

United Nations peace-building, amnesties and alternative forms of justice: A change in practice?

by

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How to deal with the consequences of gross human rights violations has become one of the greatest challenges for the United Nations in the past decade. The creation by the Security Council of the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) and the adoption, under United Nations auspices, of the Rome Statute of the International Criminal Court have been the focus of international attention. It is less well known, however, that the United Nations has simultaneously played an active role in the promotion of various forms of national reconciliation, involving *inter alia* the granting of amnesties for the perpetrators of human rights violations. The practice of the world organization in this context has long been characterized by two features: first, a contradictory position with regard to amnesty clauses, ranging from the endorsement of rather general amnesties as a means of restoring peace to their condemnation;¹ and second, a rather strict distinction between the concepts of national reconciliation and international prosecution.

While UN human rights bodies have traditionally been critical of the granting of amnesties,² a different picture prevailed for

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quite some time in the field of UN peace-keeping activities. When analysing the early peace-building efforts of the United Nations, it can be seen that the world organization has generally felt free of legal constraints in endorsing amnesty-for-peace deals. In most cases, however, the grant of amnesty was accompanied by the parallel establishment of a truth commission.³ An early example, illustrating the general approach taken by the United Nations, is the peace process in El Salvador. The United Nations was actively involved in the negotiation of the El Salvador peace accords.⁴ The issue of amnesties was not expressly dealt with in those accords. But the "Mexico Agreements" signed on 27 April 1991 under UN auspices provided for the establishment of a truth commission,⁵ which was to consist of "three individuals appointed by the Secretary-General of the United Nations after consultation with the parties". The Commission was mandated to investigate "serious acts of violence" committed in El Salvador between 1980 and 1991. It was originally not conceived as a substitute

1 For an overview, see M. P. Scharf, "Justice versus peace", in S. B. Sewall and C. Kaysen (eds), *The United States and the International Criminal Court*, Rowman & Littlefield, Boston, 2000, p. 179.

2 In 1985, United Nations Special Rapporteur Louis Joinet suggested in a report that international crimes should not be subject to amnesties. See "Study on amnesty laws and their role in the safeguard and promotion of human rights", Preliminary Report by Louis Joinet, Special Rapporteur, UN Commission on Human Rights, UN Doc. E./CN.4/Sub.2/1985/16 (1985). Furthermore, the Human Rights Committee noted in its General Comment No. 20(44) on Article 7 of the International Covenant on Civil and Political Rights that amnesties are "generally incompatible" with the obligation of the States Parties under Articles 2(3) and 7 of the Covenant, UN Doc. No. CCPR/C/21/Rev.1/Add.3, 7 April 1992. See also N. Roht-Arriaza, "Sources in international treaties of an obligation to investigate, prosecute, and provide

redress", in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, Oxford, 1995, pp. 24 and 29; and N. Roht-Arriaza, "Special problems of a duty to prosecute: Derogation, amnesties, statutes of limitation, and superior orders", *ibid.*, pp. 57 and 59.

3 See generally on truth commissions as institutions, challenging the option of prosecution, J. Dugard, "Dealing with crimes of a past regime: Is amnesty still an option?", *Leiden Journal of International Law*, Vol. 12, 1999, p. 1002.

4 The accords were concluded between the government of El Salvador and a coalition of rebel groups. They are reprinted in United Nations, *El Salvador Agreements: The Path to Peace*, UN Department of Public Information, No. 1208-92614 (1992).

5 T. Buergenthal, "The United Nations Truth Commission for El Salvador", *Vanderbilt Journal of Transnational Law*, Vol. 27, 1994, p. 498.

for judicial proceedings.⁶ However, shortly after presentation of the Truth Commission's report, the government of El Salvador adopted a law which granted amnesty to all persons charged with serious crimes, even those mentioned in that report.⁷ The cautious reaction of the United Nations to this sudden about-turn reflects quite well the prevailing legal view at that time. The Secretary-General expressed concern about the immediate, sweeping amnesty law, noting that it should have been based on a broader national consensus, but did not condemn the grant of amnesty as such.⁸

Only two years later, the United Nations helped to negotiate the "Governors Island Agreement"⁹ allowing President Aristide to return to Haiti after agreeing to a controversial amnesty for the military leaders who had taken control of the country.¹⁰ The Security Council approved the peace deal, including the amnesty clause,¹¹ qualifying the solution adopted as "the only valid framework for

6 See M. Popkin and N. Roht-Arriaza, "Truth as justice: Investigatory commissions in Latin America", in Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, United States Institute of Peace Press, Washington, 1995, pp. 262 and 283.

7 See D. W. Cassel, "International truth commissions and justice", in *Transitional Justice*, *ibid.*, pp. 326 and 328. The General Amnesty Law for the Consolidation of Peace of 20 March 1993 (Decree 486) granted full, absolute and unconditional amnesty to all those who participated in any way in the commission of political crimes or common crimes linked to political crimes or crimes in which the number of persons involved exceeded twenty persons.

8 See United Nations, "Report of the Secretary-General on the United Nations Observer Mission in El Salvador", UN Doc. S/25812/Add. 1 of 24 May 1993. The Inter-American Commission on Human Rights (IACHR), however, found the amnesty to be in violation of the American Convention on

Human Rights. See IACHR, "Report on the situation of human rights in El Salvador", OEA/Ser.L/V/II.85, Doc. 28 rev., 11 February 1994, at 77. On the reaction to the amnesty in El Salvador, see generally Popkin and Roht-Arriaza, *op. cit.* (note 6), p. 283.

9 Agreement between President Jean-Bertrand Aristide and General Raoul Cédras of 3 July 1993, in Report of the United Nations Secretary-General, "The situation of democracy and human rights in Haiti", UN Doc. A/47/975, S/26063, 12 July 1993, pp. 2-3.

10 M. P. Scharf, "Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?", *Texas International Law Journal*, Vol. 31, 1996, p. 1. See also I. P. Strotzky, "Haiti: Searching for alternatives", in *Impunity and Human Rights in International Law and Practice*, *op. cit.* (note 2), p. 188.

11 Paragraph 6 of the Governors Island Agreement granted full amnesty to the leaders and supporters of the military coup for "political human rights violations". See Strotzky, *op. cit.* (note 10), p. 189.

resolving the crisis in Haiti".¹² The amnesty law for the members of the military regime was subsequently enacted by Haiti's parliament on 6 October 1994, but was followed by the establishment of a truth commission, composed of Haitians and international experts, who undertook the task of investigating a number of specific human rights violations.¹³

Furthermore, the United Nations assisted in the conclusion of the Guatemalan Peace Accords,¹⁴ which again contained an amnesty clause. This time the amnesty was limited. It excluded, in particular, the granting of immunity for crimes punishable under international treaties to which Guatemala was a party.¹⁵ Despite the negotiators' visible attempt to avoid conflict with Guatemala's obligations under international law, the amnesty remained controversial.¹⁶ But it was once again accompanied by the creation of a truth commission with the task of identifying the "human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict".¹⁷ Deviating slightly from the model of the United Nations Truth Commission for El Salvador, the

¹² Statement of the President of the Security Council of 15 July 1993, Resolutions and Decisions of the Security Council 1993, 48 SCOR, at 126, UN Doc. S/26633 (1993).

¹³ On the Truth Commission in Haiti, see P. B. Hayner, *Unspeakable Truths, Confronting State Terror and Atrocity*, Routledge, London, 2001, p. 66.

¹⁴ On the involvement of the United Nations in the Guatemalan peace process, see generally R. Grote, "The United Nations and the establishment of a new model of governance for Central America: The case of Guatemala", *Max Planck Yearbook of United Nations Law*, Vol. 2, 1998, p. 239.

¹⁵ Agreement on the Basis for the Legal Integration of the *Unidad Revolucionaria Guatemalteca*, UN Doc. A/51/776 — Doc. S/1997/51, Annex II, paras 17 ff. The details of the amnesty were later spelled out in the Law of National Reconciliation, which stated that

amnesty shall not extend to the crimes of genocide, torture and forced disappearance. See Art. 8 of the Law of National Reconciliation of 18 December 1996. For a full account, see Grote, *op. cit.* (note 14); p. 266 and M. Popkin, "Guatemala's national reconciliation law: Combating impunity or continuing it?", *Revista Instituto Interamericano de Derechos Humanos*, Vol. 24, 1996, p. 173.

¹⁶ See Grote, *op. cit.* (note 14), p. 268.

¹⁷ Accord on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, signed in Oslo on 23 June 1994, UN Doc. A/48/954-S/1994/751 of 1 July 1994. On the work of the Commission, see C. Tomuschat, "Between national and international law: Guatemala's Historical Clarification Commission", in V. Götz (ed.), *Liber amicorum Günther Jaenicke*, Springer, Berlin, 1998, p. 991.

Commission was composed of two national members and one international member, appointed by the UN Secretary-General.

Lastly, in 1999, the United Nations supported the conclusion of the Lusaka Ceasefire Agreement in the Democratic Republic of Congo,¹⁸ which provides that the parties “together with the UN” shall create conditions favourable to the arrest and prosecution of “mass killers”, “perpetrators of crimes against humanity” and “other war criminals”, while acknowledging that these conditions “may include the granting of amnesty and political asylum, except for genocidaires”.¹⁹ The Security Council expressed its support for the agreement on several occasions, pointing out that it “represents the most viable basis for a resolution of the conflict in the Democratic Republic of Congo”.²⁰

This divergent approach to amnesty-for-peace deals has not been the only characteristic feature of UN practice. A second typical phenomenon has been the more or less stringent dissociation of the international prosecution of crimes from the furtherance of national reconciliation. The United Nations has embarked on one or the other course, but has not combined them. The prosecution of crimes was usually left within the sole authority of the government involved in a peace settlement, and was carried out by the United Nations only when no reasonable alternative appeared to be in reach. If the United Nations decided to act, it was the Security Council which took on this task, opting for the model of a systematic and fully internationalized prosecution of serious crimes.²¹ The creation of mixed national-international institutions, acting under the auspices of

¹⁸ Lusaka Ceasefire Agreement of 10 July 1999, UN Doc. S/1999/815 of 23 July 1999. The agreement was “witnessed” by the United Nations.

¹⁹ See Chapter 9.1 and 9.2 of Annex A to the Ceasefire Agreement of 10 July 1999, UN Doc. S/1999/815.

²⁰ See the preambles to Security Council Resolutions 1273 (1999) of 5 November 1999, UN Doc. S/RES/1273, 1279 (1999) of 30 November 1999, UN Doc. S/RES/1279 (1999) and 1291 (2000) of 24 February 2000, UN Doc. S/RES/1291 (2000).

²¹ It is worth noting in this context that during negotiation of the Rules of Procedure of the International Criminal Tribunal for the former Yugoslavia (ICTY), the United States submitted a proposal that perpetrators of low-level crimes be given immunity from prosecution in return for their testimony. See “United States proposed Rules of Procedure for the ICTY”, in V. Morris and M. P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia*, Vol. 2, Irvington-on-Hudson, New York, 1995, pp. 509 and 560. The Tribunal's practice,

the international community, was limited to the area of truth commissions. But their efforts were not seldom hampered by questionable amnesty laws, which were again slowly revised by the jurisprudence of domestic courts.²²

Contemporary trends in United Nations peace-building

An interesting change of direction in UN practice seems, however, to have taken place within the last two years. The United Nations has first of all invented new forms and mechanisms for the prosecution of serious crimes, acting on the borderline between the national and the international legal order. Moreover, it has also made additional efforts to support and establish combined justice and reconciliation models, treating truth commissions and prosecution as complementary rather than as competing and mutually exclusive mechanisms for dealing with the injustices of the past.

The invention of new mechanisms for the prosecution of international crimes

The growing tendency of the United Nations to explore new avenues in the prosecution of international crimes is particularly manifest in Kosovo and East Timor which, after political conflicts involving serious human rights violations, have both been placed under the transitional administration of the United Nations since

however, has been to reject claims for immunity of low-level perpetrators. In a statement to members of diplomatic missions, the President of the Tribunal noted: "The persons appearing before us will be charged with genocide, torture, murder, sexual assault, *wanton destruction, persecution and other inhumane acts*. After due reflection, we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be". See United Nations, "Statement by the President made at a briefing to members of diplomatic missions", UN Doc. IT/29, at 5 (1994), reprinted in V. Morris and M. P. Scharf,

An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia, Vol. 1, Irvington-on-Hudson, New York, 1995, p. 112.

²² Domestic courts in countries such as Argentina, Chile, El Salvador or Honduras have subsequently restricted the scope of amnesty laws by ruling them inapplicable to certain serious human rights violations or insisting on their jurisdiction to determine on a case-by-case basis whether or not the amnesty provisions apply. See on this jurisprudence, N. Roht-Arriaza and L. Gibson, "The developing jurisprudence on amnesty", *Human Rights Quarterly*, Vol. 20, 1998, p. 843.

1999. To restore a functioning legal system, effective and impartial mechanisms for the adjudication of serious human rights violations must be created. The United Nations Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) have taken up this challenge by entrusting UN-created internationalized court chambers with the prosecution of conflict-related crime. UNTAET has adopted Regulation 2000/15 setting up special panels with exclusive jurisdiction over serious criminal offences, which act under the authority of the District Court of Dili.²³ UNMIK has followed a similar approach by allowing the assignment of international prosecutors and judges to proceedings known to have a politically sensitive or ethnically motivated background.²⁴ But the internationalized court chambers established within the framework of the UN transitional administrations in Kosovo and East Timor are not the only examples of mixed international-national institutions designed to try serious human rights violations. Cambodia has recently established Extraordinary Court Chambers for the prosecution of crimes committed by the former leaders of the Khmer Rouge,²⁵ which will be

²³ UNTAET Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences of 6 June 2000, <<http://www.un.org/peace/etimor/UntaetN.htm>>. On the UNTAET panels, see C. Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A first analysis", *Max Planck Yearbook of United Nations Law*, Vol. 5, 2001, pp. 105 and 171 (2001) (forthcoming); S. Linton, "Rising from the ashes: The creation of a viable criminal justice system in East Timor", *Melbourne University Law Review*, Vol. 25, 2001, p. 122; M. Othman, "Peacekeeping operations in Asia: Justice and UNTAET", *International Law Forum*, Vol. 3, 2001, p. 118.

²⁴ UNMIK intended to create a Kosovo War and Ethnic Crimes Court for the prosecution of war and ethnically motivated crimes. However, owing to budgetary restraints and the number of cases simultaneously pending before the domestic courts, UNMIK decided to deal with these cases within the existing

judicial framework by providing the local courts with international judges and prosecutors. See OSCE Mission in Kosovo, Report on the Criminal Justice System (2000), pp. 71-72, <<http://www.oesce.org/kosovo>>. See also Section 1 of UNMIK Regulation 2000/64 of 15 December 2000.

²⁵ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, <<http://www.cambodian-parliament.org/Legislative.htm>>. The Court Chambers will *inter alia* rule on charges of genocide, crimes against humanity and war crimes. See Articles 4, 5 and 6 of the Law. It should be noted, however, that on 8 February 2002 the United Nations withdrew from negotiations for the establishment of the Extraordinary Chambers on the grounds that the Law establishing them would have prevailed over the Articles of Cooperation (the agreement) between the United Nations and

composed of three Cambodian and two internationally appointed judges.²⁶ Furthermore, the United Nations and the government of Sierra Leone have concluded an agreement on the creation of a mixed international domestic court to prosecute persons responsible for human rights abuses committed in Sierra Leone's civil war.²⁷ This Special Court is a *sui generis* treaty-based institution of mixed jurisdiction and composition, including *inter alia* judges appointed by the UN Secretary-General in both the Trial and the Appeals Chambers.²⁸

An increased reliance on combined accountability and reconciliation mechanisms

The examples of East Timor and Sierra Leone are of special interest here because they are typical of the second of the above-mentioned trends, namely the increasing reliance of the United Nations on combined accountability and reconciliation mechanisms, limiting prosecution to the most serious atrocities while furthering alternative forms of justice in the case of less serious crimes. The United Nations has in both cases not only created mixed national-international judicial bodies for the prosecution of international crimes, but has also actively supported the parallel establishment of

the Government of Cambodia, and that the Chambers, as currently envisaged, would not "guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have". Statement by UN Legal Counsel Hans Corell at a press briefing at UN Headquarters in New York, 8 February 2002, <<http://www.un.org/News/dh/infocus/cambodia/corell-brief.htm>>.

²⁶ Art. 9 of the Law, *op. cit.* (note 25).

²⁷ See "Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000", UN Doc. S/2000/915. See generally on the Special Court for Sierra Leone, M. P. Scharf, "The Special Court for Sierra Leone", *ASIL Insights*, October 2000; M. Frulli, "The Special Court for Sierra Leone:

Some preliminary comments", *European Journal of International Law*, Vol. 11, 2000, p. 857; R. Cryer, "A 'Special Court' for Sierra Leone?", *International and Comparative Law Quarterly*, Vol. 50, 2001, p. 435; A. Tejan-Cole, "The Special Court for Sierra Leone: Conceptual concerns and alternatives", *African Human Rights Law Journal*, Vol. 1, 2001, p. 107.

²⁸ See Art. 12 of the Draft Statute of the Court, contained in the Report of the Secretary-General, *op. cit.* (note 27), at 25; and Art. 2 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, *ibid.*, at 15.

truth and reconciliation commissions,²⁹ though without calling into question the principle that there can be no amnesties for serious human rights violations. Some doubts in this respect might have arisen in the case of Sierra Leone, because Article IX of the UN-brokered Lomé Peace Agreement, concluded between the government of Sierra Leone and the Revolutionary Front on 7 July 1999,³⁰ granted a blanket amnesty (“absolute and free pardon”) to all combatants.³¹ However, the Special Representative of the Secretary-General for Sierra Leone had appended an oral disclaimer to his signature of the agreement on behalf of the United Nations, stating that the amnesty clause “shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”.³² Furthermore, last doubts about the applicability of the Lomé amnesty clause to serious crimes have been removed by Article 10 of the Statute of the Special Court for Sierra Leone, which provides that the amnesty does not bar the prosecution of crimes contained in Articles 2 to 4 of the Statute, namely crimes against humanity (Art. 2), violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Art. 3) and other serious violations of international humanitarian law (Art. 4). The prosecution of serious crimes by the Special Court for Sierra Leone is to be complemented by the activities of the Truth and Reconciliation Commission for Sierra Leone,³³ which was established to investigate and report on the causes, nature and extent of human rights violations related to the armed conflict in Sierra Leone and help create “a climate

²⁹ See UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor of 13 July 2001. See also Sierra Leone, Truth and Reconciliation Act 2000, <<http://www.sierra-leone.org/trc.html>>.

³⁰ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, UN Doc. S/1999/777, Annex.

³¹ For a discussion of this, see A. J. McDonald, “Sierra Leone’s uneasy peace: The amnesties granted in the Lomé Peace

Agreement and the United Nations’ dilemma”, *Humanitäres Völkerrecht*, Vol. 1, 2000, p. 12.

³² Report of the Secretary-General, *op. cit.* (note 27), para. 23. A reminder of this reservation was later given by the Security Council in the preamble to SC Resolution 1315 (2000) of 14 August 2000, UN Doc. S/RES/1315 (2000).

³³ See Truth and Reconciliation Commission Act 2000, *op. cit.* (note 29). On the Commission, see also Hayner, *op. cit.* (note 13), p. 70.

which fosters constructive interchange between victims and perpetrators".³⁴ The Commission was formally created by the parliament of Sierra Leone, but the United Nations played a significant role in its establishment. The UN High Commissioner for Human Rights endorsed not only the idea of creating the Commission, originally formulated in Article XXVI of the Lomé Peace Agreement, but has also been closely involved in the drafting of its statute.³⁵ Moreover, in a letter of 12 January 2001, the UN Secretary-General acknowledged the important role of the Truth Commission by underscoring that "the Special Court for Sierra Leone and the Truth and Reconciliation Commission will operate in a complementary and mutually supportive manner, fully respectful of their distinct but related functions".³⁶ Finally, when evaluating the relationship between the Truth Commission and the Special Court for Sierra Leone, the Security Council pointed out that the Truth Commission will, in particular, have "a major role to play in the case of juvenile offenders".³⁷

A similar model has been adopted in East Timor. One year after the creation by UNTAET Regulation 2000/15 of the Panels with exclusive jurisdiction over serious criminal offences, the Secretary-General's Special Representative there passed Regulation 2001/10 establishing a Commission for Reception, Truth and Reconciliation in East Timor designed to "promote national reconciliation and healing following the political conflict in East Timor, and in particular following the atrocities committed in 1999".³⁸ The Commission is not only vested with a general mandate to establish the truth regarding the commission of human rights violations in East

³⁴ Art. 6 (2) of the Truth and Reconciliation Commission Act 2000, *op. cit.* (note 29).

³⁵ See M. Parlevliet, "Truth Commissions in Africa: The non-case of Namibia and the emerging case of Sierra Leone", *International Law Forum*, Vol. 2, 2000, p. 107, where the author notes that "it is the first time that the UNOHCHR has been so closely involved in setting up a truth commission". On the Commission's creation, see also McDonald, *op. cit.* (note 31), p. 13.

³⁶ Letter dated 12 January 2001 from the Secretary-General to the President of the Security Council, UN Doc. S/2001/40, para. 9.

³⁷ Letter dated 22 December 2000 from the President of the Security Council to the Secretary-General, para. 1, UN Doc. S/2000/1234.

³⁸ See para. (d) of the preamble to UNTAET Regulation 2001/10 of 13 July 2001, <<http://www.un.org/peace/etimor/UntaetN.htm>>.

Timor,³⁹ but may also conduct individual Community Reconciliation Procedures,⁴⁰ allowing participants to gain immunity from criminal and civil responsibility for specific categories of crimes.⁴¹ The remarkable development here is that the fulfilment of obligations undertaken in a reconciliation procedure in no way releases the perpetrator from his or her criminal responsibility for the commission of serious crimes. This is explicitly stated in Section 32.1 of UNTAET Regulation 2001/10, which stipulates that “no immunity conferred by operation of this or any other provision of the present Regulation shall extend to a serious criminal offence”. The term “serious criminal offence” is defined in Part 1, section 1(m) of the Regulation. It comprises, in particular, the crimes listed in Sections 4 through 9 of UNTAET Regulation 2000/15, namely genocide, crimes against humanity, war crimes, torture, murder and sexual offences. In concept the East Timorese Truth Commission therefore clearly diverges, for example, from the South African Truth Commission, which was entitled to grant full immunity for all categories of crimes committed within a political context.⁴²

The developments in Sierra Leone and East Timor are of considerable significance, because they shed new light on the peace-building activities carried out under the auspices of the United Nations. They not only show increasing UN support for the invention of new mechanisms for the prosecution of grave human rights violations, but also reflect the world organization’s ever more critical attitude towards the unlimited granting of amnesties in a process of national reconciliation. The rejection, in the case of East Timor, of immunity for perpetrators of serious crimes is particularly indicative of

³⁹ See generally Part III of UNTAET Regulation 2001/10.

⁴⁰ See generally Part IV of UNTAET Regulation 2001/10.

⁴¹ See Section 32 of UNTAET Regulation 2001/10.

⁴² In South Africa, amnesty was granted in return for full confession of involvement in politically motivated crimes. In particularly grave cases, the Amnesty Committee of the Truth Commission examined whether there

was “proportionality” between the act and the political objective pursued. On the requirement of proportionality for the granting of immunity by the South African Committee on Amnesty, see Art. 20(3)(f) of the Promotion of National Unity and Reconciliation Act of 1995. For the practice of the Committee on Amnesty, see T. Puurunen, *The Committee on Amnesty of the Truth and Reconciliation Commission of South Africa*, Helsinki Forum Iuris, Helsinki, 2000, p. 37.

the changing practice of the United Nations, because in that case the organization has itself determined the legal framework for the restoration of peace and justice in a territory placed under its exclusive administration. Nevertheless, the same conclusion may also be drawn from a statement made by the Secretary-General, in his report on the establishment of the Special Court for Sierra Leone, that amnesty is considered to be “an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict”, but “cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law”.⁴³ Finally, the recent practice of the United Nations with regard to Sierra Leone and East Timor challenges the view that truth commissions present an alternative rather than a supplement to the option of prosecution.

Merits of the new justice and reconciliation model

The emerging combined justice and reconciliation model most recently supported by the United Nations has several merits. First of all, it eases the strain on the all too often overburdened Security Council by involving different players in the creation of UN-established prosecution mechanisms. The Special Court for Sierra Leone, for example, was established by means of an agreement negotiated by the Secretary-General between the United Nations and the government of Sierra Leone. The role of the Security Council was confined to a request to the Secretary-General to negotiate the agreement, and some general recommendations concerning the Court’s jurisdiction.⁴⁴ The Panels with universal jurisdiction in East Timor, on

⁴³ Report of the Secretary-General, *op. cit.* (note 27), para. 22. This view is in line with Principle 7 of the newly established Princeton Principles on Universal Jurisdiction, which express a presumption that amnesties are incompatible with a State’s obligation to prevent impunity. Principle 7 reads: “Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified

in Principle 2(1)”. Principle 2(1) lists as serious crimes under international law “(1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture”. The Princeton Principles are obtainable at <http://www.law.nyu.edu/library/foreign_intl/international.html>.

⁴⁴ See paras 1-3 of SC Resolution 1315 (2000), *op. cit.* (note 32).

the other hand, were created on the basis of an UNTAET Regulation adopted by the Special Representative of the Secretary-General in East Timor. The authority to adopt UNTAET Regulation 2000/15 derived from the general mandate given to the Special Representative by the Security Council in its Resolution 1272 (1999).⁴⁵

The differentiated approach taken by the United Nations in the cases of Sierra Leone and East Timor is also of particular merit in that it manages to strike a reasonable balance between the conflicting principles of individual criminal responsibility for serious crimes, on the one hand, and national reconciliation. Limited amnesty is the carrot and prosecution the stick. Furthermore, prosecution is targeted.⁴⁶ It is confined to cases which are of concern to the international community as whole, while meeting the requirements of international human rights law.⁴⁷ At the same time, the combined justice and reconciliation approach leaves room for alternative forms of justice such as truth-telling and individualized amnesty procedures, which have proved to be useful tools in restoring justice to a post-conflict society.⁴⁸ Moreover, the compromise formula reflected in the most recent practice of the United Nations addresses the specific needs of a transitional society in which the accumulation of human rights violations usually exceeds by far the capacity of the judicial system.⁴⁹

⁴⁵ See para. 1 of SC Res. 1272 (1999) of 25 October 1999, endowing UNTAET with "overall responsibility for the administration of East Timor" and the "exercise of all legislative and executive authority, including the administration of justice".

⁴⁶ The Security Council suggested in para. 3 of its Resolution 1315 (2000) that the jurisdiction of the Special Court for Sierra Leone be limited to "persons who bear the greatest responsibility". The Secretary-General opted for the term "most responsible". See Art. 1 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, *op. cit.* (note 28), at 15.

⁴⁷ On the duty to prosecute serious human rights violations, see generally

D. F. Orentlicher, "Settling accounts: The duty to prosecute human rights violations of a prior regime", *Yale Law Journal*, Vol. 100, 1991, p. 2537; and C. Edelenbos, "Human rights violations: A duty to prosecute?", *Leiden Journal of International Law*, Vol. 7, 1994, p. 5.

⁴⁸ For a survey of the practice of truth commissions, see P. B. Hayner, "Fifteen truth commissions — 1974 to 1994: A comparative study", *Human Rights Quarterly*, Vol. 15, 1994, p. 597.

⁴⁹ See generally on this aspect, J. Widner, "Courts and democracy in postconflict transitions: A social scientist's perspective on the African case", *American Journal of International Law*, Vol. 95, 2001, pp. 64 and 65.

However, the current trend towards a “nationalization” of prosecution under the auspices of the United Nations also has some less convenient implications. The limited involvement of the Security Council, for example, goes hand in hand with a decline in power of the newly established UN prosecution mechanisms. In contrast to the Chapter VII-based ad hoc International Criminal Tribunals,⁵⁰ the Special Court for Sierra Leone or the UNTAET Panels do not, in particular, enjoy primacy over national courts of *all* States. The Special Court for Sierra Leone, for instance, has concurrent jurisdiction with and primacy over Sierra Leonean courts, but lacks the power to assert primacy over national courts in third States.⁵¹ The same holds true for the UNTAET Panels. Although established by the United Nations, the Panels are formally integrated into the domestic legal system of East Timor. They are formally part of a domestic court, namely the District Court of Dili.⁵² Accordingly, they lack, for example, the power to order the surrender of an accused located in a third State.

However, various arguments support the view that internationalized prosecution bodies such as the Special Court for Sierra Leone or the UNTAET Panels offer a valuable alternative to the ad hoc International Criminal Tribunals. In opting for an internationalized rather than a purely international prosecution body, stronger emphasis is placed on the domestic investigation of the past: prosecution and justice are not primarily in the hands of a foreign institution, but are handled as a national task requiring the involvement and commitment of the country’s own citizens. Furthermore, the creation of mixed national-international prosecution bodies operating within, or at least in direct connection with, the judiciary of the territory concerned helps to restore the country’s legal system and strengthens local capacity-building, while simultaneously guaranteeing the impartial and neutral conduct of the criminal proceedings. Finally, a combined justice and reconciliation system involving both a truth-telling and a

⁵⁰ See Article 8 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and Article 9 of the Statute of the ICTY.

⁵¹ See Article 8(2) of the Draft Statute of the Special Court for Sierra Leone and the

comments by the Secretary-General in his report to the Security Council, *op. cit.* (note 27), para. 10.

⁵² Section 1.1 of UNTAET Regulation 2000/15.

prosecution component cannot work unless the prosecution mechanism is linked to the domestic legal system in a manner which permits effective cooperation between the two entities. The East Timorese Truth and Reconciliation Commission is an excellent example of this. It is authorized to grant individualized immunities for less serious crimes, after completion of a reconciliation procedure. However, when determining whether a specific act constitutes a less serious crime to be dealt with in a reconciliation procedure, the Commission is entirely dependent on the findings of the judiciary, which is vested with exclusive jurisdiction over serious crimes.⁵³

Résumé

Consolidation de la paix par les Nations Unies, amnisties et formes alternatives de justice : un changement de pratique ?

par CARSTEN STAHN

La pratique des Nations Unies concernant l'amnistie des crimes internationaux s'est fortement développée au cours des vingt dernières années. L'organisation mondiale a d'abord été peu restrictive dans ses efforts de consolidation de la paix, en adhérant à des accords de paix garantissant une amnistie générale. Les commissions de vérité ont cependant complété ces amnisties. L'auteur démontre que les clauses d'amnistie dans les accords de paix deviennent par la suite plus limitées et il discute des exemples récents de Timor-Est et de la Sierra Leone. Ces tribunaux internationalisés semblent indiquer une tendance à limiter la poursuite pénale des crimes les plus abominables d'une part et à renforcer des formes alternatives de justice pour des crimes moins sérieux d'autre part.

⁵³ See Sections 27, 28 and 32 of UNTAET Regulation 2001/10.