

Provoking the dragon on the patio Matters of transitional justice: penal repression vs. amnesties

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Abstract

This article modestly seeks to address some of the various matters related to transitional justice and focuses on whether penal repression for violations of international humanitarian law and international human rights law must be insisted upon in all situations, or if there are cases where other action, in particular amnesties, would be more appropriate to ensure national reconciliation or the peaceful development of a country. Dilemmas clearly exist in responding to such choices, calling for the ability to maintain a judicious balancing act between competing important interests, including the most basic decision of whether or not to provoke the dragon on the patio.

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Introduction

“[Many governments and some individuals] have made the call that to leave the past alone is the best way to avoid upsetting a delicate process of transition

* The views expressed in this article reflect those of the author and not necessarily those of the ICRC.

or to avoid a return to past dictatorship [and reopening the victims' old wounds]. The attitude is that there is a dragon living on the patio and we had better not provoke it.”¹

As a political transition unfolds after a period of violence or repression, a society is often confronted with a difficult legacy of abuse. Countries as diverse as Bosnia-Herzegovina, Sierra Leone, Peru and East Timor struggle to come to terms with crimes of the past. In order to promote justice, peace and reconciliation, government officials and non-governmental advocates are likely to consider both judicial and non-judicial responses to violations of international human rights law (IHRL) and international humanitarian law (IHL). These may include prosecuting individual perpetrators, offering reparations to victims of state-sponsored violence, establishing truth-seeking initiatives about past abuse, reforming institutions like the police and the courts and removing perpetrators from positions of power. Increasingly, these approaches are used together in order to achieve a comprehensive and far-reaching sense of justice termed “transitional justice”.²

By identifying certain relevant questions, this article modestly seeks to address some of these various matters related to “transitional justice” and focuses on whether penal repression for violations of IHL and IHRL must be insisted upon in all situations, or whether there are cases where other action, in particular amnesties, would be more appropriate to ensure national reconciliation and peaceful development of a country. Interestingly, this article — and the language of restorative justice (versus retributive justice) and forgiveness of the offenders — comes about when international law is developing in the opposite (punitive) direction with the creation of the International Criminal Court, prosecutions brought by the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the employment of universal jurisdiction.

Starting mainly in the 1980s, the dozens of states moving forward to democracy after civil war or the end of a repressive regime popularly had recourse to mechanisms, such as truth commissions, in the hope of achieving a successful transition. The main priority of many of these truth commissions, as in Chile or in Argentina, was to reveal truths about the past and especially to determine the fate of the thousands of disappeared. In contrast, the South African Truth and Reconciliation Commission in the 1990s was much more ambitious. More than any other truth commission before, it sought reconciliation as the basis for nation-building;³ yet reconciliation was not fully defined in the initial state documents establishing the commission, and its meanings proliferated and were transformed

1 Neil J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. 1, United States Institute of Peace Press, Washington, 1995, p. 346, citing Tina Rosenberg, in A. Boraine, J. Levy & R. Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa*, 1994, p. 66.

2 For a further definition, see the website of the International Center for Transitional Justice, available at <http://www.ictj.org>.

3 Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, Cambridge University Press, Cambridge, 2001, p. 121.

during the commission's life.⁴ Nevertheless, the term "reconciliation" has become an integral part of discussions in search of solutions during transition.

Many people associate "reconciliation" with pardoning and forgetting (i.e., do not "provoke the dragon on the patio"); others hold the opposite view. It remains indisputable, however, that there is no single universal model for reconciliation, owing not only to the varying contexts but also to the diverse understandings of that term. For example, is the goal to reach individual reconciliation, or national or political reconciliation?⁵ Either type of reconciliation is a process, not a single event. Of the two, the more realistic goal is that of national or political reconciliation, which can be understood as focusing on long-term support to political, socio-economic and cultural institutions so that they are able to address the root causes of conflicts and establish necessary conditions for peace and stability.⁶

Individual reconciliation is much more complex because it is just that: individual. Each person's needs are different, as is their reaction to forgiveness, healing and reconciliation. The victims are the only ones who can forgive. Neither a government that has oppressed a people nor the individuals who committed the violations can "proclaim" forgiveness; they can only ask for it. The victim(s) must decide to forgive and then reconciliation has the chance to develop.

"Unfortunately, in all too many cases, it is the victim(s) who must start the process of reconciliation. And often times, it ends with the victim(s). All too often, the one(s) who has done oppression is not interested in true reconciliation. In this case, reconciliation becomes a process of the victims coming to terms with themselves, with their families, with their neighbors. For those who have suffered atrocities, reconciliation often means learning how to live in and with their family, community, society in a process of healing, of becoming alive again."⁷

It is suggested that reconciliation as the goal cannot be imposed, and that it must be built. Reconciliation requires knowledge because the person must know what he or she is forgiving and only after atonement may there be reconciliation. Without atonement it is a new and additional unfairness to ask the victims to forgive without any contrition or acknowledgment on the part of the wrongdoer.⁸ Thus, truth appears to be a necessary ingredient for reconciliation. If truth is necessary to advance reconciliation,⁹ by whom does the truth need to be acknowledged — by both parties, or by the community at large? Which truth is the "truth" sought?

4 Ibid., p. 98.

5 Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, London, 2001, p. 155.

6 See generally K. Kumar, *Rebuilding Societies after Civil War*, Lynne Rienner Pub., Boulder, CO, 1997; *Reconciliation After Violent Conflict, a Handbook*, Handbook Series, International Institute for Democracy and Electoral Assistance, Stockholm, 2003.

7 Dave Lindstrom, *National Dialog — A Chance for Reconciliation?*, available at: <http://www.fhrg.org/remhi/reconcil.htm>.

8 Juan E. Méndez, "Accountability for Past Abused", *Human Rights Quarterly*, Vol. 19, 1997, pp. 255, 274.

9 Hayner, above note 5, p. 6.

Furthermore, some believe that truth is always preferable to justice. With reference to the experiences of Chile and South Africa, it has been suggested that truth reports should replace trials.¹⁰ It has even been proposed that the International Criminal Tribunal for the former Yugoslavia should be closed down and replaced with a truth commission like that of El Salvador or Chile.¹¹ However, Chile and South Africa have also prosecuted successfully.¹² “It is far from proven that a policy of forgiving and forgetting automatically deters future abuses.”¹³ Haiti would be an example of amnesties that have not led to the deterrence of future abuses.¹⁴ And the South African Truth and Reconciliation Commission, which spoke more of reconciliation than any truth commission before it, realized that its initial claims of achieving full reconciliation were unrealistic. Archbishop Desmond Tutu began to argue that a more realistic goal for the commission was to “promote” reconciliation.¹⁵

Truth must be part of the process, but must it be placed in competition with justice? Should truth telling have priority over justice? May not truth be a step in the direction of accountability, not an alternative to it? Must reconciliation and justice always be juxtaposed?

All choices of how to handle these transitional periods involve finding solutions to two key issues: 1) acknowledgment: whether to remember or to forget the abuses; and 2) accountability: whether to impose sanctions on the persons responsible for these abuses.¹⁶ Ultimately, “[t]he issue becomes to determine which elements of truth, justice and clemency measures are compatible with one another, with the construction of democracy and peace, with emerging standards of international law, and with the search for reconciliation.”¹⁷

Penal repression — the obligation under international law

The rule of law must stand above political decisions; the essence of the rule of law, a cornerstone of democracy,¹⁸ is that no person is exempt from the law. Trying

10 See Charles Krauthammer, “Truth, not trials: A way for the newly liberated to deal with the crime of the past”, *Washington Post*, 9 September 1994, at A27.

11 Neil A. Lewis, “Nuremberg isn’t repeating itself”, *New York Times*, 19 November 1995, at E5 (quoting Robert Pastor a senior aide to President Jimmy Carter); David Forsythe, “The UN and human rights at fifty: An incremental but incomplete revolution”, *Global Governance* No. 1, 1995, p. 297.

12 Méndez, above note 8, p. 267.

13 *Ibid.*, p. 266.

14 “[E]ach self-amnesty by the military has led to further interruptions of democracy and to further atrocities.” Méndez, above note 8, p. 266, citing Kenneth Roth, “Human rights in the Haitian transition to democracy”, in *Human Rights and Political Transitions: Gettysburg to Bosnia*, Carla Hesse & Robert Post (eds.), 1997.

15 Hayner, above note 5, p. 156.

16 Luc Huyse, “Justice after transition: On the choices successor elites make in dealing with the past”, *Law & Social Inquiry*, Vol. 20, No. 1, Winter 1995, cited in Kritz, above note 1, p. 337.

17 Juan Méndez, “National Reconciliation, Transitional Justice, and the International Criminal Court”, *Ethics and International Affairs*, Vol. 15, 2001, pp. 25, 29.

18 Diane F. Orentlicher, “Settling accounts: The duty to prosecute human rights violations of a prior regime”, *Yale Law Journal*, Vol. 100, 1991, pp. 2537, 2543.

suspected war criminals who are political and military leaders, however, does not always appear the appropriate or easiest policy choice. As mentioned above, some hold that the notion of reconciliation is a *sine qua non* for democracy and insist that criminal prosecution is an obstacle to reconciliation.¹⁹ Conversely, international human rights literature widely considers criminal punishment to be “the most effective insurance against future repression”²⁰ and stresses the relationships between accountability, reconciliation, peace and democracy.²¹

A discussion on penal repression and amnesty must begin with an understanding of existing obligations under international law, because the obligation under international law to prosecute and punish certain criminal conduct reduces or eliminates the state’s legal options, including the passing of amnesty laws, for those specified violations. If states are required to prosecute offenders, amnesty laws for those crimes are thus proscribed. If a lesser duty of non-criminal accountability exists, however, abusers could be held responsible through civil suits, naming by a truth commission, lustration²² and other mechanisms without violating a particular international legal obligation. Respect for the rule of law is a crucial factor to be weighed when assessing whether to abandon or complement penal repression with other mechanisms of accountability and/or acknowledgment, even for the desirable aim of achieving national reconciliation or the peaceful development of a country.

Obligations under international law regarding penal repression of international humanitarian law violations

There is an obligation to suppress all violations of IHL.²³ This obligation does not require states to adopt criminal legislation, but it does leave them to decide

- 19 *Azania People’s Organization (AZAPO) and Others v. President of the Republic of South Africa*, 1996(4) SA 671, pp. 684–86 (“If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming”); *ibid.*, p. 685; Michael Ignatieff, *The Warrior’s Honor: Ethnic War and the Modern Conscience*, Henry Holt & Company, LLC, New York, 1997, p. 184 (“[I]f trials assist the process of uncovering the truth, it is doubtful whether they assist the process of reconciliation. The purgative function of justice tends to operate on the victims’ side only. While the victims may feel justice has been done, the community from which the perpetrators come may feel that they have been made scapegoats.”).
- 20 Orentlicher, above note 18, p. 2542. See also Malamud-Goti, “Transitional governments in the breach: Why punish state criminals?”, *Human Rights Quarterly*, Vol. 12, 1990, p.12.
- 21 Steven R. Ratner, “New democracies, old atrocities: An inquiry in international law”, *Georgetown Law Journal*, Vol. 87, 1999, pp. 707, 735, citing Méndez, above note 8, pp. 273–75; Larry Rohter, “Huge amnesty is dividing Guatemala as war ends”, *New York Times*, 18 December 1996, at A9 (“There can be no real peace without justice” in the words of Indian leader Genara Lopez); Judith Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, Cambridge, Massachusetts, 1986, p. 158 (trials replace “private, uncontrolled vengeance with a measured process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured”).
- 22 Lustration is an administrative mechanism, defined as “the disqualification and, where in office, the removal of certain categories of officeholders under the prior regime from certain public or private offices under the new regime.” See Herman Schwartz, “Lustration in Eastern Europe”, in Kritz, above note 1, p. 461.
- 23 “Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches...” Articles 49(3), 50(3), 129(3)

whether to repress violations or to implement appropriate administrative, disciplinary or other measures in order to fulfil their obligation.

Under IHL, specific treaty obligations requiring states to prosecute or extradite violators for prescribed crimes committed anywhere exist only for the grave breaches listed in the four Geneva Conventions²⁴ of 1949 and Additional Protocol I²⁵ of 1977. This obligation for states to prosecute or extradite on the basis of universal jurisdiction is clearly stated in these treaties. Various other “IHL treaties”²⁶ likewise oblige a state party to prosecute or extradite for actions prescribed in them, despite the fact that, generally speaking, explicit treaty obligations to that effect are rare.

Under customary international law, war crimes encompass serious violations committed in international armed conflicts in addition to those listed as grave breaches of the four Geneva Conventions and Additional Protocol I.²⁷ Today war crimes also encompass serious violations occurring in non-international armed conflict²⁸, including serious violations of Article 3 common to the four Geneva Conventions.²⁹ The extension of war crimes to cover acts in non-international armed conflicts is of great significance, as nowadays most conflicts are internal, and transitional governments or transitional democracies, if associated with armed conflict at all, were usually brought about by non-international armed conflict.

According to customary international law, states are required to investigate war crimes allegedly committed, whether in international or non-international armed conflict, by their nationals or armed forces or on their territory and, if appropriate, to prosecute the suspects. States must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.³⁰ This is so despite the existence of some contrary practises, such as the granting of amnesties for violations committed in non-international armed conflicts.³¹

and 146(3) respectively of the four Geneva Conventions. Article 85(1) of Additional Protocol I stipulates that the provisions of the Conventions relating to the repression of breaches and grave breaches shall apply also to the repression of breaches and grave breaches of the Protocol.

24 The grave breaches specified in Arts. 50, 51, 130 and 147 respectively of the four Geneva Conventions when committed during international armed conflict against persons and property protected by the four Geneva Conventions are war crimes.

25 The grave breaches of Additional Protocol I are defined in Articles 11(4), 85(3) and 85(4) and constitute war crimes.

26 The 1954 Hague Convention for the Protection of Cultural Property; the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property; the 1972 Biological Weapons Convention; the 1976 Environmental Modification Techniques Convention; the Amended Protocol II to the 1980 Conventional Weapons Convention; the 1993 Chemical Weapons Convention; the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

27 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Law*, Vol. I, Cambridge University Press, Cambridge, pp. 574–590.

28 *Ibid.*, pp. 590–603.

29 *Ibid.*, p. 590.

30 *Ibid.*, p. 607.

31 See section entitled Amnesties — their (il)legality; *Ibid.*, pp. 609–610.

Therefore, the legal framework binding states with regard to all war crimes, whether established through treaty or custom, requires states to “exercise criminal jurisdiction which their national legislation confers on their courts, be it limited to territorial and personal jurisdiction, or include universal jurisdiction, which is obligatory for grave breaches.”³² How these legal boundaries impact on the permissibility of grants of amnesty is discussed after the following section.

Obligations under international law regarding penal repression of violations of human rights law

As with IHL, certain international human rights treaties oblige a state party to prosecute or extradite persons accused of acts prescribed in the treaty. Their diversity demonstrates the varying forms in which universal jurisdiction is exercised.³³

Apart from those treaties, most international human rights treaties remain vague in terms of a specific obligation to prosecute violators. International human rights treaties generally require that the state party offer a remedy, in both civil and criminal law, to victims of human rights violations. For example, the International Covenant on Civil and Political Rights contains a less precise obligation than *aut dedere aut judicare*, namely to “respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized [therein]” and to provide “an effective remedy” to them.³⁴ The European and American Conventions contain similar language.³⁵ What constitutes an effective or adequate remedy has been subject to interpretation by human rights courts and commissions and, despite the absence of a “black-letter” obligation to prosecute, these bodies have proclaimed such a principle.³⁶ The Inter-American Court of

32 Ibid., p. 607.

33 The 1930 Convention concerning Forced Labour and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide require states parties to punish individuals for crimes committed on *their* territory. The 1999 International Convention for the Suppression of the Financing of Terrorism requires states parties to punish or extradite individuals for crimes committed on *their* territory or by their nationals. The 1979 International Convention against the Taking of Hostages, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1994 Inter-American Convention on the Forced Disappearance of Persons require states parties to extradite or prosecute offenders for crimes committed *anywhere*. The 1956 Slavery Convention and the 1973 Convention on the Suppression and Punishment of the Crime of *Apartheid* appear the strongest, in that they require state parties *to prosecute*, without the choice of extraditing, for crimes committed anywhere. The 1998 Rome Statute of the International Criminal Court establishes jurisdiction over genocide, war crimes and crimes against humanity, including the crime of apartheid, thereby inferring a duty to prosecute these crimes on the part of states parties who wish to take advantage of the complementary regime; its preamble recalls “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

34 International Covenant on Civil and Political Rights, 19 December 1966, Art. 2, paras. 1 and 3(a).

35 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Arts. 1, 5(5) and 13; American Convention on Human Rights, 22 November 1969, Arts. 1(1), 10 and 25.

36 Ratner, above note 21, p. 720. See Naomi Roht-Arriaza, “Sources in international treaties of an obligation to investigate, prosecute, and provide redress”, in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford University Press, New York, 1995, pp. 24, 28–32.

Human Rights assumed a duty to prosecute deriving from Article 1 of the American Convention on Human Rights.³⁷ The European Court held in *Aksoy v. Turkey* that “the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complaint to investigatory procedure.”³⁸ The UN Committee on Human Rights found a similar duty based on Article 6 of the International Covenant on Civil and Political Rights.³⁹

Louis Joinet as Special Rapporteur for the Commission on Human Rights wrote in his report on the “Question of impunity of perpetrators of human rights violations” that impunity is unacceptable not only because it clashes with the sense of justice but also because it runs contrary to respect for the victim’s most fundamental rights.⁴⁰

“Impunity arises from a failure of States to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations. Although the decision to prosecute lies primarily within the competence of the state, supplementary procedural rules should be introduced to enable victims to institute proceedings ... where the authorities fail to do so, particularly as civil plaintiffs.”⁴¹

He formulated a “right to know,” a “right to justice,” and a “right to reparations” for victims and interpreted these rights as requiring states to adopt a

37 The Inter-American Court of Human Rights interpreted Article 1(1) of the American Convention as imposing on each state party a “legal duty to take reasonable steps to prevent human rights violations and to use the means at 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.” *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Ser. C, No. 4, para. 174. Even so, “the Inter-American Court did not specifically mention prosecution as the exclusive method of punishment and might have left open the door to administrative punishment alone. Subsequent opinions of the Inter-American Commission have, however, pronounced general amnesties incompatible with the American Convention and emphasized prosecutions.” Ratner, above note 21, pp. 721–722 (footnotes omitted). *Velasquez-Rodriguez Case*, Inter-American Court of Human Rights, Judgment of 1988, Series C, No. 4, para. 174, cited in Ratner, *ibid.*, p. 721.

38 Judgment of 18 December 1996, Reports 1996-VI, par. 98.

39 *Ana Rosario Celis Laureano v. Peru*, UN Doc. CCPR/C/56/D/540/1993.

40 “Question of the impunity of perpetrators of human rights violations (civil and political)”, revised final report prepared by Mr. Joinet pursuant to subcommission decision 1996/119, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 49th Session (Joinet Report), U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1. In 2004, the UN Commission on Human Rights appointed Professor Diane Orentlicher as an independent expert to update the Joinet Principles on combating impunity; the Commission on Human Rights “took note with appreciation ... the updated Set of Principles for the protection and promotion of human rights through action to combat impunity [hereinafter Updated Principles] (E/CN.4/2005/102/Add.1) as a guideline to assist States in developing effective measures for combating impunity.” Human Rights Resolution 2005/81, Impunity, E/CN.4/RES/2005/81, para. 20.

41 *Ibid.*, p. 22, Principle 18.

variety of measures in order to expose the truth, combat impunity and guarantee non-recurrence of violations.⁴² The “right to know” is not only a fundamental right for individual victims but is equally a collective right, which “draws upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember”, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism...; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved.”⁴³ The “right to justice” entails each victim’s right to a fair and effective remedy. From this individual right, one could conclude that “[m]ajorities in society do not have a right to tell the victims that their cases will be forgotten for the sake of a higher “good”.”⁴⁴ Finally, the “right to reparations” includes individual (e.g., restitution, compensation and rehabilitation) as well as collective measures (e.g., formal recognition by the state of its responsibility or commemorative ceremonies).⁴⁵

Amnesties — their (il)legality

The term amnesty usually refers to an official act, usually through law, prospectively barring criminal prosecutions of a class of persons for a particular set of actions or events. Amnesty is often contrasted with pardons, which usually refer to the exemption of criminals from serving all or part of their sentences but do not expunge the conviction.⁴⁶ Amnesties can be blanket or partial; they may be official, with, for example, the passing of a law, or *de facto*, where a state simply does not prosecute. Those amnesties found to be illegal by treaty-monitoring bodies have all been blanket amnesties.⁴⁷ Thus, they are currently more liable to be prohibited than partial amnesties. Among types of amnesties, self-amnesties, those passed by the former regime hoping that the future regime will not examine them,⁴⁸ must be regarded with great suspicion⁴⁹ as they deny the right of the new

42 Ibid., paras. 16–30.

43 Joinet Report, above note 40, para. 17.

44 Méndez, above note 8, p. 277.

45 Joinet Report, above note 40, paras. 40–42.

46 Amnesties shield from prosecution and are not pardons. These distinctions are inexact; pardons, like amnesties, can be used to foreclose prosecutions, and amnesties sometimes cover persons serving prison terms. See A. Damico, *Democracy and the Case for Amnesty*, University Press of Florida, 1975. The word “amnesty,” like “amnesia,” derives from the Greek “*amnestia*,” which means “forgetfulness” or “oblivion”; an amnesty constitutes a declaration that the government intends to obliterate (and not merely forgive) a crime. See K. Moore, *Pardons: Justice, Mercy and the Public Interest*, 4–5, 1989. Black’s Law Dictionary defines amnesty as “the abolition and forgetfulness of the offense,” while pardon is “forgiveness”.

47 As of yet no case of partial amnesty for serious human rights violations has been brought before such a monitoring body. Ratner, above note 21, p. 744.

48 For examples, see *ibid.*, p. 736, n.147.

49 Amnesties adopted by new regimes after deliberation have the same end result for the victims and perpetrators but are not held in such abomination as self-amnesties. The fact that self-amnesties are considered particularly atrocious is a further indication of an accepted legal duty not to ratify self-amnesties. *Ibid.*, p. 744. See also Robert O. Weiner, “Trying to make ends meet: Reconciling the law and practice of human rights amnesties”, *St. Mary’s Law Journal*, No. 26, 1995, pp. 857, 859 (describing this as “an exercise in power, not legitimacy”).

government to choose its own path toward accountability (and also democracy). Moreover, self-amnesties also violate the general principal of law prohibiting persons from being judges in their own cases: *nemo debet esse iudex in propria causa*.⁵⁰

Support for amnesties rests on a resistance to prosecution based upon the fear that prosecution would destabilize the new government or simply prolong the vengefulness exhibited by the former regime. Some also believe that for the sake of moving forward those issues (i.e., violations of the law) should be left in the past, because it is best not to “provoke the dragon on the patio.” In stark contrast, others contend that neither a society nor a country can move forward and heal through impunity; thus, crimes must be prosecuted. These two viewpoints, nevertheless, do appear to coincide on the issue of serious violations of international law:⁵¹ these crimes must always be prosecuted, and a failure to prosecute them perpetuates a culture of impunity. International human rights literature widely considers criminal punishment as necessary to act as a deterrent and to reinforce the rule of law. Yet some advocates of prosecution would concede that amnesty should not be ruled out completely as a means to promote reconciliation, as long as the amnesty law does not include crimes requiring punishment under international law.⁵² A state can not extinguish its international obligations by enacting inconsistent domestic law.

The main arguments for granting official amnesties or simply not prosecuting (*de facto* amnesty) — namely that without amnesty hostilities in a conflict would not come to an end and/or trials would be politically charged, thus destabilizing the fragile new government⁵³ — make peace or reconciliation contingent upon impunity through amnesty. Any claim that prosecutions are impossible should be closely examined to see that it is not being overstated. The argument that amnesty laws are necessary for reconciliation or for mending social divisions may falsely assume that there are no other means to do so.⁵⁴ “A critical distinction to be drawn here is between military insubordination and a challenge that poses a genuine and serious threat to national life.”⁵⁵ Proposals have been made that amnesties should be granted in exchange for information (e.g., on the

50 Ratner, above note 21, p. 744.

51 “While generally in favor of tolerance in the handling of past abuses, most participants in the debate agree that two exceptions must be made. The first is that self-amnesties are illegitimate. Second, states have the duty to prosecute violations of international law relating to human rights. Such crimes, it is argued, cannot be unilaterally forgiven. ... The idea that crimes against humanity must always be prosecuted is also behind the trial of Paul Touvier, a French collaborator who in 1994 was brought before a criminal court, 50 years after the end of the war.” See *Le Monde* (Special Issue), 17 March 1994; Huysse, above note 16, p. 337, n. 27.

52 Orentlicher, above note 18, p. 2550 and n. 46.

53 *Ibid.*, p. 2444. Particularly in countries where the military may still retain substantial power, prosecuting some of the military’s members may threaten to weaken the civilian government.

54 *Ibid.*, p. 2550. See John Dugard, “Is the truth and reconciliation process compatible with international law? An unanswered question”, *South African Journal on Human Rights*, No. 13. 1997, pp. 258, 267; Carla Edelenbos, “Human rights violations: A duty to prosecute?”, *Leiden Journal of International Law*, No. 7, 1994, pp. 5, 20.

55 Orentlicher, *ibid.*, p. 2548. Méndez, above note 8, p. 257.

fate of missing persons). Prosecutions, and particularly international tribunals, have been criticized as hindering information-gathering, as those with the information do not come forward for fear of prosecution.

It should not be overlooked that the legal obligation to prosecute certain crimes may be of value during negotiations, as by generally requiring prosecutions international law helps assure that governments do not forego trials simply because it is politically expedient to do so.⁵⁶ International law, by requiring punishment of atrocious crimes and, more to the point, international pressure for compliance, can provide a counterweight to pressure from groups seeking impunity. Would those same groups mount such strong opposition to prosecution if the issue was understood to be non-negotiable?⁵⁷ Also, when the law requires prosecution, such cases will not be so easily perceived as “revenge prosecutions,” nor will justice be perceived as vengeance;⁵⁸ the issue, therefore, will not present itself as revenge *versus* reconciliation. Regardless of this impact, the legal obligation *aut dedere aut judicare* applies to certain crimes, thus granting amnesties for them directly violates the rule of law and in effect advocates impunity. Any such decision, therefore, must seriously consider whether an amnesty is truly best for national reconciliation and the peaceful development of a country.

The (il)legality of amnesty for international humanitarian law violations

As shown above, states are under a legal obligation to suppress general violations of IHL, but they are under no obligation to prosecute such violations. Only the grave breaches provisions require repression, and this requirement has been extended through customary law to include other war crimes. This section will consequently focus on war crimes.

Several states have granted amnesties for war crimes, but these often have been found unlawful by their courts or criticized by the international community.⁵⁹ In Sierra Leone, for example, the United Nations never recognized the amnesty granted in the Lomé Accords of July 1999 to the belligerents with regard to crimes against humanity, war crimes and other serious violations of international humanitarian law.⁶⁰ The crimes referred to in the Statute of the Special Court for Sierra Leone make clear that the amnesty accord does not bar the court from having jurisdiction over persons within its competence concerning the above-mentioned crimes.⁶¹

56 Angleika Schlunck, *Amnesty versus accountability: third party intervention dealing with gross human rights violations in internal and international armed conflicts*, Berlin Verlag, Berlin, 2000, p. 13.

57 Orentlicher, above note 18, n. 39.

58 *Ibid.*, p. 2549.

59 Henckaerts, above note 27, pp. 609–610.

60 Antoine J. Bullier, “Souveraineté des Etats africains et justice pénale internationale: une remise en cause?”, *Afrique contemporaine*, No. 198, 2eme trimestre 2001, p. 82.

61 Statute of the Special Court for Sierra Leone, Arts. 2–4. See also Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, preamble, para. 2 (“WHEREAS ... the Security Council requested the Secretary-General to

IHL does support grants of amnesty for certain actions. Article 6(5) of Additional Protocol II calls for the “broadest possible amnesty” to be granted after a non-international armed conflict.⁶² Unfortunately, owing to a mistaken interpretation of this article, it has been used to justify amnesties for violations committed during wars in, for example, Latin America.⁶³ In reality, the article merely encourages the granting of an amnesty for taking part in hostilities, which otherwise is subject to prosecution as a violation of domestic criminal law.⁶⁴ Although IHL understands that granting certain amnesties may help to bring about peace or circumstances conducive to peace, customary international law confirms that amnesty should be given to those persons *not* suspected of having committed war crimes,⁶⁵ and most amnesties do exclude persons suspected thereof.⁶⁶

The (il)legality of amnesty for violations of international human rights law

A prohibition on amnesties is not limited to war crimes. A duty to prosecute exists also for other international crimes considered just as atrocious, including gross human rights violations. The UN Human Rights Committee has condemned amnesties. Originally the committee concerned itself solely with the right not to be subjected to torture: “[a]mnesties are generally incompatible with the duty of States to investigate such acts.”⁶⁷ Since then it has extended its concern to blanket amnesties: “amnesty prevents appropriate investigation and punishment of perpetrators of past human rights violations, undermines efforts to establish respect for human rights, contributes to an atmosphere of impunity among perpetrators of human rights violations.”⁶⁸ However, “the Committee has not

negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law” (emphasis added)).

62 “The “trauvaux préparatoires” of Art. 6(5) [of Additional Protocol II] indicate that this provision aims at encouraging amnesty (i.e., a sort of release at the end of hostilities). It does not aim at an amnesty for those having violated international humanitarian law. ... Anyway, States did not accept any rule in Protocol II obliging them to criminalize its violations. In the debate at the Diplomatic Conference elaborating Protocol II, the representative of the Union of Soviet Socialist Republic stated on Art. 10 of Draft Protocol II (which has later become Art. 6 of Protocol II) that his delegation “was convinced that the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever.”” *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva (1974 – 1977)*, Berne, 1978, Vol. IX, p. 319.

63 See, e.g., Decision of the Supreme Court of Justice of El Salvador on the Amnesty Law, Proceedings No. 10-93, 20 May 1993, and Douglas Cassel, “Lessons from the Americas: Guidelines for international response to amnesties for atrocities”, *Law and Contemporary Problems: Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, Vol. 59, Autumn 1996, pp. 197, 218 and n.127.

64 Cassel, *ibid.*, p. 218.

65 Henckaerts, above note 27, pp. 611–614.

66 *Ibid.*, pp. 612–613.

67 General Comment 20(44), Art. 7, para. 15, “Report of the Human Rights Committee”, U.N. GAOR, 47th Session, Supplement No. 40, Annex VI, pp. 193, 195, U.N. Doc. A/47/49 (1992). All cited in Ratner, above note 21, p. 721, n. 62.

68 Human Rights Committee, “Preliminary observations on Peru”, para. 9, U.N. Doc. CCPR/C/79/Add.67 (1996). See also Human Rights Committee, “Comments on Argentina”, paras. 153, 158, in “Report of

recommended that states with amnesty laws replace them with prosecutions (perhaps due to concerns about retroactive application of the law), but has instead requested investigations, compensation for victims, and removal of offenders from office.⁶⁹ The UN High Commissioner for Human Rights, the UN Commission on Human Rights⁷⁰ and the Sub-Commission on the Promotion and Protection of Human Rights have stressed the importance of fighting impunity and therefore the need to exclude international crimes from amnesties.⁷¹

Joinet, in his report on the “Question of the impunity of perpetrators of human rights violations,” describes restrictions to certain rules of law designed to combat impunity.⁷² These include restrictions relating to amnesty:

“Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

(a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations referred to in principle 18 [“Duties of States with regard to the Administration of Justice”];

(b) They shall be without effect with respect to the victims’ right to reparation...⁷³

The Inter-American Commission appears to leave little doubt that it considers amnesties for serious violations of human rights to violate multiple provisions of the Inter-American Convention: “It is now clear that nothing less than judicial investigations designed to identify perpetrators, name names, and punish the guilty will suffice.”⁷⁴ The Inter-American Commission recommended changing a self-amnesty law “with a view to identifying the guilty parties, establishing their responsibilities and effectively prosecuting them.”⁷⁵ This is in contrast to earlier cases in which the Commission recommended “just compensation” and “measures necessary to clarify the facts and identify those responsible”.⁷⁶ Despite these steps, the commission never referred any of the cases to the Inter-American Court for a binding decision.

the Human Rights Committee”, U.N. GAOR, 50th Sess., Supplement No. 40, pp. 31, 32, U.N. Doc. A/50/40 (1995); Human Rights Committee, *Hugo Rodriguez v. Uruguay*, Comm. No. 322/1988, U.N. Doc. CCPR/C/51/D/322/1988 (1994). All cited in Ratner, above note 21, n. 63.

69 Ratner, *ibid.*, citing Human Rights Committee, “Preliminary observations on Peru”, para. 20; “Comments on Argentina”, para. 158.

70 See, in particular, the resolution entitled “Impunity” adopted by the Commission on Human Rights in numerous sessions; the latest resolution, E/CN.4/RES/2005/81, was adopted in 2005.

71 See, e.g., Henckaerts, above note 27, Vol. II, Part 2, pp. 4035–4038.

72 Joinet Report, above note 40, Principles 23–32, pp. 24–26. These principles have been updated, see Updated Principles, above note 40, Principles 22–30, pp. 13–16.

73 Principle 25, *ibid.*, p. 24. See also Updated Principles, above note 40, Principle 24, p. 14.

74 Cassel, above note 63, p. 217.

75 Report No. 36/96 (Chile), 15 October 1996, para. 111, 1996. *Annual Report*, Inter-American Commission on Human Rights, 1997, pp. 156, 183.

76 Report No. 29/92 (Uruguay), 2 October 1992, para. 54, 1992–1993, *Annual Report*, Inter-American Commission on Human Rights, 1993, pp. 154, 165, recommending “just compensation” and “measures

Notwithstanding current rulings and opinions advocating a broad duty of criminal liability, in the last decades the following states, during transitions, chose to pass broad amnesty laws — or honour amnesties of prior regimes — for various government atrocities: Argentina,⁷⁷ Uruguay,⁷⁸ Chile,⁷⁹ Brazil,⁸⁰ Peru,⁸¹ Guatemala,⁸² El Salvador,⁸³ Honduras,⁸⁴ Nicaragua,⁸⁵ Haiti,⁸⁶ Ivory Coast,⁸⁷ Angola⁸⁸ and Togo.⁸⁹ In addition, South Africa's Constitutional Court held in *AZAPO v. South Africa* that the country's truth and reconciliation process, including its amnesty procedure, is not incompatible with international law.⁹⁰ In 2005, Colombia adopted a partial amnesty law and, more recently, Algeria passed an amnesty law.⁹¹

“I stress that certain gross violations of human rights and international humanitarian law should not be subject to amnesties. When the United Nations faced the question of signing the Sierra Leone Peace Agreement to end atrocities in that country, the UN specified that the amnesty and pardon provisions in Article IX of the agreement would not apply to international

necessary to clarify the facts and identify those responsible” but not prosecutions. see also Cassel, above note 63, pp. 208–19; Weiner, above note 49, pp. 862–64.

77 Law No. 23492, 23 December 1986, reprinted in Kritz, above note 1, Vol. 3, p. 505.

78 Law No. 15848, 22 December 1986, *ibid.*, p. 598.

79 Decreto Ley No. 2.191, 18 April 1978.

80 Lei No. 6.683, 28 August 1979, Art. 1.

81 Ley No. 26479, 14 June 1995, available at <http://www2.congreso.gob.pe/ccd/leyes/cronos/1995/ley26479.htm>.

82 Ley de Reconciliación Nacional, Decreto No. 145-96, 18 December 1996.

83 Decree No. 486, 20 March 1993, reprinted in Kritz, above note 1, p. 546.

84 Decreto No. 87-91, 23 July 1991, *ibid.*, p. 546.

85 Law No. 81 on General Amnesty and National Reconciliation, 9 May 1990, *ibid.*, p. 591.

86 Loi relative à L'Amnistie, published in *Le Moniteur*, Official Gazette of the Republic of Haiti, 10 October 1994 (Haiti), reprinted and transl. in Michael P. Scharf, “Swapping amnesties for peace: Was there a duty to prosecute international crimes in Haiti?”, *Texas International Law Journal*, No. 31, 1996, pp. 15–16.

87 “Ivory Coast parliament passes amnesty law”, Reuters Library Rep., 29 July 1992, available in LEXIS, World Library, BBCSWB File.

88 “Angola: national assembly approves amnesty law”, BBC Summary of World Broadcasts (Televisao Popular de Angola), 9 May 1996, available in LEXIS, World Library, BBCSWB File.

89 Tchidah Banawe, Togo-Politics: Trying to heal the wounds, Inter Press Service, 2 March 1995, available in LEXIS, News Library, INPRES File.

90 Menno T. Kamminga, “Lessons learned from the exercise of universal jurisdiction in respect of gross human rights offenses”, *Human Rights Quarterly*, No. 23, 2001, pp. 940, 957. Dugard has criticized the judgment for paying insufficient attention to international law considerations. But he accepts that “state practice is too unsettled to support a rule obliging states to prosecute those alleged to have committed crimes against humanity under all circumstances and that the present state of international law does not bar the granting of amnesty in circumstances of the kind prevailing in South Africa.” Dugard, above note 54, p. 267. See also John Dugard, “Dealing with crimes of the past: Is amnesty still an option?”, *Leiden Journal of International Law*, No. 12, 1999, pp. 1001–15.

91 On 20 June 2005, the Senate approved the “Justice and Peace” law, which President Alvaro Uribe Velez signed on 22 June 2005. This law grants the paramilitaries political status, allowing them to potentially benefit from pardons; under the demobilization program, paramilitary commanders are supposed to confess all their crimes in order to benefit from reduced sentences of 4–8 years in prison. On 27 February 2006, Algeria's full cabinet, with President Abdelaziz Bouteflika presiding, approved the “Decree Implementing the Charter for Peace and National Reconciliation,” bypassing a debate in parliament, which was not in session.

crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. We must be cautious not to send the wrong message regarding amnesties for serious violations of human rights and international humanitarian law, and I believe that the Princeton Principles correctly express the position that certain crimes are too heinous to go unpunished.⁹²

Deciding between penal repression and amnesty

If a state's decision-makers choose to deal with alleged perpetrators of war crimes or gross violations of human rights by enacting an amnesty law, they must be fully aware that failure to prosecute or extradite would be a violation of the state's international legal obligations. The state must also be aware that those granted amnesty would not be immune from prosecution outside that state.⁹³ When making this choice, the state must consider whether the objective it attempts to achieve by granting amnesty is not ultimately undermined by acting contrary to the rule of law. But what if the decision-makers accurately and justly conclude that the purpose of the law requiring the prosecution of war criminals is not fulfilled by the actual prosecution and that, under those circumstances, it is necessary, in fact, to disregard that law in order to fulfil its original purpose? Again, this remains an extreme position, teetering on the brink of a very slippery slope.

Could decision-makers instead choose a form of amnesty that does not so directly affront the rule of law as blanket amnesty, such as partial amnesty? If so, which criteria should be used to evaluate to whom and for which crimes amnesties will be granted? The need for a competent functioning body to justly apply those criteria must also be borne in mind. Is not the disquiet caused by grants of amnesty perhaps lessened by the knowledge that the alleged violators are not free from prosecution outside the state (at least for war crimes or other crimes for which states have established universal jurisdiction)? Or could it perhaps be agreed

92 Mary Robinson, UN High Commissioner for Human Rights, Foreword, *The Princeton Principles on Universal Jurisdiction*, Princeton Project on Universal Jurisdiction, Stephen Macedo (Project Chair and Editor), Princeton University, Princeton, New Jersey, pp. 17–18. Principle 7 of the Princeton Principles on Universal Jurisdiction: "Amnesties": "1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle 2(1). 2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state."

93 It would not be contrary to Article 14(7) of the International Covenant on Civil and Political Rights to bring a defendant who has benefited from an amnesty in the territorial state to justice in another state on the basis of universal jurisdiction. Procedures for awarding amnesties do not amount to "acquittal" within the meaning of Article 14(7). The prohibition against *ne bis in idem* contained in that provision therefore does not apply. Even if it were assumed that the procedures of some truth and reconciliation commissions are sufficiently judicial in character to meet this standard, the Human Rights Committee has held that Article 14(7) does not prohibit trial for the same offence in another state. *A.P. v. Italy*, Comm. No. 204/1986, 2 November 1987, U.N. Doc. A/43/40, at 242. Kamma, above note 90, pp. 940, 958 and n. 81.

that if a state will not prosecute, at least it will not grant a formal amnesty? However, *de facto* amnesties are no less illegal, and they also promote impunity. Could they nevertheless be considered a preferred compromise in that they do not so blatantly and flagrantly demonstrate acceptance of impunity as does a formal grant of amnesty? In addition, it must be recalled that states must not aid or assist in violations of international law and must exert their influence to bring violations to an end.⁹⁴ An amnesty law may be construed as condoning the international crime, whereas merely not prosecuting might be interpreted differently.

If in view of the desired objectives (i.e., national reconciliation and the peaceful development of a country) it is concluded that the rule of law must stand and no amnesties for war crimes or gross violations of human rights are ever permissible, do other options remain? Could a state invoke a derogation or *force majeure*, on grounds, for instance, of the lack of an operative judicial system and/or an overwhelming number of accused awaiting prosecution?⁹⁵ Or could a state apply a statute of limitations? With regard to war crimes, such a limitation on the prosecution of grave breaches of the four Geneva Conventions or Additional Protocol I could violate the obligation to prosecute or extradite and would be contrary to the duty to investigate and try other war crimes over which a state exercises normal jurisdiction or is required to pursue under other treaties.⁹⁶ At least a statute of limitations does not state that the act was not illegal but simply makes prosecution no longer possible. Nevertheless, the end result is the same: no accountability.

Should a state seek to grant pardons in lieu of amnesties? Pardons generally happen less frequently than amnesties. The party negotiating for the amnesty may not find a pardon satisfactory for the same reason that a pardon may be more acceptable than an amnesty: in contrast to an amnesty, where there is no judicial finding, a pardon is when the government abrogates the punishment after conviction for an offence. At least a pardon leaves the judgment of guilt intact — but still contradicts the rule of law; unless a criminal conviction itself is a satisfactory punishment. But would a criminal conviction alone satisfy the

94 Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10 (A/56/10), Chap. V, Art. 16. See also Henckaerts, above note 27, p. 509–513.

95 The term “*force majeure*” is defined as “an occurrence of an irresistible force or of an unseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.” Responsibility of States for Internationally Wrongful Acts, *ibid.*, Art. 16. Could the situation faced by Rwanda be an example of *force majeure*, owing to the overwhelming number of persons awaiting prosecution? Even with a political will to prosecute, common problems prevent or seriously hinder trials, particularly after periods of armed conflict or other situations of violence: a barely functioning judicial system whether due to lack of human resources (including expertise) or financial resources; police and prosecutors without the requisite skills to investigate and present a strong case, or worse, corrupt or compromised officials; a lack of concrete evidence; the practical or logistical impossibility to prosecute large numbers of accused; absence of the necessary national legislation (implementing international treaty obligations).

96 GA Resolution 95(I) of 11 December 1946 affirming the Nuremberg principles. 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes. See Henckaerts, above note 27, pp. 614–618.

requirements of accountability, acknowledgement and truth referred to by Joinet? Anyway, the punishment for war criminals is left to the discretion of national governments, and the legal obligation specifies only that they must prosecute or extradite. The option of pardon again raises the same questions: what purpose does prosecution or punishment serve? What role does penal repression (i.e., criminal prosecution) play with regard to justice, peace and reconciliation?

So why prosecute? One reason is deterrence.⁹⁷ Although the extent to which punishment is preventative may not be absolutely clear, it is clear that impunity, including exemption from punishment through grants of amnesty, makes it more likely that further crimes will be committed. Prosecution is also considered as one of the most effective means of separating collective guilt from individual guilt and thus removing the stigma of historic misdeeds from the innocent members of communities that may otherwise be collectively blamed for the atrocities committed on other communities.⁹⁸ Prosecution followed by punishment is also undertaken for the rehabilitation of the offender. Are criminals prosecuted as a form of retribution? Those opposing prosecution often contend that prosecution is only vengeful and vindictive, continuing a cycle of hatred.⁹⁹ Or is society simply saying through prosecution that it does not permit the breaking of rules, especially the rules that protect the innocent and defenceless?¹⁰⁰ By prosecution society also demonstrates the importance it assigns to the norms that prohibit torture, rape and murder. However, the “right to justice,”¹⁰¹ which advocates prosecution, does not mean to prosecute for prosecution’s sake. The judicial guarantees must be in place to ensure fair prosecution.¹⁰²

It must be recognized that even an ideally functioning judicial system is limited in the role it can play in reconciliation and a successful transition to peace or away from a repressive regime. Prosecution handles individual accountability well,¹⁰³ but it does not address institutional accountability (i.e., the recognition

97 “The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression. By laying bare the truth about violations of the past and condemning them, prosecutions can deter potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence.” Orentlicher, above note 18, p. 2542.

98 Méndez, above note 8, p. 277.

99 “Forgiveness is not opposed to justice, especially if it is not punitive justice but restorative justice, justice that does not seek primarily to punish the perpetrator, to hit out, but looks to heal a breach, to restore a social equilibrium that the atrocity or misdeed has disturbed.” *Are We Ready to Forgive?* Desmond M. Tutu interviewed by Anne A. Simpkinson, 2001, available at http://www.beliefnet.com/story/88/story_8880_1.html#cont.

100 Méndez, above note 8, p. 276. Méndez, above note 17, p. 31.

101 As formulated by L. Joinet, see, above note 40 and accompanying text.

102 “[T]o insist on prosecutions in the presence of an important legal obstacle like a pre-existing amnesty law that has firm legal effects would be irresponsible, because it would subvert the ... rule of law ... and because it would violate the cardinal principle of *nulla poena sine lege* ... Advocating amnesties and pardons to be enacted by democratic authorities is quite a different matter.” Méndez, above note 8, p. 273.

103 The law does a number of things well, such as providing redress, accountability, legal justice and official acknowledgment. “The specific role of the law needs to be clear, so that legal mechanisms will not end up doing a number of things badly.” Naomi Roht-Arriaza, “Combating impunity: Some thoughts on the way forward”, *Law and Contemporary Problems: Accountability for International Crimes and Serious Violations of Fundamental Human Rights*, Vol. 59, Autumn 1996, pp. 103, 125.

that certain institutions and perhaps even the judiciary played a part in the violations), nor does it make proposals for the reform of those institutions. A criminal trial seeks to determine an individual's guilt for or innocence of a certain crime by satisfying a standard of proof; this is not necessarily the same objective as exposing the truth. Of course, truth does emerge during criminal trials,¹⁰⁴ but a court's necessary compliance with rules of evidence often limits the facts — the truth — exposed.¹⁰⁵ A trial is designed neither to research the history of the political and economic structure of a system that permitted the armed conflict or repressive regime to take hold, nor to assess the societal impact of violence committed by the regime or parties to the conflict.¹⁰⁶ Both processes, however, are necessary for institutional reform and to create a collective memory¹⁰⁷ of the past contributing to reconciliation. At such time, prosecution is best complemented by other mechanisms and embedded in a long-term conflict management concept that addresses all aspects of reconciliation of the post-conflict society.¹⁰⁸

When faced with the impossibility to prosecute a large number of people, should no prosecution then take place instead of prosecuting only some? If it is decided to prosecute only some, which ones should be prosecuted? Only those who ordered the violations (the “big fish”), but not the subordinates who carried out the acts? Is the solution found by the Special Court for Sierra Leone to prosecute those bearing the greatest responsibility perhaps not the best one? It is argued that justice is not served by only prosecuting some and that doing so carries the risk of arbitrariness and threatens equality before the law. Yet in most domestic legal systems not all of the accused are ultimately prosecuted. Prosecutorial discretion allows prosecutors to base their decisions to file charges not only upon the law and the evidence but also on public policy. No one seems to equate this with justice not being done. Trials for past abusers can be limited to the most atrocious crimes.¹⁰⁹

“To the extent that the purpose of prosecutions is to vindicate the authority of the law and deter repetition of recent crimes, it is not necessary [to] prosecute all who participate in a previous system of violations. These and other objectives ... can be accomplished with exemplary trials, provided the criteria used to select the defendants do not vitiate the justifying aims of prosecutions by, for example, cynically targeting scapegoats.”¹¹⁰

104 In Argentina, for example, trials during the mid-1980s of former *junta* members received extensive media coverage, providing testimony from hundreds of victims and witnesses; Hayner, above note 5, p. 100.

105 *Ibid.*, p. 100.

106 The International Criminal Tribunal for the former Yugoslavia (ICTY) may contradict this assessment of prosecution. In Bosnia, the truth commission's mandate remains very limited so as not to interfere with the work of the ICTY. Consequently, no such truth commission could supply the amount of evidence as published in the ICTY's lengthy judgments.

107 Wilson, above note 3, p. 121.

108 Schlunck, above note 56, p. 64.

109 Orentlicher, above note 18, pp. 2542–43.

110 *Ibid.*, p. 2598 (footnotes omitted).

One example of such a selection process can be found in Rwanda. In order to determine which cases to try and where to try each case, either in a Rwandan national court or at the International Criminal Tribunal for Rwanda (ICTR), distinctions between suspects are based on the degree of gravity of their crime. In Rwanda, approximately 120,000 individuals were detained in connection with the 1994 genocide, and it has been estimated that Rwandan national courts and the ICTR would need at least 100 years to try them all.¹¹¹ In order to alleviate the situation, the Rwandan government set up the *gacaca*, an alternative system of transitional justice using participatory and proximity justice whereby individuals from the communities act as “people’s judges”. The *gacaca* sticks to the categorization of the accused according to the degree of gravity of their crime.

If a choice is possible between national and international prosecution, national prosecutions should prevail. Besides conserving the principle of the primacy of national jurisdiction, they are generally considered more beneficial to reconciliation because the state, not an outside entity such as an international tribunal, assumes responsibility and clarifies the facts. An external mechanism can be perceived as taking the problem off the government’s hands, thus creating no incentive for the government either to assume responsibility for past crimes or to concentrate on creating or reforming the necessary internal mechanisms. The conclusions and recommendations of an external mechanism are more easily dismissed than those handed down by a national court or even a national truth commission. Of course, the national judiciary must be capable, and the process must provide all minimum judicial guarantees. It must also be respected and trusted or the public will not perceive justice as achieved. The perception of justice may, of course, only come with time once the public sees the mechanism in action and its results.

Perceived justice has a crucial impact on the extent to which the law or the judiciary can play a part in reconciliation. A judicial system may uphold all principles of the rule of law, but if such justice is perceived by society as, for example, simply victor’s justice, prosecutions can have a negative effect. The impact of justice perceived is an additional reason to “prosecute smartly”. If the judiciary took part or was seen as taking part in the victimization caused by the former repressive regime, it would need to be seriously and manifestly rehabilitated in the eyes of society before it could even be considered capable of carrying out justice, regardless of any formal reforms already introduced within it. Otherwise, doubts about the trials would arise for society. Are they sham trials? Or, to take the other extreme, are they only a demonstration of revenge and vindictiveness? The poor perception of the International Criminal Tribunal for the former Yugoslavia in Serbia is a striking example.

111 “Rwanda: Genocide survivors worried about people’s courts”, Agence France-Presse via NewsEDGE, 10 March 2001. Other estimates include 150 years: Abigail Zoppetti, “Crime de guerre. Au Rwanda, retour à la justice coutumière des ‘gacaca’”, *Le Temps*, 19 July 2001; and 200 years: Gabriel Gabiro and Julia Crawford, “Les Rwandais expriment des sentiments partagés sur les ‘gacaca’”, *Arusha International Criminal Tribunal for Rwanda News*, Agence de Presse Hirondelle, 4 May 2001.

Conclusion

The primary objective of this article was to identify questions relevant to matters of transitional justice, particularly the roles of penal repression and amnesty in the attainment of national reconciliation or the peaceful development of a country. Many of the questions posed have no single clear answer as the answers largely depend on the circumstances. Also, a grasp of a variety of disciplines (most beyond the expertise of this author) is required to reach conclusions with regard to many of them, including philosophy, sociology, psychology, political science and international relations, as well as law. Some of the topics of this article raise questions that may be identified as more philosophical than practical. What is our conception of justice? What purpose is justice intended to serve? Does our conception of justice actually serve this intended purpose? What purpose does a judicial system serve? And prosecution? To provide precise answers to these questions was outside the scope of this article. It must be recognized, however, that any practical decisions made and steps taken in matters of transitional justice, such as impunity, amnesty, repression and especially their connection to reconciliation, ultimately presuppose one's answers to them.

To answer even those questions raised here necessitates a broader understanding of matters of transitional justice. The relationship of amnesties and prosecution to other complementary mechanisms, particularly truth commissions, must be understood for a proper assessment to be made. Rarely can one mechanism meet all the needs for a successful transition after serious violations have taken place. "In the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience."¹¹²

Perhaps the so-called dilemma arising from the dual ambition to prosecute violators while also fostering national reconciliation is in fact a false dilemma, because if the cycle of impunity is never properly addressed, true reconciliation will never occur. While that one may prove to be false, dilemmas do clearly exist in responding to such matters, calling for the ability to maintain a judicious balancing act between competing important interests, including the most basic decision: whether or not to provoke the dragon on the patio.

112 Raoul Alfonsín, Argentina's first elected president after the collapse of the military regime, "“Never again” in Argentina", *Journal of Democracy*, No. 4, January 1993, pp. 15, 19, cited in Huyse, above note 16, pp. 337, 342. See generally, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 3 August 2004.