interest of justice' under article 53 of the Rome Statute; and

(3) By the Security Council deferring proceedings as a measure to maintain or restore peace and security.

Definitely, there is a gap in the literature with regard to when and why either prosecution or amnesty should apply. Therefore, in this respect, this study will attempt to fill the gap which has been left behind, leading to states coming up with conflicting decisions on fulfilling the obligation *erga omnes* with respect to the duty of states to prosecute international crimes.

In this regard, the case law will be drawn from States which have applied amnesty for perpetrators of international crimes specifically the Azania Peoples Organization *(AZAPO) case* from South Africa, the *Kwoyelo case* from Uganda, the *Prosecutor v*

[14] On a discussion of these possible ways to accommodate amnesties into the Rome Statute, see also generally, Ruth Wedgwood, "The International Criminal Court: An American View", *European Jaurnal af Internatianal Law 10(1999)* 97; Gerhard Hafner, Kristen Boon, Anne Rubesame and Jonathan Huston, "A Response to the American View as Presented by Ruth Wedgwood" *European Jaurnal af International Law* 10(1999) 107; Michael P. Scharf, "The Amnesty Exception to the Jurisdiction to the International Criminal Court", 32 *Cornel/International Law Journal* 507 91999).

[15] Op cit, Yasmin Q. Naqvi, p. 87.

Kallon et al from Special Court for Sierra Leone (SCSL).

Furthermore, the experience is drawn from other states that have granted amnesty including Argentina, Ecuador, EI Salvador, Haiti, Paraguay, Uruguay, Chile in Latin America and Angola, Burundi, DRC and Zimbabwe.

1.9 Scope of the Study

This study intends to discuss the duty of States to prosecute international crimes and the question of amnesty from international, regional and national levels, particularly in Africa in which case laws have been taken from Uganda, Kenya, South Africa, Niger, Burkina Faso, Burundi, Ethiopia, Senegal, DRC, Sierra Leone and Zimbabwe.

CHAPTER TWO

2.0 PROSECUTION OF INTERNATIONAL CRIMES FROM WORLD WAR I TO THE MODERN ERA

2.1 International Crimes

International crimes refer to crimes of the international concern, which include genocide, war crimes, crimes against humanity and the crime of aggression. International crimes involve more than the State because of differences of nationality of victims or perpetrators or the means employed or which concern a lesser protected interest which cannot be defended without international criminalization. An international crime may also be defined as an offence which is created by international law itself, without requiring the intervention of domestic law. In the case of such crimes, international law imposes criminal responsibility directly on individuals, and this is the central idea of this study.

The classic statement of this form of international criminal law comes from the IMT's seminal statement that: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ... individuals have international duties which transcend the national obligations of obedience imposed by the individual state.[16] Generally, crimes which are regulated by international criminal law are those of concern to the international community in that they threaten international interests[17]. In this study, international crimes refer to crimes

[16] IMT Judgment; Broomhall, *International Justice and the International Criminal Court*, 9-10; Robert Cryer, *Prosecuting International Crimes: Selectivity in the International Criminal Law Regime* (Cambridge, (2005) 1.

[17] Opcit, Cherif Bassiouni, p. 99

of the international concern, which include genocide, war crimes, crimes against humanity and the crime of aggression (also known as the crime against peace)[18].

2.1.1 The Notion of International Crimes and the Norms of *Jus Cogens*

Jus cogens is an inherent attribute of norms which safeguards public interest and envisages their special effect of non-derogabilitv[19]. Since *jus cogens* protects the community interest, respective absolute obligations are imposed on States towards the international community as a whole and not to individual States.[20] In this regard, *jus cogens* not only postulates the hierarchy between conflicting interests, but also provides by its very essence, the legal tool of ensuring the maintenance and continuous operability of this hierarchy, depriving conflicting acts and transactions of States of their legal significance. A rule which is *jus cogens* because of the importance of the values it protects enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'[21].

The purpose of *jus cogens* is to safeguard overriding interests and values of the international community as well as distinct interests of individual States[22]. Thus, the emphasis as stressed on community interest as distinct from the interests of individual States as the basis of peremptory norms reinforces their public order character.

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[18] Robert Cryer et al, An Introduction to International Criminal Law and Procedure (2008) p.2.
[19] Alexander Orakhelashvili, *Peremptory Norms in International Law*, (2006) p 68.
[20] ibid.
[21] *Furundzijo*, ICTY, Trial Chamber II, Judgement of 10 December 1998, Case No.IT-95-17/1-T; 39 ILM (1999), para. 153.
[22] Alexander Orakhelashvili, *Peremptory Norms in International Law*, 92006) p 46

2.1.1.1 *Jus Cogens* Norms and the Obligation *Erga Omnes* to States

In line with *jus cogens,* an obligation *erga omnes* amounts to 'the obligations of a State towards the international community as a whole,' as explained by the International Criminal Justice (ICJ).[23] The ICJ held that 'an essential distinction should be drawn between obligations of a State towards the international community vis-a- vis another State,' and proclaimed as follows:

> "By their very nature the former are the concern of 'all States. In view *bf* the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*[24]"

Bassiouni distinguishes *jus cogens* and *erga omes* as follows:

> *"Jus cogens* refers to the legal status that certain international crimes reach, and obligation *erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*[25]"

Gradually, the notion of the obligation of the State towards the international community, and the interest of the international community as a whole, was beginning to settle in the minds of member States of the international community and reflected in State practice[26]. It was in 1970 that the ICJ acknowledged the obligation *erga omnes.* In the Barcelona Traction Case, the ICJ stated:

> '[A]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those

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[23] Barcelona Traction, Light and Power Co. Ltd. *(Belgium v. Spain),* 1970 10 Report, p.32.
[24] Op cit.
[25] M. Cherif Bassiouni, 'International Crimes: *Jus cog ens* and Obligation *Erga Omnes' Law and Contemporary Problems* Vol. 59 No.4 (Autumn 1996), p. 63.
[26] Mitsue Inazumi, *'Universal jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law'* (20050 p.39.

> arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligation *erga omnes*[27]'

Moreover, the ICJ admitted that an obligation *erga omnes* includes acts of aggression, genocide, slavery, racial discrimination, and various fundamental principles and rules concerning respect for human rights.

2.2 The Origin of Prosecutions of International Crimes

International crimes have been perpetrated against civilians groups since the dawn of time; whereby, empires were built on the subjugation, enslavement, massacres, and general overall ill- treatment of conquered peoples[28]. Some headway was made internationally for the introduction of laws against inhuman acts at the beginning of the last century via the Hague Convention IV of 1907 concerning the laws and Customs of War on Land[29]. The notion *'Crimes against humanity'* for example, was propounded for the first time in 1915, on the occasion of mass killing of Armenians in the Ottoman Empire[30]. On 28 May 1915 the French, British, and Russian Government decided to react strongly, and jointly issued a declaration stating that:

> "In view of these new crimes of Turkey against humanity and civilization, the Allied government announced publicly to the

[27] Ibid.
[28] Clare de Than and E. Shorts' International Criminal Law and Human Rights' (2003) p. 87.
[29] ibid.
[30] Antonio Cassese *'International Criminal Law'* 2Ed {2008} p 10l.

> sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of who are implicated in such rnassacre[31]."

Thus, the philosophical origin of *"Crimes against humanity"* lies in humanistic and humanitarian values, while its normative origin rests in the evolution of the international regulations of armed conflicts.[32]

It is arguably that, while the Nuremberg Charter was the first international instrument to specify the contents of "Crimes against humanity", it did not create a new principle of international law because the notion of offences against the law of nations, *delicti jus gentium,* pre-existed the Charter by centuries[33]. In 1993 the ICTR was established by the UN Security Council to prosecute those responsible for crimes committed in the former Yugoslavia and in the following year, the ICTR was established to prosecute serious violations of international humanitarian law committed in Rwanda.

The major landmark in the development to provide for international accountability is the establishment of the ICC whereby, the ICC statutes in its preamble affirms, "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

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[31] Ibid.
[32] M. Cherif Bassiouni *'Crimes Against Humanity in International Criminal Law'* {1992} p 148.
[33] Ibid {p 148}.

Even after the creation of the ICC, direct enforcement of international criminal law through international courts remains the exception. Universal jurisdiction provides for the possibility of decentralized prosecution of international crimes by third states. However, this would create a comprehensive network of jurisdictional claims for international crimes and markedly improve the chances of ending wide spread impunity for international crimes[34].

Furthermore, the validity of the principle of universal jurisdiction under customary international law is generally acknowledged for genocide, war crimes in international armed conflicts, and crimes against hurnanity[35], and is also accepted in regard to crimes in civil wars[36]. This authorises even third-states-that is, states with no special link to the crime to prosecute.

Thus, it is from this standpoint, whereby States as members of the international community have found themselves in a cross road on whether to respect, promote and protect human rights by fulfilling their duty to prosecute and punish those perpetrators of international crimes or blanketing them.

This can be achieved through recognising and granting of amnesty relying on national authorities, like those granted in Argentina, Chile, EI Salvador, Zimbabwe, Sierra Leone, Uganda and South Africa.

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[34] Gerhard Werle, *Principles oj International Criminal Law,* 2nd Edition (2009) p.67.
[35] Brownlie, *Principles of Public International Law,* in Edn (2008), pp.306 et sq., and p. 565.
[36] C. Kress, 30 *Israel Yearbook on Human Rights* (2001), p.103 at pp .. 169 et sq.

2.3 States and the Duty to Prosecute International Crimes

The duty to investigate and prosecute international crimes applies to all States; not only States Parties to the Rome Statute as the ICC Prosecutor cannot prosecute everything as it focuses only on the most responsible. In this respect, it is obvious that this results in an impunity gap in relation to lower - ranking accusation, which can only be filled by states, and only if: domestic laws correspond to international obligations; capacity exists to handle serious crimes; and if appropriate institutions are in place. Also, under the complementarity principle the ICC will not interfere with such proceedings in national jurisdiction so long as they are genuine. According to this principle, the ICC will only deal with cases that are not genuinely dealt with by national jurisdictions.

A stronger argument that a duty to prosecute might emanate from the commission of international crimes relates to the duties of States under the law of State responsibility. Also, the Policy paper of the Office of the Prosecutor of the ICC states that: ' ... the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States'[37], Furthermore, the peremptory character of *jus cogens* crimes has also been urged to infer an obligation to prosecute. It is commonly asserted that 'the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus eogens* would not constitute a peremptory norm of international law'[38].

[37] Available at: http://www.icc-cpLint!librarv!organs!otpti!30905-Policy-Paper.pdf.
[38] Cherif Bassiouni, *"International Crimes"*, at 266.

In *Kallon and Kamara,* the SCSL inferred this line of reasoning law that are the subject of universal jurisdiction' justified by the assertion that 'the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*[39], This echoes the reasoning of the Inter-American Court of Human Rights in the 2001 *Barrios Altos case,* in which the Court stated that Peru's amnesty laws were in admissible because, *inter alia,* they were intended to prevent the punishment of violations of non-derogable human rights.[40] The Inter- American Court of Human Rights has decided on more than one occasion, that:

> *"A state has a legal duty to take reasonable steps to prevent human rights violations and to use the means as its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation*[41].

International law not only allows the international community and the states to prosecute international crimes through universal jurisdiction, but even obligates them to do so under certain circumstances. In this regard; customary international law today recognizes that the State in which a crime under

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[39] *Kallon and Kamara,* Decision on Amnesty case, para.71

[40] *Barrios Altos* case, para.41.

[41] Inter-American Court of Human Rights, Case *Velasquez Rodriguez,* Judgement of 29 July 1988 (ser. C) No.49hereafter, *Velasquez Rodriguez* case), para. 174. See also Case *Neira Alegra and others,* Judgment of 19. January 1995 (ser. C) No. 20, para. 69; Case *Caballero Delgado and Santana,* Judgment of 8 December 1995. (ser. C), No. 22, para.56; Case *Blake,* Preliminary Exceptions, Judgment of 2 July 1996 (ser. C), No. 27, para. 39 and Case *Castillo Paez,* Judgment of 3 November 1997 (ser. C), No. 34, para.90.

international law is committed has a duty to prosecute[42]. This duty also exists under treaty law for genocide and war crimes in international armed conflicts[43]. However, the "grave breaches" provisions of the Geneva Conventions obligate every state party to prosecute certain serious violations.

In the Preamble to the ICC Statute, the contracting parties emphasize that;

> *"The most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation," The parties recall that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes', and underline their resolve 'to these ends ... to establish an independent permanent International Criminal Court .. [44]"*

An academic debate in the 1990s, triggered by a 1988 decision by the inter-American Court of Human Rights, [45]was also useful in demonstrating duties to prosecute. However, States by opting to fulfill their obligation, have found themselves on a struggle to prosecute or whereas seen necessary to extradite these perpetrators of international crimes. Under this investigative study, the duty of States to prosecute international crimes has been raised in a number of sources.

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[42] 42 C. Kress, 30 *Israel Yearbook on Human Rights* (2001), p.103 at p .. 163, n.237; Naomi Roht Arriaza, in D. Shelton (ed.), *International Crimes, Peace and Human Rights* (2000), p.77 at p. 78.

[43] Genocide Convention, Art. IV; Geneva Convention III, Art. 129, and Geneva Convention IV, Art.146; in addition, there is a treaty-based duty to prosecute if the crime under international law is based on torture; this derives from Art. 7 of the Torture Convention.

[44] ICC Statute, Preamble (4) and (6).

[45] *Velazquez Rdriguez*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C No.4.

Under the 1949 Geneva Conventions and the 1977 Additional Protocols, member States are obliged to put an end to all 'grave breaches' set out therein. [46] Basically, these great breaches are referred to under international law as war crimes, and listed under Geneva Conventions. The Convention on the Crime of Genocide (Genocide Convention) entered into force on 12 January 1952 was intended to prevent genocide by ensuring its punishment.

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Torture Convention)[47] imposes an unequivocal duty on State parties to prosecute acts of torture as criminal.[48] The Convention requires each state party to ensure that all acts of torture are criminalized under its municipal laws,[49] and to establish its jurisdiction over such offences in cases where, inter alia, the alleged offender is its national.[50] Moreover, article 7 requires state parties either to prosecute or extradite alleged offenders. [51]

The obligation on the part of states to investigate and prosecute 'core international crimes,'[52] arguably also emanates from the Rome Statute of the ICC, as state parties risk an intervention by the ICC if there is no investigation or prosecution. However, the ratification of the Rome Statute by more than 110 States [53] constitutes

[46] V Morris & MP Scharf, *An insider guide* to *the International Criminal Tribunal for former Yugoslavia* (1995) 64-65.
[47] Convention Against Torture and Cruel, Inhuman or Degrading Treatment.
[48] Article 6 and 12 of Inter-American Convention.
[49] Article 1 of Torture Convention.
[50] Article 5 of Torture Convention.
[51] Article 7 of Torture Convention.
[52] Article 5 of the Rome Statute.
[53] As of June 2013, 120 states had ratified the Rome Statute of the ICC. (According to the ICC website).

significant evidence of an acknowledgement of the duty to prosecute and punish these crimes.[54] Furthermore, the Rome Statute apart from making no provision for amnesty for perpetrators of international crimes, the Statute defines crimes against humanity for the first time and provides for constitutive elements of the crime as well as their grounds for [55]prosecution and punishment.

2.4 International Crimes in International Perspective

The duty imposed on States to prosecute international crimes has a long history in international arena. The blatant atrocities committed during the WW II (1939-1945) were not only untold, but also intolerable on the world of civilised community hence led to establishment of the remarkable International Military Tribunals; the IMT and the International Military Tribunal for the Far East (IMTFE), to try those seen to bear the greatest responsibilities. The experience proves that since then, there was no prosecution of international crimes at international level until the establishment .of ICTY (1993) and the ICTR (1994).

The atrocities committed in the former Yugoslavia and the genocidal policies conducted in Rwanda led to the international community rather than establishing the *ad hoc* tribunals to have a permanent solution, hence the establishment of the Rome Statute of the ICC (1998) which came into effect in July 2002.

[54] Article 17 (1) (a)-(b) of the Rome Statute.
[55] Rome Statute, article 7.

2.4.1 International Crimes under the Nuremberg and Tokyo Tribunals

Basically, the main function of such tribunals was to punish not only those government and military officials directly connected with the war itself but also to prosecute those alleged to have committed gross humanitarian crimes against civilians. The crimes included mass murder, persecution, deportation, enslavement, extermination, and in modern parlance "ethnic cleansing", and of course, the "Final Solution of the Jewish Question".

However, the jurisprudence from the IMT and the Control Council Number l0 trials shows that, apart from rejecting the defence of obedience to superior orders, being acting under official policies of the state and immunity of state officials, also the tribunals gives no room for amnesties; except that of IMTFE which was granted to Emperor Hirohito by Douglas McArthur a Supreme Commander of the Allied Forces, in his capacity primarily based on political grounds. Thus, the applicability of these provisions in one way or another proves that the tribunals not only refuted all forms of immunities granted to the states officials to stand as bars for prosecutions but also it paved a way for the international community that, in the world of peace lovers, there is no room to tolerate perpetrators of international crimes.

Furthermore, in affirming that the defences of immunities to State officials were not a bar for prosecutions at all; in May 1999 the former President of the Former Republic of Yugoslavia (FRY) Slobodan Milosevic was charged (along with four others) with crimes against humanity and war crimes in Bosnia and Croatia between 1991 and 1995 and in Kosovo in 1999.

The ICTR Statute sets out three separate categories of crimes which come within the Tribunals jurisdiction; genocide Article 2 and crimes against humanity Article 3 common to the Geneva Convention of 1949 and Additional Protocol II of 1977.[56] Moreover, the ICTR Statute was set out in comparable terms to that of the ICTY, but in some extent with many marked elementary and essential differences.

Article 1 of the ICTR Statute grants the Tribunal the power to prosecute persons for serious violations of international humanitarian law.[57] Also, Article 6 (2) of the ICTR Statute, provides that immunities of state officials shall not serve as bar nor mitigating factor. For instance, in *Jean Kambanda case,*[58] the accused, the former Prime Minister of Interim Government of Rwanda from April 8 to July 17, 1994, was charged and found guilty on Genocide, complicity in genocide and crimes against humanity, despite his immunity as a Prime Minister.

Moreover, the ICTR trials continue to prove that immunity of state officials do not benefit from immunity accorded to them by national or international law, especially where such officials have been charged with international crimes. The Tribunal significantly cemented the position in *Akayesu case,* where it was held that:

> "It had been previously recognized that only public officials or government officials could be held criminal liable for serious violations of Common Article 3 and Additional protocol II. It now appears from the dictum of the Appeal Chamber in *Akayesu case* that any individual,

[56] Article 4.
[57] The ICRT Statute, Art.I.
[58] *Prosecutor v. Jeon Kambanda* (Judgment September 4,1998.

> irrespective of their status; i.e. government or otherwise, may be criminally responsible for violations of this particular Article.[59]

Thus, from the above experience as can one draw from *Akayesu case* that, under the international law, the official position of defendants, whether as Head of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

The efforts to create the ICC however materialised in 1998 when the Rome Statute was officially drafted hence coming into effect in July 2002. The Rome Statute enumerates a list of international crimes under Article 5. Moreover, Articles 6 to 9 provide a range of constituting ingredients for each respective crime. Since it become into operations the ICC have initiated investigations, issued summonses and tried individuals accused for perpetrating international crimes including Jean-Pierre Bemba Central Africa Republic (CAR), Hassan AI Bashir (Sudan), Muammar Gadaffi (Libya), Bosco Ntaganda Democratic Republic of Congo (DRC), Joseph Kony Lord Resistance Army (LRA) and the famous known as 'Ocampo Six' from Kenya.

2.5 Conclusion

Since the establishment of the ICC, rulers who have committed international crimes including Genocide Article 6, crimes against humanity Article 7 and war crimes Article 8 of the Rome Statute have found their hide-out of immunity or even the

[59] *Prosecutor* II, *Jeon-Paul Akayesu*.

exile options substantially diminished. The evidence is the emergence of a new era of power mongers like Mugabe (Zimbabwe), Museveni (Uganda), Kibaki (Kenya), the attempt of Abdullaye Wade of Senegal and currently the activities of Assad in Syria. In this regards, the ICC as a court of the last resort, today's world has become one of the stumbling blocks for prevalence of the culture of impunity which for a long time seems to exist from the era of the Nuremberg Charter.

However, the world will never be the same after the establishment of the International Criminal Court. [60]This is due to fact that, the establishment of the ICC with its developed elements of crimes, marks the new era of states to their obligation to prosecute perpetrators of international crimes. This also marks the end of a historical process that started since the Nuremberg Charter in 1945 as well as the beginning of a new phase in the history of international criminal justice.

Thus, by forming the ICC as court of the last resort, perpetrators of international crimes irrespective of wherever they are have found themselves lacking hide-out. Hence, the future world of rule of law as well as human rights observers is promising.

[60] M. Cherif Bassiouni 'The Legislative History of the International Criminal Court Introduction: Analysis and Integrated Text' (2005) p120.

CHAPTER THREE

3.0 DEVELOPMENTS ON AMNESTY IN PRACTICE

3.1 The Concept of Amnesty

"Amnesty" comes from amnesia. *"Amnesia"*, which means *"loss of memory or an act of oblivion/forgetfulness"*. [61]Hence, in etymological terms, the oldest term is "oblivion" and it appears frequently in old peace treaties to denote forgiveness granted to a group of persons guilty of crimes committed during a war.[62] In the Encyclopaedia of Human Rights, amnesty is defined as:

> ‘‘..... the absolution, or overlooking by a government of an offence of a political nature, such as treason or rebellion, frequently on condition that the offender resumes his or her duties as a citizen within a prescribed period.[63]

The Dictionary of International Law and Diplomacy define amnesty as ' ...immunity for acts done during the war without sufficient authority or in excess of authority. Provision for these matters is usually included in the treaty of peace.[64]

According to Black's Law Dictionary, amnesty is defined as 'a sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been guilty of crime or *delict,* generally political offenses,-treason, sedition, rebellion, draft evasion, - and often conditioned upon their return to obedience and duty within a prescribed time'.

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[61] Henry Black, *Black's Law Dictianary* (1990) 44.
[62] Edmund Osmanczyk, *The Encyclopedia of the United Nations and Internationol Relations* (1990) 142.
[63] Edward Lawson, *Encyclopedia of Human Rights* (1996) 73.
[64] Melquiades Gamboa, *A Dictionary of International Law and Diplomacy* (1973)

In a legal parlance, amnesty is a sovereign act of forgiveness or general oblivion for past offences, often granted before a trial or conviction by a Head of State, an executive body, to a large group of persons guilty of specific conduct or crimes. Amnesty is granted, usually in peace treaty or agreement, on condition that those responsible abandoned a course or hostilities. That is the granting of amnesty is premised on certain conditions, such as the cessation of military attacks against the government of a day.

3.1.1 The Common Concepts Associated with Amnesty

3.1.1.1 Amnesty and Impunity

The relationship between impunity and amnesty laws is to be found in the fact that in many cases amnesty laws serve as the source of impunity, especially where reconciliation is officially imposed on victims of gross human rights violations by the political elite. A good example is what happened in Sierra Leone, South Africa and Uganda just to point few.

Literally, the term impunity means that the government does not investigate crimes committed, and that they are ignored or denied. Impunity is the result of a deliberate attempt by authorities to cover up or ignore certain human rights violations by taking no action against those criminally responsible. In this regard, impunity may take different forms, depending on the circumstances of each case. Robert Garreton.[65] Identifies four types of impunity namely, legal, political, moral and historical.

[65] Robert Garreton, "The Transition Process to Democracy in Latin America: An Analysis from the Perspective of Human Rights," Paper Presented at a Conference in Celebration of a Decade of Democracy in South Africa, Durban, 22-25 January 2004, p 4-5.

Legal impunity occurs when legal means are used to ignore or deny victims of human rights violations justice through amnesty laws. Legal impunity further manifests itself when crimes committed are reserved for military courts, or national security laws are used to prevent future investigations or the prosecution of those responsible for violation of international crimes. Political impunity occurs when those who were once dictators and assassins are legally elected as Presidents, Ministers or congressmen after leaving office.

Moral impunity arises when, despite the crimes committed, the perpetrator justifies his action on the basis that they were done to 'save the county' or 'to protect certain values.' The perpetrator does not feel any remorse for his action, or fear that he will one day be prosecuted and judged for what he has done.

3.1.1:2 Amnesty and Immunity

Immunity is another variant of impunity which provides protection against prosecution for heads of state developed in international customary law.[66] It is further developed to also cover State officials, including Ministers for foreign affairs, Heads of government and also a king or queen. This immunity prevents the application of remedies for victims of human rights violations.

3.1.1.3 Amnesty and Statute of Limitations

Another concept which may be associated with amnesty is the doctrine of Statute of Limitations, which means that if investigations or prosecutions are not undertaken within a prescribed period, subsequent criminal or civil proceedings will be nullified

[66] ibid.

on the basis that the time frame within which such action should have been brought has expired.

However, it must be noted that, serious violations of human rights and international humanitarian law such as, genocide, crimes against humanity and war crimes are not subject to a statute of limitations.[67] This means that those responsible for international crimes must be sent to justice irrespective of when such offences were committed.

3.1.1.4 Amnesty and Pardon

Unlike amnesty, a pardon is usually granted to individuals any time after conviction or sentence. It serves a number of purposes, namely to allow the accused to make a fresh beginning because he or she has refrained from entanglement with the law and thus, deserves an opportunity to start fresh; to correct miscarriages of justice and to mitigate the harshness of a sentence.[68] For example, after 1996 the Advisory Legal Services Directorate of the Department of Justice and Constitution Development of the Republic of South Africa based on past experiences with the granting of pardon by the President, developed general policy guidelines for application for pardon in terms of section 84(2) of the 1996 Constitution of South Africa to clear criminal records. [69]

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[67] Article 29 of the Rome Statute provides that "The crimes within the jurisdiction of the Court shall not be subject to any statutes of limitations."

[68] Leslie Sebba, "Proceedings of the Symposium on Amnesty in Israel," organized by the Institute of Criminology, The Hebrew University of Jerusalem, Faculty of Law, Jerusalem, 13-14 May, 1968, pp. vi-x.

[69] Section 84(2)(j) of the 1996 Constitution of the Republic of South Africa provides that the President is responsible for pardoning or reprieving offenders and remitting any fines, penalties or forfeitures.

3.2 The Working Definition of Amnesty

The purpose of differentiating between amnesty and other related concept is to avoid confusion between amnesty, as understood in this study, and the other related concepts referred to earlier. It is apparent thus far that although there is no uniform practice by state to free offenders for whatever reasons they may deem fit, amnesty has definitive elements, which distinguish it from the related concept discussed above. In this study, for purpose of a working definition, amnesty is defined as:

> A sovereign act of forgiveness, exemption or general oblivion from criminal prosecution, or any other form of punishment for past offences associated with harmful acts committed for political purpose by state and non-state agents granted by a head of state, a legislative body or a body established in terms of legislation, to a group of identified person available for a fixed period of time, which may, or not, be predicated upon the fulfillment of certain condition.

Having discussed the meaning and definitive elements of amnesty and associated concepts, we now examine how amnesty is reflected in different international instruments.

3.2.1 Amnesty in International Law Position

Article 6(5) Additional Protocol II to the Geneva Conventions seems to stand in favour of States granting of amnesties at the end of conflicts. However, the international law neither completely prohibits nor completely authorises States to

amnesty those accused of international crimes.[70] The obvious weakness is that the international law does provide clear principles which assist in the evaluation of the legality of amnesties for international crimes[71]. In this regard, the State's obligation to prosecute and punish those responsible for committing certain violations establishes a minimal requirement of accountability.

Courts have indicated that amnesties which come into being through democratic processes[72] or which have resulted from multi-party negotiations have more legitimacy than self-granted amnesties,[73] which violate the principle of self-judging. [74]Amnesties which are designed to hide the truth and block investigations have been held to violate the victim's and society's right to the truth. Hence, only amnesties which allow victims to know the truth about events which occurred have been considered legitimate. They include those which are tied to disclosure about politically-motivated crimes in a truth commission or co-operation with an investigation.

It has also been argued that amnesties should be granted by a formal procedure that examines each individual candidate and imposes specific conditions for accepting the amnesty application based on the need for the truth to be told and to encourage

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[70] Yasmn Q. Naqvi, *Impediments* to *Exercising Jurisdiction over International Crimes* (2009), p144.
[71] Op cit.
[72] See for example *Garay Hermonsilfa, et.al., v. Chile*, 'A *de facto* government lacks legal legitimacy ... It is not juridically acceptable that such a regime should be able to restrict the actions of the constitutional government succeeding it as it tries to consolidate the democratic system, nor is it acceptable that the acts of a *de facto* power should enjoy all those attributes that accrue to the legitimate acts of a *de jure* power:
[73] *Barrios Altos* case, para. 41.
[74] The Permanet Court of International Justice referred to the 'well-known rule that no one can be judge in his own suit' in the 1925 *Frontier between Iraq and Turkey* case Article 3, para.2, Treaty of Leussene (frontiers between Turkey and Iraq), 1925 PCIJ (se. B), No. 12, at 32 (21 November 1925).

rights-respecting behaviour;[75] Furthermore, laws which cover whole groups of people without any review process should not be considered legitimate. A provisional amnesty that may be made permanent depending on the beneficiary fulfilling the conditions may be a regulated way to find the correct balance of restorative justice. However, it should be notable that, those considered 'most responsible' for the perpetration of international crimes; including leaders planners and facilitators should not escape the prosecutorial net.

There is, however, a trend in practice towards the restriction of amnesties for serious international crimes. In the *Lome Amnesty Case* the SCSL suggested that there is a 'crystallizing international norm that a government cannot grant amnesty for serious violations of serious crimes under international law[76], For example, in 2005, Argentina's Supreme Court declared unconstitutional two laws of 1986-87, which effectively conferred amnesties on those responsible for violating human rights in Argentina's *'Dirty War'* of 1976-83[77].

3.2.2 Amnesty and the Versailles Peace Treaty

Immediately following the outbreak of the WWI, the Commission on responsibilities of the authors of war and on enforcement of penalties was established to examine allegations of war crimes committed by the Central Powers.[78] Offence against the law and customs of war, known as 'Hague law'

[75] Slye, "The Legitimacy of Amnesty under International Law:'
[76] *Lome Amnesty Case*
[77] *Simon Case,* Argentina Supreme Court, causa No 17.768 (14 June 2005) 5.1767. XXXVIII.
[78] *Violations of the Law and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris,* 1919, Oxford: Clarendon Press, 1919.

because of their roots in the 1899 and 1907 Conventions are codified in the 1993 Statute of ICTY,[79] and in Article 8(2) (b), (e) and (f) of the Statute of the ICC. This provision is known as the Martens clause, as named after the Russian Diplomat who drafted it.[80] Basically, the Hague Convention, as international treaty was meant to impose obligations and duties upon states.

3.2.3 Amnesty in the Nuremberg and the Tokyo Military Tribunal

The Additional Protocol II to the Geneva Convention actually encourages states to grant the "broadest possible amnesty" at the end of hostilities in non-international armed conflict.[81] For instance, an informally agreed amnesty was linked to the accord between German and Austria of 11 July 1936, which granted amnesty to all Nazis, except those convicted for the most serious crimes.[82] At the end of WW II, prosecution became the focus for dealing with Nazi war criminals leading to the Nuremberg trial and subsequent prosecutions and amnesty agreements concluded with Axis countries did not contain amnesty clauses.[83]

3.2.4 Amnesty and the International Tribunals

The International Community in the last decades has intensified its efforts to create international mechanisms for prosecuting and punishing individuals accused of particularly grave human right violations. The establishment of the Criminal

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[79] Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, Annex.

[80] Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 *American Journal of International Law 78*.

[81] See Additional Protocol II to the Geneva Conventions of August 12, 1949 relating to the protections of victims of Non-International Armed Conflicts, June 7, 1977, article 6(5), 1125 U.N.T.S 609 (applying to those individuals participating in the armed conflict or those deprived of their liberty because of the armed conflict.

[82] *Nuremberg Trial Proceedings*, Vo1.1, Indictment, Count at IV(F)3(b).

[83] http:<www.yale.edu/lawweb/avalon.wwii>.

Tribunal for the former Yugoslavia and Rwanda was intended to ensure that perpetrators of the most serious crime were brought to justice. However, none of these tribunals seems to provide room for amnesty. The Security Council establishing the Tribunal was:

> *"Determined* to put an end to sush crimes and to take effective measures to bring to justice persons who are responsible for them, Convinced that in the particular circumstance the prosecution of person responsible for serious violation of international humanitarian law would enable this aim to be achieved and would contribute to the process of National reconciliation and to the restoration and maintenance of peace"[3]

The implication of this argument is that international law prohibits amnesty. This was spelt out by the Trial Chamber of the ICTV in *Prosecutor v. Furundzija,*[84] which held that amnesties for torture are null and void and will not receive foreign recognition. More recently, the special Court for Sierra Leone was established to contribute to the process of National reconciliation and to the restoration and maintenance of peace". It has the power to prosecute person who bear the greatest responsibility for serious violations of International humanitarian law and Sierra Leonean law. In *Prosecutor v Morris Kallon* & *Brima Bazzy Kamara* (SCSL),[85] it was noted that insurgents are subject to international humanitarian law and are bound to observe the Geneva Convention.

3.2.5 Amnesty and the Rome Statute of the International Criminal Court

The potential tension between the ICC and the alternative forms of justice remains a moot question. This tension was evident when appeals for the recognition of

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[84] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (10 December 1998); (1999) 39 ILM, at paras. 151-157 (1999).

[85] SCSL Case No. SCSL-2004-15-AR 72(E) and SCSL 2004-16-AR72(E).

amnesty were raised during the Plenipotentiary Conference for the ICC in Rome in 1998, which resulted in the Rome Statute. No agreement was reached on how the future Court should deal with efforts by States to resolve conflicts other than through prosecution and punitive justice when dealing with crimes within the jurisdiction of the Court. However, according to a number of commentators, there are essentially three different ways that have been identified under the ICC Statute to provide such leeway for amnesty:

(1) By reason of inadmissibility of a care due to an amnesty following an investigation by the statute of territory or Nationality;

(2) By the prosecution deciding not to proceed to an investigation in the interest of justice and;

(3) The Security Council deferring proceedings as a measure to maintain or restore peace and security.

This provision appears to recognize that peace and justice may conflict at certain moments in time, and if the Security Council determines that a prosecution by the ICC might threaten international peace and security, it may stay the prosecution for as long as that threat remains. Moreover, the recent hard-line policy of the UN not to recognise amnesties for international crimes in any circumstances would also make such a resolution even more difficult to conceive. [86]

The notion of justice has to be interpreted within the context of the Rome Statute, which is concerned first and foremost with criminal justice. The term is left

[86] See Report of the Secretary – General "The rule of law and transitional justice in conflict and post-conflict societies", , UN Doc. 5/2004/16, 3 August 2004.

undefined, although some elements are mentioned that should guide the Prosecutor in this regard: the gravity of the offence, the interests of the victims, the age or infirmity of the perpetrator and the role he or she played. [87]

3.3 The Position of National Laws on Amnesty

3.3.1 Nature, scope of laws and States practice from Africa and Latin American experience

In the past twenty years, Argentina, Chile, Uruguay, EI Salvador, Guatemala, Peru, Zimbabwe, South Africa, Haiti, Sierra Leone, Colombia, Afghanistan, and Algeria have granted amnesty to persons who had absolute and unconditional amnesty to those persons who committed "political crimes with ramifications, or common crimes committed by no less than twenty people" before the 1st of January,1992.

In Argentina, during Alfonsin's presidency, the judiciary annulled an amnesty that the military had granted to itself before leaving power and prosecutions began. However, unrest grew amongst the military, especially as lower-ranking officers were called into court. The government first responded by limiting the time frame for new complaints to be brought to sixty days. When this strategy was unsuccessful, the government passed a law in effect granting amnesty to many those who had committed human rights abuses during the 1970s.

The law extinguished penal liability for persons below the rank of colonel, and others who were not chiefs of security forces, by creating an irrefutable presumption

[87] ICC Statute, Article 53(1)(c) and (2)(c).

that lower officers were merely following higher orders and thus were not liable for their actions!, Soon after, the Supreme Court of Argentina upheld the constitutionality of the law.

In Chile In 1978, General Pinochet issued an amnesty decree to "all persons who committed criminal offenses during the period of the State of Siege, between 11 September 1993 and 10 March *1978"* [88]As enacted, the law created a blanket amnesty which protected persons, whether convicted or not, from prosecution for non excluded criminal acts. Some common crimes were accepted from the amnesty, including infanticide, armed robbery, rape, incest, fraud, embezzlement, dishonesty and drunk driving.[89] However, murder, kidnapping, and assault were not covered. [90]

The Chilean amnesty law has been challenged at least twice.[91] The Supreme Court of Chile held in both cases that amnesty was constitutional and consistent with international law.[92] In doing so, it overruled lower court opinions which had struck down the amnesty. However, certain lower courts continue to open investigations into cases of forced disappearance under the "Aylwin doctrine" which holds that courts may investigate cases in order to determine whether, under their facts, the amnesty law is applicable.[93] Chilean courts have convicted military and secret police personnel of murder and other crimes in cases not covered by the amnesty, most notably the former Head of the Secret Police, General Manuel Contreras, and

[88] *Op cit (917-918).*
[89] *Ibid (906,918).*
[90] Ibid (170).
[91] *Romo Mena case of May - August 1990.*
[92] *Romo Mena case of May - August 1990 at 64.*
[93] Jorge Mera, *Chile: Truth and Justice Under the Democratic Government,* in Impunity

his assistant, Brigadier Pedro Espinoza, for the murder of Orlando Letelier and Ronni Moffit.[94]

3.3.1.1 EI Salvador

In 1993 the Constitutional Court of EI Salvador found the amnesty to be consistent with the Salvadoran Constitution.[95] Since then, courts have applied the amnesty in several cases. For example, in the case of Santos Guevara Portillo, FMLN members shot down a US military helicopter that was on an unauthorized flight. One American soldier died in the plane crash and two others were killed after the crash when the FMLN members allegedly shot them. [96]

3.3.1.2 Peru

In 1995, three years after the Sendero's main leaders were captured, Peru passed a sweeping amnesty law.[97] Unlike most other amnesties, this law was not passed in order to promote national reconciliation after the fall of authoritarian rule, or a negotiated end to a civil war. Rather, it granted amnesty only to police, military personnel, and civilians condemned for acts linked with the fight against terrorism for the fifteen year period between 1980 and 1995.[98] The amnesty is limited to counterterrorists, Sendero members or those found to be associated with the Sendero or other armed groups who may be found criminally and civilly liable for any of their actions. Furthermore, there is neither truth commission nor other means of

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[94] and Human Rights in International Law and Practice 171(Naomi Roht- Ariaza ed., *Contreras Sepulveda case* Chilean Supreme Court (May- August 1995) at 70.

[95] *EI Salvador: Supreme Court oj Justice Decision on the Amnesty Law, Proceedings No. 10-93 (May 20*, 1993), 3 Transitional Justice 549, 555 (1995).

[96] See *Guevara Portillo Case.*

[97] Law No. 26479, IS June 1995, as discussed in *Salazar Monroe Case*

[98] Op cit (237 at article 1).

reparation for victims of human rights abuses.

3.3.1.3 South Africa

South Africa presents an interesting and unique experience in states practice in granting amnesty to perpetrators of international crimes. The Parliament enacted the Truth and Reconciliation Act of 1995 (TRA) in which Section 20 (7) of the TRA protects certain persons who have committed political human rights abuses from civil and criminal liability. [99]

South Africa's Promotion of National Unity and Reconciliation Act (1995) provide that one of the functions of the Truth and Reconciliation Commission is to:

> *"facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty, in the Gazette.*[100]

The South Africa's model of amnesty differs from previous cases; persons do not receive amnesty, unless they present themselves to the Truth and Reconciliation Commission (TRC} and make a "full disclosure of all the relevant facts relating to

[99] Promotion of National Unity and Reconciliation Act, Act No.34 of 1995, Section 20(7), in GG 16574 of 26 July 1995 (colloquially known as the Truth and Reconciliation Act) [hereinafter TRA).
[100] South Africa, Promotion of National Unity and Reconciliation Act, 1995, Article 4(c).

acts associated with a political objective". [101]The Commission's duties also include allowing the victims an opportunity to relate their own accounts of the violations, and recommending reparations. [102]

3.3.1.4 Sierra Leone

After a prolonged period of civil war which casted lives of innocent women and children and left majority wounded in thousands in Sierra Leone, in July 1999, the Revolutionary United Front (RUF) and the Government of Sierra Leone signed a Peace Agreement in Lome, Togo (as commonly known as "Lome Agreement"). The amnesty granted unconditional and free pardon to all participants in the conflict. However, the experience of Sierra Leone with regard to its two amnesties contained in the 1996 Abidjan Agreement and in the 1999 Lome Peace Agreement also indicates that the granting of amnesties does not necessarily lead to lasting peace.

3.3.1.5 Burundi

The 1993 Arusha Peace and Reconciliation Agreement for Burundi, allowed the transitional National Assembly to pass a law or laws, on the one hand, to provide a framework for the granting of amnesty for political crimes consistent with international law,[103] while on the other hand it emphasised values of solidarity, forgiveness, mutual tolerance, respect for others and for oneself *(Obup/asoni)* and *Ubuntu* (humanism and character). By Article 22 (2) (c) of Protocol II to the 2000 Arusha Peace and reconciliation Agreement for Burundi, which forms an integral part of the Agreement, the National Assembly of Burundi agreed "pending the

[101] Op cit (225, Section 3(1) (b).
[102] ibid (226, Section 3(1) (c).
[103] Article 8(1) (b) of the Arusha Peace Accord of 1993.

installation of a transnational Government [to] adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes prior to the signature of the Agreement".

3.3.1.6 Angola

Angola is a recent example of an amnesty as part of the disarmament, demobilisation of armed opposition groups. In November 1994, UNITA and the MPLA government of Angola signed the Lusaka Cease-fire Agreement, which promised to grant amnesty for crimes committed during the armed conflict.[104] Subsequently, on 4 April 2002, UNITA and the MPLA forces signed a Memorandum of Understanding (MoU) for the cessation of hostilities and the resolution of the outstanding military issues under the Lusaka Protocol. [105]

3.3.1.7 The Democratic Republic of Congo

In the DRC the amnesty process was to be administered by an ad hoc Commission headed by the Minister of Justice established to ensure the application of the Presidential Decree on Amnesty.[106]

Furthermore, amnesty was also granted as part of the demilitarisation, disarmament and reintegration process in the DRC in 2001.[107] Article 8 of the Cease- fire Agreement in the DRC provided that:

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[104] See Lusaka Protocol, Lusaka, Zambia of 15th Novembedr 1994.
[105] Ibid.
[106] *Second Report of the Secretory - General on the United Nations Organisation Mission in the Democratic Republic of the Congo,* UN Doc. 5/2000/330, 18 April 2000, para. 57.
[107] Agreement for a Cease-fire in the Democratic Republic of the Congo - Joint Military Commission, Annex III of the *Report of the Security Council Mission* to *the Great Lakes Region*, 15-26 May 2001, UN Doc. S/200ljS2l/Add. 1, 30 May 2001.

> " ... [the granting) of amnesty to the rank and file of Armed Groups who are not suspected "genocidaires" will be a much needed incentive to surrender. Amnesty laws should be adhered to by the amnesty granting countries. Monitoring Teams will be required to check on abuse."

3.4 Theories and Position on Granting Amnesty versus Prosecution of International Crimes Apart from recognising the existence of amnesty, 'Realist School' turns its attention to preventing further violations, and their rivals 'Liberalist School' emphasizes the need to provide accountability for existing victims of violations. In other words, this has sometimes been characterised as the tension between peace and justice. Basically, one can argue that the two broad schools of thoughts account for the achievement and maintenance of peace. This is due to the fact that, while "Realist approach" views a policy of non-prosecution as often being the only way to induce warring parties to come to the negotiating table, (for granting of amnesties) on the contrary, the 'Liberalist approach' claims that a lasting peace must be predicated up on a sense of justice (that is prosecution).

The main argument in favour of granting amnesties is that they represent a useful tool to end civil wars or military stand-offs and, therefore, prevent further bloodshed. This views amnesties as a political necessity in reaching peace agreement. It was until few years ago, such justification was used by United Nations (UN) in pressing Government to enact amnesty laws. For example, in Haiti the UN and United States of America (USA) pressured President Aristide to grant a full

amnesty, as a part of the Governors Island Agreement,[108] to the members of Generals Cedras and Brigadier General Biamby's military regime which was responsible for killing and torturing over 3000 civilian political opponents from1990 to 1994.[109] The UN Security Council gave its full support to the Agreement which it described as 'the only valid framework for resolving the crisis in Haiti'[110]. Similar arguments about the political necessity of amnesty laws have been made in relation to the political transition in Argentina, Uruguay, Chile and EI Salvador.

On the other hand, supporters of Liberalist approach provide that criminal indictments may serve to shorten the political future of dangerous political players and remove them from existing power structures. In this respect, the good recourse of case law is the exile of Charles Taylor to Nigeria and eventually transferred to The Hague to face charges before the SCSL. It is hoped that a similar result will occur in relation to the indictment of the ICC against Joseph Kony, a leader of the Lord's Resistance Army (LRA), and three of his top Commanders.

Basically, 'Liberalist' approach bases on the view that there can be no peace without justice, and there can be no justice without accountability.[111] The argument is that a new democratic regime or a fragile state in the aftermath of an armed conflict built

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[108] "The Situation of Democracy and Human Rights in Haiti", Report of the Secretary-General, UN GAOR, 4ih Sess., Annex 1, Agenda Item 22, at 4, UN Doc. *A/47/975,* 5/26063 (1993) (reproducing the Governors Island Agreement).

[109] "The Situation of Democracy and Human Rights in Haiti", Report of the Secretary-General, UN GAOR, 4ih Sess., Annex 1, Agenda Item 22, at 4, UN Doc. *A/47/975,* 5/26063 (1993) (reproducing the Governors Island Agreement).

[110] Statement of the President of the Security Council, UN SCOR, 48th Sess., 3298th mtg., at 26, UN Doc. *51* INFI 49 (1993).

[111] Christopher Joyner, Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability", 26 (4) *Denver Journal of International Law and Policy* 609 (1998).

on foundations of impunity and a forgotten record of human right atrocities will not be tenable and will inevitably disintegrate or at least hamper the collective psychological rebuilding process of the society[112].

However, experience shows that, where truth commission has been set up in transitional societies, amnesties may be the only incentive to induce those responsible for crimes to expose or acknowledge facts about the past, and thereby provide some form of redress to victims. The best example of this is in South Africa, where a quasi-judicial Amnesty Commission was established under the Promotion of National Unity and Reconciliation Act to consider applications for Amnesty.[113] In addition, criminal trials generally focus on one individual and sometimes just one act at a time, whereas a truth commission seeks to document a whole picture of abuse. Similarly, systematic documentation of violations may shed more light on the causes of the conflict or the practices of the previous regime and can, therefore, address institutional as well as individual accountability. [114]

3.4.1 International versus National Laws

The 'Princeton Principles' declare that universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law, provided that the person is present before such judicial body.[115] Individuals have certain legal

[112] J. Van Dyke, "The Fundamental Human Right To Prosecution And Compensation", 29 (2) *Denver Journal Of International Law And Policy* 77 (1999).
[113] See Sections 10 (1), 19 (3)(B)(Iii) Of Act 34 Of 1995.
[114] Priscilla Hayner, *Unspeakable Truth: Confronting State Terror And Atrocity* (London: Routledge, 2001), At 100-101.
[115] Princeton Principle 1(2), Http://Www1.Umn.Edu!Humanrts!Instree!Princeton.Html.

obligations that transcend obligations to the State. When an individual violates these international legal obligations, he or she is subject to prosecution by a domestic or international court that exercises internationally accepted norms of due process. Thus, it is arguably that international law has a "vertical relationship" to domestic law.[116]

The ad hoc International Criminal Tribunal for the Former Yugoslavia,[117] and that of Rwanda,[118] established in 1993 and 1994 respectively, by the UN Security Council, pursuant to its powers under Chapter VII of the Charter of the United Nations, is also silent on amnesties. The clear implication is that no national amnesty would constitute a bar to proceedings since this would defeat the object and purpose of the Tribunals.

Interestingly, the only Court of the former Yugoslavia to have adopted an amnesty law, the Former Yugoslav Republic of Macedonia, in relation to the internal armed conflict in 2001 between government forces and the National Liberation Army (NLA) contained an exception for crimes falling within the jurisdiction of the ICTV.[119] This supports the contention that the ICTR would not countenance an amnesty law as a barrier to its exercise of jurisdiction. The Rome Statute of the ICC,

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[116] *Prosecutor v Kallon* & *Kambara,* Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL- 2004-15-AR72(E), SCSL-2004-16-AR72 para.7(quoted in Leila Sadat, Exile, Amnesty and International Law, 81 Notre Dame Law Review 955, 1018 (2006).

[117] SC Res. 808 (1993), annexed to Report of the Secretary - General Pursuant to Paragraph 2 of UN SC Res. 808 (1993), UN Doc. 5/2-5704 and Add. 1 (1993).

[118] SC Res. 955 (1994), Annex, UN Doc. S/RESf-j55(1994).

[119] Amnesty law of 8 March 2002, passed for the 'promotion of peace and overcoming the crisis [of 2001],' cited in *Boskoviski and Tarculovski*, ICTY, Trial Chamber, Case No. IT -04- 82-T, Judgment, 10 July 2008, para. 238.

which entered into force in July 2, 2002, is similarly silent on the provision of amnesties.

The UN Charter on Human Rights, which drafted the ICCPR, extensively debated the nature of a State Party's duty under Article 2(3) to provide an 'effective remedy' for violations of the Covenant, including considering the possibility of explicitly requiring State Parties to prosecute and punish violators.[120] In its General comment 20 concerning Article 7 (the right to be free from torture), the Committee stated that:

> *"Amnesty is generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the-future, States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.*[121]

In the same stand point, the United Nations has often taken the position that domestic amnesties for perpetrators of serious crimes under international law are not legitimate under international law. In this regard, the UN has criticized amnesties on several occasions in the last decade. For example, in 2000 during the creation of the Special Court of Sierra Leone, the then UN Secretary- General Kofi Annan reported:

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[120] Yasmin Q. Naqvi, Impediments to Exercising Jurisdiction over International Crimes (2009), p12S.
[121] General Comment 20 concerning Art. 7, replaces General Comment 7 concerning prohibition of torture and treatment or punishment, 10 April 1992.

> *"While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the UN has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious of international humanitarian law".*[122]

Similarly, in August 2004 the UN Secretary- General's report to the Security Council on the Rule of Law and Transitional Justice, Kofi Annan argued that Security Council resolutions and mandates should "reject any endorsement of amnesty for genocide, war crimes or crimes against humanity, including those relating to ethnic, gender and sexually based international crimes, [and] ensure that no such amnesty previously granted is a bar to prosecution before any United Nations - created or assisted court". [123]

3.4.1.1 The Controversy Between the Two Mechanisms to Justice

In the wake of contemporary conflicts, two seemingly contradictory but complementary trends have emerged. One trend is a general acknowledgement that the current momentum towards a comprehensive international criminal justice system is in itself inadequate to deal with complex political emergencies. The other is that non-punitive mechanisms, such as truth commissions are necessary to bring

[122] Report of the Secretary - General on the establishment of a Special Court for Sierra Leone, 5/20001315 (October 4, 2000), para.22.

[123] The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary - General, S.c. res. 616, UN SCOR, ss" s., at 21, UN Doc. 5/2004'616 (2004).

about lasting peace and reconciliation among the local population. Furthermore, international criminal tribunals generally fail to address reparations for the actual harm suffered by victims of war, or to engage in a pedagogical exercise capable of reconstructing national identity as a lesson for future generations.

To educate, to make formally public institutional memory, to address the collective guilty of various parts of the population, and to set the historical record straight about what really happened in the past, all came within the purview of such non-punitive measures as a truth and reconciliation exercise.[124] However, both international criminal tribunals and Truth Commissions have distinct, but complementary, roles and functions.[125]

3.5 Conclusion

It is self evident that, in the wake of contemporary conflicts two seemingly contradictory but complementary trends have emerged. One trend is a general acknowledgement that the current momentum towards a comprehensive International criminal justice system is, in itself, inadequate to deal with complex political emergencies. Non-punitive mechanisms such as truth commissions are necessary to bring about lasting peace and reconciliation among the local population. The reason for this is, as Heyner correctly puts it "partly due to the limited reach of the courts, and partly out of recognition that even successful

[124] Karl Jaspers, *The Question of Germ on Guilt* (1948) 62.
[125] Claude Jorda, "The International Criminal Tribunal for the Former Yugoslavia and the Truth and Reconciliation Commission in Bosnia and Herzegovina" ICTY Press Release JL/P.I.S/592-e, The Hague, 22 May 2001.

prosecutions do not resolve the conflict and pain associated with past abuses.[126]

In this sense, national reconciliation is needed to complement the weaknesses of the international criminal justice system. For example, the role of the current *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda in bringing about justice is limited. Generally, these tribunals are unable to try all the perpetrators of violations of international humanitarian law, but usually reach those who bear the greatest responsibility for such responsibilities, the situation which is similar to the SCSL.

With regard to internal armed conflicts, the situation is even more conflicting due to the fact that, amnesties are not only permitted, but are encouraged by Article 6(5) of Additional Protocol II,[127] which provides that at the end of the hostilities, 'the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict'. Therefore, several national courts have relied on this provision to support their positions that general amnesties are valid under international law.[128] On the view of the international community and the international criminal law respectively, this leeway has intensified the conflict between international and national perspectives on amnesty. In the next chapter we evaluate arguments on the conflict between amnesty and prosecution of international crimes, with a view to stating the position on which mechanisms should be used and why.

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[126] Priscilla Heyner, Unspeakable Truths: Confronting State Terror (2001) 14.
[127] Op cit.
[128] *AZAPO* case, para. 30.

CHAPTER FOUR

4.0 THE CONFLICT BETWEEN AMNESTY AND PROSECUTION

4.1 Introduction

This chapter explores the conflicting positions between prosecution and amnesty by looking at international and national perspectives. The study presents case studies from African and Latin American States where crimes were committed and such States opted for amnesty. It considers the arguments both in support of prosecution of international crimes and arguments in favour of amnesty. After looking at both positions, the chapter offers the position that this study takes.

Principally, the study argues in favour of prosecution of international crimes based on customary international law obligation imposed on States to prosecute and punish perpetrators of international crimes. Arguments are also presented that *jus cogens* norms create an *erga omnes* obligations for States to apply universal jurisdiction to prosecute international crimes. Amnesties may sometimes prevent national courts from exercising jurisdiction over perpetrators of international crimes. However, foreign national courts may apply universal jurisdiction and disregard amnesty granted by other courts. This means, even if one State grants amnesty to certain individuals, other states may still be entitled to prosecute the perpetrators under universal jurisdiction.

More on *jus cogens,* the study argues that these are higher norms that obligate States to punish persons responsible for international crimes and such norms are higher than the lower standard adopted by states to grant amnesty to perpetrators of international crimes. The study challenges amnesty granted by states, with

particular reference to South Africa which granted amnesty to perpetrators of apartheid. It argues that by granting amnesty to such individuals, South Africa acted contrary to its national obligations under the Constitution of South Africa and also international obligations imposed on all states to prosecute and punish perpetrators of international crimes. It concludes that whereas national authorities have capacity to grant amnesty for crimes (including international crimes) as was the case for South Africa, such amnesties cannot be accepted by international courts. This conclusion is based on the established jurisprudence of international courts, especially the Special Court for Sierra Leone which disregarded amnesty granted to perpetrators of international crimes.

4.2 Legal Basis for Amnesty

The centre-piece in the discussion on the legality of amnesty is often rooted in international humanitarian law treaties while those who contend for prosecution of perpetrators of international crimes tend to find basis under international criminal law treaties and customary international law. The issue which inevitably arises here is whether international criminal law can sometimes surpass international humanitarian law in certain circumstances despite the fact that international criminal law is primarily intended to reinforce and complement international humanitarian law.

Two conflicting or competing perspectives have existed for a long time now since 1977 regarding amnesty. Different scholars have pondered whether amnesty is accepted under international law or whether it can be limited under certain

circumstances,[129] perhaps permitted by international law.

Generally, one should note that amnesty has been a matter of treaty law, national laws and state practice for a long period. Before discussing amnesty as reflected in modern treaties and agreements it is important to briefly talk about amnesty as contained in ancient treaties. Amnesty was recognized in the Westphalia Peace Treaty on 24 October 1648 after the war which engulfed the whole of the Roman Empire. The treaty provided for amnesty in the following terms: "There shall be on the one side and the other a perpetual oblivion, amnesty, or pardon of all that has been committed since the beginning of these troubles [...] in words, writings, and outrageous actions, in violence, hostilities, damages and expenses." [130]

The above provision recognised a perpetual amnesty in respect of all acts committed during the war. Since then, amnesty became one of the key aspects in peace negotiations. Treaties that followed included amnesty provisions.

During the 17th century France signed peace treaties with other Powers in Europe, and in most of these treaties amnesty provisions were explicitly provided. For example, on 7 November 1659, France and Spain signed a Treaty of Pyrenees under which Article IV thereof provided that 'whatsoever hath been done, or hath happened upon occasion of the present Wars, or during the same, shall be put into

[129] Yasmin Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' in Vol. 85 *International Review of the Red Cross* 583 - 626; John Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001 - 1015. See further, Lord Lloyd's opinion in R v Bow Street Metropolitan Stipendiary Magistrate's Court, *Ex Parte* Pinochet, [1998)ALL ER 897 (HL) at 929h-i.

[130] Article 2, *Westphalia Peace Treaty*, 1648, http: <www.yale.edu/lawweb/avalon/westphal.htm> (accessed on 10 July 2012).

perpetual oblivion'.[131] The Treaty of Ryswick of 20 September 1697 between France and the Great Britain contained an amnesty in its article 2 in the following terms:

[A]II offences, Injuries, Damages, which the said King of Great Britain and his Subjects, or the said most Christian King and his Subjects have suffered from each other during this War, shall be forgotten.

Equally, the Treaty of Hubertsburg of 1756 signed in Austria stated in Article II that:

> "Both sides shall grant a general amnesty and totally wipe from their memory all hostilities, losses, damage, and injuries whatever their nature committed or sustained on either side during the recent disturbances ... No subject on either side shall ever be troubled but shall enjoy this amnesty and all its effects to the full .... " [132]

Article 1 of the Treaty of Paris of 10 February 1763 that put to an end the Anglo-French conflict over North America also had an amnesty provision which provided that [t]here shall be a general oblivion of everything that may have been done or committed before, or since the commencement of the war, which is just ended,[133] The same situation was continued in Article 16 of the Treaty of Peace and Amity of 30 May 1814 between France and Great Britain which stopped the Napoleonic

[131] Faustin Ntoubandi, Amnesty for Crimes against Humanity under International Law, 17 (quoting A Alexlrod and C.L Phillips, Encyclopaeciia of Historical treaties and Alliances, Vol. I (2001) 50.
[132] Ibid (quoted in Ntoubandi in 17).
[133]Ibid (18). The text of this treaty can be found at www.historicaldocuments.com/TreatyofParis1673.htm.(accessed on 10 July 2012).

Wars. The provision provided that:[134]

> *"The High Contracting Parties, desirous to bury in entire oblivion the dissensions which have agitated Europe, declare and promise that no individual, of whatever rank or condition he may be, in the Countries restored and ceded by the present Treaty, shall be prosecuted, disturbed ... under any pretext whatsoever ... "*

After World War I, the Versailles Treaty of 1919 which ended the World War I contained Article 227 which expressly rejected amnesty and called for prosecution of the German Kaiser. Despite this, amnesty was recognized in other treaties signed after World War I. This is evidenced by the Treaty of Brest-Litovisk signed on 3 March 1918 between Germany, Austria-Hungary, Bulgaria, Turkey and the Soviet Union recognized amnesty in its Articles 23 up to 27.[135]

4.2.1 Amnesty in Treaties and Agreements

Although the post-World War II developments led to the deterioration of the recognition of amnesty after armed conflicts, there are certainly some examples to indicate that international law itself has codified amnesty. The drastic changes were recorded in the context of international humanitarian law in 1977 when the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977[136] was adopted. This Protocol encourages parties to armed conflicts to grant the broadest possible amnesty to anyone who participates in the conflicts.

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[134] Ibid (18).
[135] Ibid(19).
[136] 1125 UNTS 609.

It is therefore necessary to conclude that truly, amnesty is a matter of treaty or agreements as demonstrated above. Regarding amnesty granted to the rebels in Sierra Leone, as observed above, such rebels were to benefit absolutely free from judicial actions in Sierra Leone-even for war crimes and crimes against humanity-crimes that were largely committed in Sierra Leone during the non-international armed conflict. It must be understood, however, that such amnesty could only exist before national courts of Sierra Leone as Article IX expressly provides. Whether that amnesty would bar international courts or even foreign national courts from prosecuting perpetrators of war crimes and crimes against humanity committed in Sierra Leone is another question which must be answered for the matter touches on the duty imposed on states to prosecute and punish international crimes, individually or collectively. This will be done in the next part of this chapter. Suffice at this stage to highlight that in most cases, amnesty is a matter of law and treaty.

Another example of amnesty provision is found in Article 22 (2) c) of Protocol II to the Arusha Peace and Reconciliation Agreement for Burundi,[137] an integral part of the agreement. Under this provision the National Assembly of Burundi agreed, 'pending the installation of a transnational Government [to] adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes prior to the signature of the Agreement.' Similarly, in 2002 following the armed conflicts in the Democratic Republic of Congo, the Global and Inclusive Agreement on Transition in the DRC provided for amnesty to elements and entities that had participated in the armed conflict in the DRC. It

[137] Protocol II (on Democracy and Good Governance) to the Arusha Peace and Reconciliation Agreement for Burundi, 2000.

provided that:

> "To achieve national reconciliation, amnesty shall be granted for acts of war, political offences and opinion offences, *with* the *exception* of war *crimes, crimes* of *genocide* and crimes against humanity. To *this* effect, the transitional national assembly shall adopt an amnesty law *in* accordance with universal principles and international law. On a provisional basis, and until the amnesty law *is* adopted and promulgated, amnesty shall be promulgated by presidential decree-law. The principle of amnesty shall be established in the *constitution* of the transition.[138]

The armed conflict that rocked Ivory Coast in 2007 led to the signing of the Ouagadougou Political Agreement between the Presidency of Cote d'ivoire and the Forces Nouvelles of Cote d'ivoire which stipulated for amnesty as follows:

> *"In order to facilitate pardon and national reconciliation and to restore social cohesion and solidarity among the Ivorians, the two Parties of the Direct Dialogue agree to extend the scope of the amnesty law adopted in 2003."*
>
> *"To this effect, they have decided to adopt, by way of an ordinance, a new amnesty law covering the crimes and offences relating to attacks on the security of the State linked to the disturbances which have shaken Cote d'ivoire and were committed between 17 September 2000 and the date of entry into force of the present agreement, with the exception of economic crimes, war crimes and crimes against*

[138] Article 8, Global and Inclusive Agreement on Transition in the Democratic of Congo, signed at Sun City, South Africa, 2002.

humanity.[139]

From the preceding examples, it can be concluded that although parties to armed conflicts signed various agreements which granted amnesty to persons who participated in the conflicts, two conclusions are drawn: (i) some agreements provided for total amnesty and; (2) some agreements only recognized limited amnesty, excluding amnesty for war crimes, genocide and crimes against humanity as demonstrated by agreements signed in Ivory Coast and the DRC quoted above. This already signals that amnesty cannot be accepted in certain serious international crimes.

Even if international criminal law seems to impose obligations on states to prosecute persons responsible for international crimes, it can still be argued that this branch of law does not outlaw amnesty in its entirety. There are certain circumstances whereby amnesty could be accepted, albeit indirectly or explicitly in certain treaties. For example, the Rome Statute of the International Criminal Court can be said to have impliedly accepted the existence of amnesty.

4.2.2 Amnesty in National Laws, Judicial Decisions and State Practice

Apart from treaties and agreements, amnesty is also a matter which is largely reflected in national laws and state practice.[140] Particularly in states arising from non-international armed conflicts. The purpose of granting amnesty is to seek reconciliation, peace and unity. Here, this part examines some notable examples on

[139] Article 6.3, Ouagadougou Political Agreement between the Presidency of Cote d'ivoire and the Forces Nouvelles of Cote d'Ivolre, 2007.

[140] International Committee of the Red Cross, 'Practice Relating to Rule 159: Amnesty' available at <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159> (accessed on 20 October, 2012).

how amnesty has been accepted in a number of states. Various Military Manuals have been codified in certain countries and have replicated the contents of Article 6(5) of Additional Protocol II on the recognition of amnesty.

In Canada, the Manual on the Law of Armed Conflict at the Operational and Tactical Levels provides clearly that '[a]t the end of hostilities, and in order to facilitate a return to peaceful conditions, the authorities in power are to endeavour to grant the broadest possible amnesty to those who have participated in the conflict, or been deprived of their liberty for reasons related thereto, whether they are interned or detained'.[141] This is relatively similar position found in the United Kingdom of Great Britain and Northern Ireland's Manual on the Law of Armed Conflict, 2004,[142] and those in New Zealand[143] and the Netherlands.[144]

Amnesty has widely been used in laws of most states in the world, particularly in Latin America, Europe, Asia and Africa. The International Committee of the Red Cross (ICRC) has documented certain notable examples[145] here that would help demonstrate this assertion, and accordingly, this contribution acknowledges the information found on the website of the ICRC. In 1973, Argentina enacted an amnesty law which provided that, 'amnesty shall be granted for acts committed before 25 May 1973 and relating to political, social, trade union or student activities,

[141] Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001, para 1717.
[142] United Kingdom, Manual on the Law of Armed Conflict, Ministry of Defence, 1 July 2004, para 15.42.
[143] New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Wellington, November 1992, para 1816.
[144] Netherlands, Military Manual, 2005, para. 1072.
[145] International Committee of the Red Cross, 'Practice Relating to Rule 159: Amnesty' available at <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159> (accessed on 20 October 2012).

and for acts committed by civilians prosecuted by military courts or military commanders. Under this law, all sentences for such acts should be discontinued'.[146] This law was followed by the Self- Amnesty Law of 1983 relating to armed conflicts and all actions done to stop subversive or terrorist activities.[147] The 1983 law was found to be unconstitutional and declared void by the Law Repealing the Self-Amnesty Law in the same year.[148] In Chile, the then military government under General Augusto Pinochet enacted the Decree-Law on General Amnesty. Under this law, amnesty was to apply in the following category of persons:

> *"[A] II persons who have been the authors, accomplices, or accessories of unlawful deeds during the period in which the state of siege was in force, between 11 September 1973 and 10 March 1978, unless they are currently being tried or have been sentenced and to those persons who as of the date that this decree-law took effect have been sentenced by military tribunals since 11 September 1973."*[149]

In Colombia, the Amnesty Decree enacted in 1991 provided that amnesty or pardon could be granted to members of the guerilla groups who demonstrated the need to reintegrate into civilian life.[150] This certainly imposed conditions for granting for people to benefit from amnesty. In EI Salvador, the General Amnesty Law for Consolidated Peace which was enacted in 1993 provided for full, absolute and unconditional amnesty to all persons who had participated in the commission of

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[146] Argentina, Amnesty Law, 1973, Articles 1 & 5.
[147] Argentina, Self-Amnesty Law, 1983, Articles 1, 2 & 6.
[148] Argentina, Law Repealing the Self-Amnesty Law, 1983, Articles 1 &2.
[149] Chile, Decree-Law on General Amnesty, 1978, Article 1.
[150] General Amnesty Law for Consolidated Peace, 1993, Articles 1 & 2.

political crimes and related crimes committed before January 1992.[151] This law defined political crimes to include crimes against the public peace. Article 4 of this law provided that amnesty extinguishes all civil liability. Similar laws were enacted in Guatemala and Peru.

In 1996 Guatemala enacted the National Reconciliation Law which accepted amnesty for political crimes. It warranted amnesty in the following manner: 'total release from penal responsibility for political crimes committed during the armed internal confrontation' and 'the total release from penal responsibility for common crimes. connected to' such political crimes.[152] However, Article 8 of this law rejected amnesty for genocide, torture, forced disappearance, and to all crimes which statutes of limitations do not apply, and according to internal and international treaties ratified by Guatemala, do not allow exception from penal responsibility.

In South Africa, perpetrators of the crime of apartheid benefited from amnesty as a result of the enactment of the Promotion of National Unity and Reconciliation Act, of 1995. The Act, which among other things established the Truth and Reconciliation Commission, provides that one of the functions of the TRC is to:

> *"facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by*

[151] Colombia, Amnesty Decree, 1991, Article 1.
[152] Guatemala, National Reconciliation Law, 1996, Articles 1 & 2.

publishing decisions granting amnesty, in the Gazette."[153]

To achieve that purpose, an Amnesty Committee[154] was established composed of judges and senior lawyers. It considered applications for amnesty granted amnesty where it was satisfied that applicants had committed acts constituting gross violations of human rights and made full disclosure of all relevant facts about acts committed in relation to political goals in the course of conflicts of the past.[155] To consider an act as constituting a political crime, the standard to be used is the same as the one under extradition law. Persons who failed to be granted amnesty or those who failed to apply for amnesty were to be prosecuted. However, section 20 (7) provides that:

(a) "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organization or the state shall be liable, and no person shall be vicariously liable for any such act, omission or offence."

(b) "Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first mentioned person."

The cumulative effect of these provisions is that once a person has been granted

[153] Promotion of National Unity and Reconciliation Act, Act 34 of 1995, Section 4(c).
[154] Ibid (Section 3(3) (b).
[155] Dugard, (1011).

amnesty cannot be prosecuted, nor can he be held civilly liable for any act, omission or offence subject of amnesty. Of those prosecuted, only a handful of them involved high profile state officials, the rest being ordinary citizens.[156] A case was instituted challenging section 20 (7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 in that it affected the right of victims of apartheid crimes to seek court remedy as provided for under the constitution and international law. The Constitutional Court, after examining article 6(5) of Additional Protocol II and the Preamble to the Constitution, read together with the purposes of the Promotion of National Unity and Reconciliation Act, held that section 20(7) was constitutional and did not violate international law because even article 6(5) of Additional Protocol II allows states to grant amnesty at the end of hostilities.[157]

The Ugandan court also took the same decision on the constitutionality of amnesty granted to rebels belonging to the Lord's Resistance Army (LRA). This, the court said in a landmark case of *Thomas Kwoyelo alias Latoni vs Uganda.*[158] The court had been called to interpret the Amnesty Act, 2000[159] in light of the Constitution of Uganda, 1995. Briefly, section 3 of the Amnesty Act provides as follows:

> (1) An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the

[156] *S v Johannes Velde van der Merwe, Adriaan Johannes Vlok, Christoffel Lodewikus Smith, Gert Jacobus Louis Hosea and Hermanus Johannes van Staden, Plea and Sentencing Agreement in Terms of Section 105A of Act* 51 *of* 1977 *(as amended),* 17 August 2007 (South Africa).

[157] *Azania People's Organisation vs the President of the Republic of South Africa,* et *01,* Case No CCT17/36, paras 1 - 66 (AZAPO Case).

[158] *Thomas Kwoyelo alias Latoni vs Uganda, Constitutional Petition No. 036/11,* arising out of HCT,{j0/1CD/Case No. 02/10, Twinomujuni, Byamugisha, Nshimye, Arach-Amoko and Kasule, JJA (Constitutional Court of Uganda), 22 September 2011.

[159] Cap 294, Laws of Uganda.

Republic of Uganda by-

(a) Actual participation in combat;

(b) Collaborating with the perpetrators of the war or armed rebellion;

(c) Committing any other crime in the furtherance of the war or armed rebellion;

or

(d) Assisting or aiding the conduct or prosecution of the war or armed rebellion.

(2) A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the cause of the war or armed rebellion.

Certain conditions are stipulated under the Amnesty Act before one can benefit from amnesty provision. Such conditions are found in section 3 which states that a reporter shall be taken to be granted amnesty declared under section 2 if the reporter (a) reports to the nearest army or police unit, a chief, a member of the executive committee of the local government, a magistrate or religious leader within the locality, (b) renounces and abandons involvement in the war or armed rebellion, (c) surrenders at any such place or to any such authority or person any weapons in his or her possession and, (d) is issued with a certificate of amnesty. *Thomas Kwoyelo* was arrested together with his fellow rebels of LRA, and they were detained at Upper Prison, Luzira where he made a declaration renouncing a rebellion and sought amnesty. His declaration was submitted to the Amnesty Commission for

consideration under the Amnesty Act.

On 19 March 2010 the Commission forwarded *Kwoyelo's* application to the Director of Public Prosecutions (DPP) for considerations as per the Amnesty Act. The Commission stated that it considered *Kwoyelo* as one who qualified to benefit from the amnesty process. Despite the recommendation by the Amnesty Commission, the DPP preferred to charge *Kwoyelo* before the court with offences specified under the Geneva Convention IV Act. *Kwoyelo* was to be prosecuted before the War Crimes Division of the High Court of Uganda. He filed an application to the Constitutional Court challenging the decision of the DPP not to grant him a certificate of amnesty and that his prosecution was based on discrimination, contrary to the constitution. The Constitutional Court ruled that *Kwoyelo* was entitled to benefit from amnesty from prosecution.[160]

From the above, it is appropriate to conclude that amnesty is still recognised in international law based on treaties and agreements, and domestic laws, despite all treaties outlawing it. Dugard observed that,

> *"The present state of international 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*

[160] *Thomos Kwoyelo alias Latoni vs Uganda, Constitutional Petition No. 036/11, arising out of HCTJf]O/lCD/Case No. 02/10,* Twinomujuni, Byamugisha, Nshimye, Arach-Arnoko and Kasule, JJA (Constitutional Court of Uganda), 22 September 2011, paras 1- 625.

> *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."* [161]

Despite such conclusion, Dugard cautions that '[ulncondltional amnesty for atrocious crimes is, however, no longer generally accepted by the international community.'[162] This makes it important to examine whether amnesty, however lawful it may be either in treaties or under national legislative frameworks, is compatible with the international law duty imposed on states to prosecute perpetrators of the most serious international crimes. To be able to answer this question, one must first establish whether there exist express obligations under treaties and customary international law.

Once this is established, it would then require one to tackle the issue whether such obligations have attained the status of high norms to the extent that if weighed against the right to grant amnesty after hostilities, it should prevail, and if so, under which circumstances and legal bases. The discussion on these identified issues follows below.

4.2.3 Is Amnesty Compatible with Modern International Law Obligations?

As discussed in Chapter 2 above, states have obligations to prosecute perpetrators of international crimes (see part 2.4 in chapter 2 above). Hence, should states fail to prosecute then they could be held liable for an internationally wrongful act entailing

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[161] Dugard, as n 1 above, 1015.
[162] Ibid.

state responsibility.[163]

Contemporary international law as found in decided cases, treaties and state practice also reflects that amnesty cannot prevail over the state obligations to prosecute and punish persons responsible for serious international crimes. This part demonstrates how international law has outlawed and rejected amnesty. This discussion here is centred on national judicial pronouncements, statutes of international courts, and the approach taken by the ICRC.. Restrictions have been imposed on amnesty in respect of war crimes, crimes against humanity and genocide.

Many states have legislated against amnesty in their domestic laws. For example, the Military Manual of the Netherlands stipulates that amnesty granted to any suspect of war crimes by his own government shall not prevent his prosecution by other states.[164] Similar position is observed in New Zealand[165] and the United Kingdom.[166] The UK Manual clearly specifies that article 6(5} of Additional Protocol II does not apply to persons responsible for crimes under international law. In Argentina, Article 184 of the Draft Code of Military Justice, 1998, provides that '[i]n no case shall amnesty or pardon be granted with respect to the offences contained in Chapter I (offences against protected persons and objects in the event of armed conflict.' Also, as already observed in the laws from ORC, Guatemala, Uruguay and Ivory Coast (discussed above), amnesty does not apply to war crimes, genocide and crimes

163 Ken Obura, Duty to Prosecute International Crimes under International Law' in Murungu, C and Biegon, J (2011) *Prosecuting International Crimes in A/rica,* Pretoria University Law Press: Pretoria, Ch.1, 1-31.
164 Netherlands, Military Manual on Armed Conflict, 2005, 1166.
165 Military Manual, 1992, para 1816.
166 Manual of the Law of Armed Conflict, 2004, para 15.42.

against humanity. Similarly, section 28(1) of the Constitution of Ethiopia, 1995 does not recognise amnesty for crimes against humanity. Article 15(6) of the Law of Iraqi Supreme Tribunal rejects amnesty. In Rwanda, Article 31 of the Law on the Prosecution of the Crime of Genocide and Crimes against Humanity, 1996 rejects amnesty: *'[t]he* court having jurisdiction over the civil action shall rule on damages even where the accused ... has benefited from an amnesty.'

In Sierra Leone, amnesty granted to the RUF/SL rebels by article IX of the Lome Agreement of 1999 was challenged by the Special Court for Sierra Leone when it interpreted Article 10 of its Statute which provides that:

> *"An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of the 1977 Additional Protocol II, and other serious violations of IHL] shall not be a bar to prosecution."*

The above provision was' put to test in the cases of *Prosecutor vs Kallon and Kamara*[167]and *Prosecutor vs Gbao*[168] whereby the' court clarified that amnesty dos not bar prosecution of persons responsible for international crimes before international courts, and that amnesty cannot bar prosecution of persons before foreign national courts exercising universal jurisdiction over serious international

[167] Case No SCSL-2004 -16AR-72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, 13 March 2004, paras 63-67, 80, 84 & 88.

[168] Case No. SCSL-2004-04-14-AR72, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, Appeals Chamber.

crimes such as war crimes, crimes against humanity and genocide. Similarly, the Extraordinary Chambers in the Courts of Cambodia cannot recognise amnesty for serious international crimes because the law establish the Chambers provides that *'[t]he* Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement[169]. Article 6 of the Statute of the Special Tribunal for Lebanon also rejects amnesty for international crimes, including terrorism.[170]

Decided cases from various countries have also outlawed amnesty for international crimes. Contrary to the decisions in South Africa and Uganda (discussed above), courts in Argentina, Chile, France, and Ethiopia have decided that amnesty cannot be granted for international crimes suspects. In Argentina, a court nullified two amnesty laws enacted in 1987 as these laws were found to violate international law duty to investigate and punish persons responsible for international crimes.[171] Similarly, in Chile, the Supreme Court of Chile ruled on the *Saavedra* case in the judgment of 19 November 1993 that amnesty could not apply, and consequently, considered the amnesty laws of 1978 invalid. In 1994, the same court ruled again regarding torture, abduction and murder as constituting grave breaches of the Geneva Conventions where amnesty cannot apply. The court held that:

> *"Such offences as constitute grave breaches of the Convention are ... unamenable to amnesty; ... [it is not] appropriate to apply amnesty as a way of extinguishing criminal liability."*

[169] The 2003 UN-Cambodia Agreement Concerning the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 11.
[170] UNSC Res 1757 (2007), Annex, Article 6.
[171] Argentina, Cavallo case, Judgment, 6 March 200l.

> *"Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law*[172].

When Mengistu Haile Mariam was tried in Ethiopia, the Special Prosecutor argued in 1995 that 'it is ... a well established custom and belief that war crimes and crimes against humanity are not subject to amnesty', [173] Apart from the judicial decisions from national courts, international and regional courts established either to monitor human rights or to prosecute international crimes have also echoed clearly that amnesty cannot be accepted for international crimes as it is incompatible with the duty to prosecute perpetrators of crimes. Particularly, the Inter-American Commission on Human Rights has concluded that an amnesty constitutes violations of international law obligations. The Commission said this in its report on the situation in EI Salvador that:

> . *"Regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law [for Consolidation of Peace] passed by EI Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a reciprocal*

[172] Chile, Appeal Court of Santiago (Third Criminal Chamber), Videla Case, Judgment, 26 September 1994.

[173] *Special Prosecutor v Mengistu et ol,* 23 May 1995, Reply Submitted in response to the Objection filed by the Defendants, Conclusion.

amnesty" without first acknowledging responsibility because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims."[174]

Later, in 1999 the same Commission decided against the General Amnesty Laws in EI Salvador. It clearly stated that:

"In approving and enforcing the General Amnesty Law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8(1) of the [1969 American Convention on Human Rights], to the detriment of the surviving victims of torture and of the relatives of ... who were prevented from obtaining redress in the civil courts; all of this in relation to Article 1(1) of the Convention ... In promulgating and enforcing the Amnesty Law, EI Salvador has violated the right to judicial protection enshrined in Article 25 of the [1969 American Convention on Human Rights], to the detriment of the surviving victims and those with legal claims on behalf of..."[175]

Similarly, the Inter-American Court of Human Rights decided in 2001 in the *Barrios Altos* case, declared the amnesty laws enacted by Peruvian government to be illegal and contrary to international law as follows:

"This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent

[174] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in EI Salvador, Doc. OEA/Ser/L/V/11.86 Doc.5 rev., 1 June 1994.
[175] Inter-American Commission on Human Rights, Case NO.10.480 (EI Salvador), Report, 27 January 1999, paras 123 & 129.

> *the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law .....''*[176]

In Africa, the African Commission on Human and Peoples' Rights has decided that amnesties for serious human rights violations are incompatible with the duty of states to prosecute and punish these violations.[177] On its part, the United Nations Human Rights Committee which is responsible to oversee implementation of civil and political rights under the International Covenant on Civil and Political Rights, was concerned by the Decree number 114 of 11 June 2006 granting general amnesty in Sudan. The Committee recommended that Sudan should ensure that no amnesty is granted to anyone believed to be responsible for serious crimes.[178] In its General Comment NO.31 stressed the need to prosecute perpetrators of international crimes and rejected amnesty. [179]

It seems now that, truly, amnesty violates international obligations imposed on states to prosecute perpetrators of international crimes. This view is shared by the ICRC which argued back in 1995 regarding article 6(5) of Additional Protocol II

[176] Inter-American Court of Human Rights, *Barrios Altos Case*, Judgment, 14 March 2001, paras 41-42, but see also paras 43 - 44. See further, Concurring Opinion of Judge concado Trindade, 14 March 2001, para 13 (in the Barrios Altos case).

[177] *Malawi African Association and Others vs Mauritania* (2000) AHRLR 149 (ACHPR 2000), paras 82 - 83.

[178] Human Rights Committee, Concluding Observations on the Third Period Report of the Sudan, UN. Doc. CCPR/C/SDN/CO!3, 29 August 2007, para 9.

[179] Human Rights Committee, General Comment No.31 on the Nature of General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, para 18.

that 'this provision could not be invoked in favour of impunity of war criminals, since it only applied to prosecution for the sole participation in hostilities[180]. In 1997 the ICRC clarified further article 6(5) of Additional Protocol II did not aim at amnesty for those violating international humanitarian law.[181] The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that torture is prohibited by a peremptory norm of international law which serves to de-Iegitimise any legislative or judicial act authorising torture[182]. This is essentially based on *jus cogens* prohibiting torture. Hence, it is prohibited by international law *jus cogens* not to adopted amnesty measures thereby violating international law.

4.2.4 Conclusion

It is now apt to conclude that amnesty cannot prevail over prosecution particularly where international crimes are involved. This conclusion is based on the established jurisprudence, national laws, treaties and statutes of international courts which expressly reject amnesty. The current trend in the world suggests that even in those states where amnesty laws were enacted, subsequent changes have occurred thereby nullifying such amnesty laws. Although a few landmark cases exists in Uganda and South Africa upholding amnesty, such are unfortunate decisions that tend to ignore the duty imposed states to prosecute perpetrators of international crimes. The decisions in the *AZAPO* case in South Africa and Kwoyelo in Uganda, indeed, detracts from the progressive move towards impunity free world for serious international crimes. It must be recalled that international treaties outlawing

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[180] Statement by the ICRC, Geneva, 19 June 1995, available at http://www.icrc.org/customary-ihl/eng/docs/v2_ruUule159 (accessed on 21 October 2012).
[181] As above.
[182] *Prosecutor v Furundzija*, Case No.IT-95-17/1-T, 10 December 1998, para 155.

international crimes have attained a *jus cogens* status thereby creating *ergo omnes* obligations to all states in the world.

The fact that some of the national courts, such as those in Ethiopia, have decided against amnesty, signals that there is no consensus at national level whether amnesty should be allowed to prevail even for international crimes.

To the contrary, in international judicial and treaty practices, it is clear that amnesty cannot prevail and does not bar criminal prosecutions of perpetrators of serious crimes under international law. It is argued here that amnesty, in fact, encourages more crimes to be committed than bringing the intended peace and reconciliation. Amnesty sets a bad precedent particularly to members of the rebel forces or armed forces of states that they might commit crimes and walk scot-free. Amnesty should be discouraged at all times, so that national and international courts can be given opportunities to exercise their jurisdictions over persons responsible for international crimes. Further, because the duty to prosecute international crimes has attained *jus cogens* status, such higher norms cannot be subservient to the lower exception as amnesty. Prosecution should be viewed as a rule and amnesty as an exception.

Amnesty does not really become beneficial to the victims of serious international crimes. It only serves a few individuals mostly in the ruling class and in the armed forces. Prosecution can prove effective because of its deterrent role and the need to bring happiness to the victims of crimes, a sort of satisfaction. This study prefers prosecution to amnesty because amnesty can be granted to perpetrators at the

expense of the victims of crimes. A particular example is Sierra Leone where rebels were granted amnesty, yet victims could not even be paid reparations. Equally, even in South Africa, victims have not been happy with the amnesty granted to the perpetrators of apartheid. So, in view of this, amnesty only seems to favour those in power but does not accommodate victims of crimes. Therefore, let prosecution reign over amnesty.

CHAPTER FIVE

5.0 FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Findings

5.2 Decided Cases Reveal that International Courts do not Recognize Amnesty

Findings show that, decisions of international and national courts support the position that the duty to prosecute and punish international crimes is part of customary international law. The dissenting judgment in the *Lockerbie* case at the ICJ, Judge Weeramantry asserted that the duty to prosecute or extradite international crimes constitutes a well-established principle of customary law.

In *Prosecutor v Gbao,* the Appeals Chamber of the Special Court for Sierra Leone stated that 'under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*[183]. The fact that some of the national courts, such as those in Ethiopia in *Special Prosecutor v Haile Mengistu Mariam* have decided against amnesty, signal that there is no consensus at national level whether amnesty should be allowed to prevail even for international crimes. To the contrary, in international judicial and treaty practices, it is clear that amnesty cannot prevail and does not bar criminal prosecutions of perpetrators of serious crimes under international law.

The current trend in the world suggests that even in those states where amnesty laws were enacted, subsequent changes have occurred thereby nullifying such amnesty laws. Although a few landmark cases exist in Uganda and South Africa upholding

[183] *Prosecutor v Gbao,* Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Appeals Chamber, SCSL -04- 15-PT-141, 25 May 2004,10.

amnesty, such are unfortunate decisions that tend to ignore the duty imposed states to prosecute perpetrators of international crimes. The decisions in *AZAPO* case in South Africa and *Kwoyelo* in Uganda, indeed, detracts from the progressive move towards impunity free world for serious international crimes. It must be recalled that international treaties outlawing international crimes have attained a *jus cogens* status thereby creating *erga omnes* obligations to all states to prosecute international crimes.

5.2.1 Challenges of Amnesty Laws in Different African National Courts

Chapter Three of this study has examined the existing laws, judicial precedents and state practice on amnesty and prosecution of international crimes whereby in Africa a good case study is presented by South Africa, Sierra Leone and Uganda. In all these states, it is observed that international crimes are punishable by law in one side, while in the other side, still presents an interesting case study on recent amnesties which have been granted to perpetrators of international crimes, hence challenged before the courts.

The fact that some of the national courts, such as those in Ethiopia, have decided against amnesty signals that there is no consensus at national levels whether amnesty should be allowed to prevail, even for international crimes. To the contrary, in respect of international judicial and treaty practices, it is clear that amnesty cannot prevail and does not bar criminal prosecutions of perpetrators of serious crimes under international law. On the other side, the experience from Latin America shows that between 1970s and 1980s amnesty laws were issued by Argentina, Uruguay, EI Salvador, and Chile were considered by the Inter-American Commission. In all the

cases the Commission found them in violation of the Inter- American Convention. [184]

5.2.1.1The African Union and the Accusations of Bias on the ICC

An observation is made that since it came into operation in July 2002, the ICC has only prosecuted individuals accused for international crimes from Africa, leaving individuals from other parts of the world free. This has led to the creation of the negative attitudes on African side. The African Union (AU) opposes the ICC prosecutions on the grounds that the ICC reflects imperialism, selective justice for targeting only Africans, and that the ICC has acted with double standards. For example, President Paul Kagame of Rwanda, a country which is not a party to the Court, has portrayed the ICC as a form of "Imperialism" that seeks to "undermine people from poor and African countries and other powerless countries in terms of economic development and politics.[185]

The attempt to prosecute AI Bashir has been particularly controversial, drawing rebuke from African governments and regional organizations. Jean Ping, the then President of the AU Commission, has accused the ICC of hypocrisy, contending that "we are not against the ICC, but there are two systems of measurement ... the ICC seems to exist solely for judging Africans".[186] A recent decision of the AU Assembly of Heads of State and Governments echoes that African states prefer

[184] Ibid (p.29).
[185] AFP, "Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008.
[186] Christophe Ayad, "Nous Sommes Faibles, Alors On Nous Juge et On Nous Punit," *liberation* (Paris), CRS translation, July 30, 2009.

withdrawal from the Rome Statute.

The AU seems to favour domestic and African centered means of resolving conflicts in Africa, including peaceful means such as amnesty and reconciliation even where international crimes have been committed in Kenya, Libya and Sudan. Furthermore, it should be well understood that customary international law imposes obligation on states to prosecute and punish international crimes. This also extends to issues of cooperation with judicial institutions established to punish international crimes such as genocide, war crimes, crimes against humanity, torture and the crime of aggression. Thus in this respect the calls for non-cooperation with the ICC in prosecution of International crimes does not only violate customary international law but also by doing so the AU has acted in violation of the provisions of the Constitutive Act of the AU which reject impunity and outlaw genocide, war crimes and crimes against humanity.[187]

5.3 Recommendations

From the preceding findings, this study presents a number of recommendations as indicated hereunder. Recommendations are directed at international, the African Union, national courts and specific African states.

Genocide Convention, Convention Against Torture and Geneva Conventions applicable in armed conflicts. The duty to prosecute perpetrators of serious international crimes should only be fully observed by allowing States to use universal jurisdiction over perpetrators of serious crimes. This obligation clearly

[187] Article 4(h) (m) & (0), of the Constitutive Act of the AU.

outweighs amnesty recognized under Article 6(5) of the Additional Protocol I to the Geneva Conventions, 1977.

5.3.4 African States Should Enact Laws to Repress Serious International Crimes

The duty to prosecute serious international crimes entails that states must adopt legislative measures to enable courts to prosecute and punish perpetrators of serious international crimes. To enable domestic courts to repress serious international crimes, states should adopt laws that proscribe international crimes and outlaw amnesty for serious international crimes. In this regard, it is recommended that the existing amnesty laws such as those in Uganda and South Africa, should be repealed and should not expressly grant blanket or conditional amnesty to members of the rebel groups operating in African states.

5.3.5 Article 6(5) of Additional Protocol II, 1977 Should be Amended

It is clear that any attempt to justify amnesty in international law finds its basis in Article 6(5) of the Additional Protocol II to the Geneva Conventions, 1977. This provision tends to recognise broad amnesty in the context of parties to armed conflicts. This in the end has an impact of going contrary to all provisions found in the Geneva Conventions (I -IV) of 1949 that require states to repress grave breaches and serious violations of international humanitarian law. Contracting parties to the Geneva Conventions and Additional Protocol II, in collaboration with the ICRC should undertake concerted efforts to reconcile the conflict between the duty to prosecute recognised under the Geneva Conventions and an amnesty provision

(Article 6(5)) in the Additional Protocol II.

5.4 Conclusions

The conclusions of this study as presented here below confirm the hypothesis that *International law jus cogens imposes obligations* to *prosecute and punish perpetrators of international crimes.* There are international law *jus cogens (a system of higher norms* to *which no derogation is permitted)* imposing obligation *erga omnes* to prosecute perpetrators of international crimes. Chapter Two of this study has shown that international law *jus cogens* imposes obligations *erga omnes* in relation to international crimes over amnesty granted by national courts to perpetrators of international crimes. Arguments are also presented that *jus cogens* crimes create an *erga omnes* obligations for states to apply universal jurisdiction to prosecute international crimes, although amnesties may sometimes prevent national courts from exercising jurisdiction over perpetrators of international crimes.

This is evident in the jurisprudence of the International Criminal Tribunal for Former Yugoslavia in *Furundzija* case[188];

> "It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio,* and then by unmindful of a State say, taking national authorizing or condoning torture or absolving its perpetrators through amnesty law".

[188] Case IT-95-17/ 1- T(10 December 1998) paras 151-157.

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