Hard Cases: A Little Justice, A Little Peace, and Some Dose of Impunity

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I. INTRODUCTION

> *No one is going to touch my people. The day they do, the state of law will come to an end.*
>
> — Augusto Pinochet[1]

When General Augusto Pinochet uttered the aforequoted words, he was not making an empty threat. He meant business. As he was handing power to the new civilian government of Patricio Aylwin Azócar, he still had the loyalty of the security apparatus and the courts of Chile.[2]

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This Article is based on the paper submitted in partial fulfilment of the requirements for LLAW 6152 (Dealing with Legacies of Human Rights Violations) of the Master of Laws in Human Rights Programme 2012–2013 at the University of Hong Kong.

Cite as 59 ATENEO L.J. 1 (2014).

1. GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 381 (2012) & Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2539 (1991) (citing AMERICAS WATCH, CHILE IN TRANSITION: HUMAN RIGHTS SINCE THE PLEBISCITE 1988–1989 73 (1989)).
2. Human Rights Watch, Human Rights Watch World Report 1990 — Chile, *available at* http://www.refworld.org/docid/467fca309.html (last accessed July 8, 2014).

States in transition from an authoritarian rule or situation of armed conflict often face this dilemma when the outgoing regime still retains considerable power. Successor governments have to decide whether to prosecute the agents of the past administration for human rights violations, pursue non-judicial transitional justice measures, or prioritize stability and democratic consolidation.

This Article will map out the debate on the propriety of granting immunity[3] from prosecution to perpetrators of human rights abuses as an acceptable transitional justice measure[4] for the attainment of peace in states emerging from a conflict situation.[5] It will primarily examine immunity through amnesty.[6]

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3. Immunity may be in several forms such as amnesty, certain types of pardon, laches, and statute of limitations. There is also democratic impunity in the case of Uruguay, and *de facto* impunity for failure to prosecute in the case of the Philippines and Haiti. *See also* Michael Freeman, Putting Law in Its Place: An Interdisciplinary Evaluation of National Amnesty Laws, (An Unpublished Working Paper Submitted to the University College London's School of Public Policy) 21, *available at* http://www.ucl.ac.uk/spp/publications/downloads/spp-wp-7.pdf (last accessed July 8, 2014) & Orentlicher, *supra* note 2, at 2548 (citing LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMPUNITY: PROSECUTIONS OF HUMAN RIGHTS VIOLATIONS IN THE PHILIPPINES (1991) & LAWYERS COMMITTEE FOR HUMAN RIGHTS, PAPER LAWS, STEEL BAYONETS: BREAKDOWN OF THE RULE OF LAW IN HAITI (1990)).

4. Transitional justice may be defined as "[comprising] the full range of processes and mechanisms associated with a [society's] attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice[,] and achieve reconciliation." Transitional justice measures may include a range of "both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and [lustration], or a combination thereof." *See* United Nations (U.N.) Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616*, ¶ 8 (Aug. 23, 2004). They may even encompass the making of memorials and, in certain cases, affirmative action programs. Craig Kauffman, Transitional Justice in Guatemala: Linking the Past and the Future (An Unpublished Paper Prepared for the ISA-South Conference in Miami, Florida) 4, *available at* http://www.academia.edu/5339698/Transitional_Justice_in_Guatemala_Linking_the_Past_and_the_Future (last accessed July 8, 2014) (citing Charles T. Call, *Is Transitional Justice Really Just?*, 11 BROWN J. OF WORLD AFFAIRS 1, 101 (2004)).

5. Research Topic for LLAW 6152.

6. Amnesty may be defined as referring "to legal measures that have the effect of: (a) [p]rospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or (b)

Part Two of this Article will consider the position that immunity through amnesty amounts to impunity and should not even be considered as a transitional justice measure. Part Two will also explore the view that amnesty is a necessary transitional justice measure in light of the actual challenges confronting states. Part Three of this Article aims to synthesize this divide through an international law perspective vis-à-vis the political realities on the ground. Part Four of this Article will discuss the smart mix of transitional justice measures, which have been shown to improve human rights, to stress the possibility of reaching an acceptable and effective middle ground. Part Five of this Article will then conclude that the chasm separating the contending sides of the debate is not really unbridgeable.

International law as interpreted by international bodies has set the standards for the legitimacy of amnesties. It is only in *hard cases* that partial amnesties may be acceptable but not necessarily legitimate. And in this difficult situation, a mix of transitional justice measures consisting of principled selective trial, partial amnesty, and truth commission may still result in improving human rights.

II. IDEALISM: THE HIGH GROUND

Ben Chigara pins his hope on the nonconformist,[7] and arguably occupies the nonconformist ground with respect to the need to prosecute human rights violations.[8] He contends that human rights are "property rights of victims."[9] The state is bereft of any authority to bargain them away in the name of stability of or transition to the democratic space.[10] Chigara maintains that the amnesty granted to human rights violators rests on fear that the perpetrators will unsettle the incoming or new dispensation if they are made to account and be held criminally liable for their past misdeeds.[11] The grant of amnesty ignores the rights of the victims and undercuts the values of the community.[12] It further undermines international law and order by rejecting the relevance of the social values, laws, and legal

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[r]etroactively nullifying legal liability previously established." OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: AMNESTIES, at 5, HR/PUB/09/1, U.N. Sales No. E.09.XIV.1 (2009) (citing Orentlicher, *supra* note 2, at 2537).

7. BEN CHIGARA, AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS, DEDICATION 4 (2002).

8. *Id.*

9. *Id.* at 4, 5, 13, 21, & 22.

10. *Id.*

11. *Id.* at 4–22.

12. *Id.* at 4 & 5.

standards of the international community.[13] Besides, the pursuit of democracy, which entails the observance of due process and equality before the law, does not fit nicely with amnesty, which privileges criminals at the expense of the victims.[14] Amnesty accommodates inequality before the law, creating "disillusionment with the law and a general sense of injustice and resentment with the establishment."[15]

Diane Orentlicher charts the principal outlines of the need to prosecute human rights violations. Prosecution has a deterrent effect, and meting out "criminal punishment [ ] is the most effective insurance against future repression."[16] Imposing penalties for past crimes can "ensure future lawful behavior."[17]

Trials expose the truth of previous violations, and the consequent condemnation of these abuses deters "potential lawbreakers and inoculate the public against future temptation to be complicit in state-sponsored violence."[18] Besides, they can facilitate society's affirmation to the "fundamental principles of respect for the rule of law and for the inherent dignity of individuals"[19] at such a crucial time when a society is reexamining its values.[20]

Orentlicher adds that the most pressing need for prosecution relates to the consequences of impunity.[21] Large-scale and systematic egregious violations of human rights, when left unaddressed, compromise the "authority of the law itself [to deter proscribed conduct.]"[22] And when an amnesty forecloses accountability in order to shield or pacify the security services, it heightens the deleterious effects of impunity and

13. CHIGARA, *supra* note 8, at 5 & 22.

14. *Id.* at 167.

15. *Id.*

16. Orentlicher, *supra* note 2, at 2542 (citing Alejandro Miguel Garro & Enrique Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L. J. 283, 343 (1987) & Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 12 (1990)).

17. *Id.* (citing Herbert Fingarette, *Rethinking Criminal Law Excuses*, 89 YALE L. J. 1002, 1013-16 (1980)).

18. *Id.* (citing Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, *in* ASPEN INSTITUTE REPORT 82 (1989)).

19. *Id.* (citing LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE 242 (1990)).

20. *Id.*

21. *Id.*

22. Orentlicher, *supra* note 2, at 2542.

emasculates faith in the law.[23] This denigrates the function of the law to protect individuals from harm.[24]

There is also the proposition that prosecution "can advance a nation's transition to democracy"[25] and the rule of law. Trials send the message that no one is above the law, thus cultivating "respect for democratic institutions and thereby deepen a society's democratic culture."[26] Orentlicher cites the enormous pride of Argentine society during the Raúl Ricardo Alfonsín government in asserting the rule of law over the former generals who had led the country during the period of sweeping state violence.[27] Corollarily, prosecutions also "strengthen fragile democracies because the rule of law is integral to democracy itself."[28] Holding accountable violators of human rights "affirms the supremacy of publicly accountable civilian institutions"[29] and reinforces the notion that "legal safeguards against arbitrary state action is essential to the full exercise of political rights."[30]

It is also argued that prosecutions help rehabilitate human rights victims and "society itself."[31] In addition, punishment accomplishes "society's duty 'to honor and redeem the suffering of the individual victim.'"[32] Besides, the duty to punish appalling violations is absolute as it springs from the "fundamental conceptions of justice."[33]

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23. *Id.* at 2542 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 81–85 (1857) & ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 25 (1942)).

24. *Id.*

25. *Id.* at 2543.

26. *Id.* (citing Garro & Dahl, *supra* note 16, at 344).

27. *Id*

28. Orentlicher, *supra* note 2, at 2543 (citing Robert Dahl, *Democracy and Human Rights under Different Conditions of Development*, *in* THE POLITICS OF HUMAN RIGHTS 168 (Obrad Savic ed., 2002).

29. *Id.* at 2544.

30. *Id.* at 2543 (citing Samuel P. Huntington, *The Modest Meaning of Democracy*, *in* DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM (Robert A. Pastor ed., 1989)).

31. *Id.* at 2544.

32. *Id.* at 2544 (citing WESCHLER, *supra* note 19, at 244 & Aryeh Neier, *What Should Be Done About the Guilty?*, 37 N.Y.R. BOOKS 1, 34 (1990)).

33. *Id.* at 2544 (citing Fermin Emilio Mignone, et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118, 149 (1984)).

The Human Rights Committee asserts that states party to the International Covenant on Civil and Political Rights[34] (ICCPR) have the duty to investigate, prosecute, and punish perpetrators of torture, enforced disappearance, and summary executions.[35]

One regional human rights court, the Inter-American Court of Human Rights,[36] interpreted the American Convention on Human Rights[37] (American Convention) as requiring state parties not only to investigate and prosecute, but also to punish any violation of human rights under the American Convention.[38] In another case, it also declared the 1995 Peruvian amnesty law, giving blanket immunity to state agents for human rights atrocities, as a breach of international human rights law.[39] It later clarified that its decision was not limited in scope to the case but was "general in nature."[40] The ruling came to be interpreted as applying to all amnesties by states' party to the American Convention.

Under the nonconformist framework, immunity from prosecution is thus seen as incompatible with human rights. Amnesty, in particular, "violate[s] human rights."[41]

As intimated, states in transition often have to make decisions under difficult circumstances. They have to contend with inherited problematic and messy situations in their domestic jurisdictions, and their responses to recent past violations are influenced by a confluence of reasons and conflicting interests. Requiring prosecution, as a non-negotiable transitional justice measure, imposes undue expectations and burdens on a society left with failed or non-existent institutions.

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34. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

35. U.N. Human Rights Committee, General Comment No. 31 [80], The Nature of the General Obligation Imposed on State Parties to the Covenant, ¶ 18, CCCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).

36. Inter-American Court of Human Rights Official Website, About Us, *available at* http://www.corteidh.or.cr/index.php/en/about-us (last accessed July 8, 2014).

37. American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter ACHR].

38. Fernando Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195, 196, 201, 202, & 209 (2008).

39. *See generally* Lisa Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 919, 962-64 (2009).

40. *Id.* at 964.

41. Freeman, *supra* note 4, at 23 (citing CHIGARA, *supra* note 8).

III. REALISM: THE POLITICAL GROUND

Michael Freeman submits that transitional societies should enjoy "a considerable 'margin of appreciation'"[42] in making difficult political judgments on how to address the legacies of human rights abuses of the past regime.[43] Politicians have broader and more complex obligations in such a situation, and a rigorous legal approach may not be appropriate under the circumstances.[44] This especially holds true in cases when peace resulted from a negotiated political settlement rather than from an outright military victory such as in the case of South Africa.[45]

José Zalaquett sums up the strongest argument against an inflexible requirement of prosecution of human rights offenders on the political necessity of emerging or fledgling democracies to survive.[46] Governments may not be in the position to "fully comply with the duty to dispense justice for past crimes"[47] since recent transitions resulted not from outright military victory but from atypical "correlation of forces."[48] The contention finds strong traction in situations where the military and security establishments still wield considerable influence despite handing power to the new civilian government such as the cases of Argentina,[49] Uruguay,[50] and Chile.[51]

President Alfonsín's democratically-elected government in Argentina faced a humiliated military that just lost the Malvinas War.[52] However, the military still had an unchallenged monopoly of armed forces.[53] Efforts to prosecute former members of the military *junta* resulted in several convictions.[54] But an attempt to expand prosecution to active mid-level

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42. *Id.* at 27.
43. *Id.*
44. *Id.* at 27-29.
45. ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 295 (2002).
46. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 HAMLINE L. REV. 3, 623, 637, 644-45, 653 (1990).
47. Freeman, *supra* note 4, at 24.
48. *Id.* at 24.
49. *See generally* Zalaquett, *supra* note 46, at 644-60.
50. *Id.*
51. *Id.*
52. *Id.* at 648.
53. *Id.*
54. *Id.* at 651.

officers backfired, triggering military revolts. Alfonsín had to put "an end to prosecutions [of] officers in active service."[55]

President Julio María Sanguinetti of Uruguay realized that the military "remained united and prepared to defend [its] positions with the use of force."[56] The military viewed prolonged detention and torture as necessary methods in containing a Marxist insurgency.[57] Recognizing prosecution as not being feasible, Sanguinetti opted for an "outright amnesty for the military."[58]

And President Patricio Aylwin of Chile had to consider that at the time General Pinochet still held sway in the Senate, the security services, and the courts.[59] The Supreme Court of Chile, "historically sympathetic to the military,"[60] allowed the continuing military prosecutions of journalists for crimes of opiniong and expression, and "upheld [the] 1978 [self-imposed] amnesty decreed by the military regime[.]"[61]

A similar situation may be said of Cambodia where former Khmer Rouge officials retained power in the Hun Sen government because they "defected to Vietnam during the last year of the Khmer Rouge's reign."[62]

Moreover, societies in transition from post-authoritarian or post-conflict situations are usually "polarized and unstable,"[63] such as the transitional situations of "the Philippines, Chile, Argentina, and Uruguay [where] the armed forces committed grave violations against sectors perceived as political opponents of the [State]."[64] Prosecuting the leaders and agents of the former regime may trigger a relapse to instability.[65] Prudence, if not necessity, dictates to give a chance for "democratic consolidation,"[66] by adopting or retaining the device of an amnesty as part of the reconciliation process.[67]

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55. *See generally* Zalaquett, *supra* note 46, at 652-53.

56. *Id.* at 656.

57. *Id.* at 644-60.

58. *Id.*

59. Human Rights Watch, *supra* note 3.

60. *Id.*

61. *Id.*

62. STEVEN R. RATNER, ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 355 (2009).

63. Orentliecher, *supra* note 2, at 2544.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 2544-45.

José Zalaquett thus appeals to "Max Weber's argument that governments must [practice] an 'ethic of responsibility' and act with prudence."[68] And he defends the Aylwin administration's human rights policy of truth and reconciliation, reparations, and guarantees of non-repetition of human rights violations,[69] as "[showing] a decent respect for human rights, international law[,] and justice in difficult political conditions, and [aiming] to heal the wounds of the past and build peace for the future."[70] And championing this circumscribed approach, he declares that "[t]he ethic of responsibility has the courage to live with real-life restrictions and to forego facile righteousness."[71]

Sometimes it may even be precipitate to dwell on the issue of accountability. Transition has to occur first before there can be any sensible discussion on truth, justice, and reconciliation. The South African experience is a case in point. Transfer of the reins of power from the Apartheid regime to the African National Congress came about through negotiation.[72] And amnesty facilitated the "initial transition from the old regime to a new democratic government."[73] It constituted as an essential element in the bargaining process and "a necessary evil to ensure transition to democracy."[74]

Arguably, similar political considerations underpinned the amnesties in Latin America particularly in Argentina, Chile, El Salvador, and Uruguay, even in those instances where the previous regime passed amnesty laws prior to handing power.[75] The former military dictatorships could have opted for a "sustained civil war[,] were it not for the grace of the incoming civilian governments in permitting the retention of these amnesties."[76]

In some situations, prosecution may in fact prolong the armed conflict. After Uganda's self-referral to the International Criminal Court (ICC), the ICC issued warrants of arrest against the leaders of the Lord's Resistance Army (LRA).[77] The LRA made the withdrawal of the warrants as "a precondition for peace talks."[78] Governments may thus be motivated

68. Freeman, *supra* note 4, at 24.

69. *Id.*

70. *Id.*

71. *Id.*

72. O'SHEA, *supra* note 45, at 295.

73. *Id.* at 24.

74. *Id.*

75. *Id.*

76. *Id.* at 296 (citing Orentlicher, *supra* note 2, at 2545).

77. RATNER, ET AL., *supra* note 62, at 255.

78. *Id.*

"to diminish or extinguish the hostility that feeds the desire for war, by providing an incentive to individuals to participate in the peace process."[79]

Karen Gallagher observes that amnesty may actually improve human rights conditions on the ground.[80] The failed Sierra Leone Lomé Accords, which granted blanket amnesty to the Revolutionary United Front rebels and other combatants responsible for systematic mutilation and other atrocious attacks on civilians,[81] "brought relative peace … [and] a substantial reduction in the killing for nearly a year."[82]

Andreas O'Shea notes that "victims and their families have an inalienable right to know the truth about past suffering and losses."[83] In fact, "[e]very society has the inalienable right to know the truth about past events … in order to prevent a repetition of such acts in the future."[84] Prosecution, however, has limitations in getting at the truth of past atrocities. During transitions, "records [are] destroyed and the truth [remains] buried in the secret cavities of the hearts and minds of [the] perpetrators and victims alike."[85] Evidence may no longer be available or accessible, and witnesses may be reluctant to testify.[86] A qualified amnesty conditioned upon the beneficiary disclosing the truth first may well serve to draw out the truth. It gives "incentive for violators to tell the truth."[87] South Africa's amnesty for truth has achieved "marginal success in helping discover truths that otherwise may have never been unearthed."[88]

Insistence on prosecuting every human rights abuser may not be feasible in some situations and may amount to imposing "impossible demands on the judiciary."[89] Prosecution is realistic and viable when the number of abusers remain small, but when the number of perpetrators "become[s] larger, full accountability becomes more complex[,] both in principle and in practice, though in many situations no less morally imperative."[90] When thousands of people, practically involving the entire

79. O'SHEA, *supra* note 45, at 26.

80. Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Siena Leone*, 23 T. JEFFERSON L. R. 149, 197 (2000).

81. *Id.*

82. *Id.*

83. O'SHEA, *supra* note 45, at 31.

84. *Id.*

85. *Id.* at 32.

86. *Id.*

87. Freeman, *supra* note 4, at 26.

88. O'SHEA, *supra* note 45, at 32–33.

89. Orentlicher, *supra* note 2, at 2596.

90. *Id.*

government bureaucracy with considerable civilian participation, commit atrocities in a frenzy of political or ethnic violence such as those "witnessed in Cambodia in the late 1970s and Rwanda in 1994,"[91] placing every perpetrator on the dock could easily overwhelm the judicial system. A similar observation may be said of Argentina's "dirty war" in the late 1970s and early 1980s.[92] An estimated 9,000 individuals disappeared,[93] and prosecuting everyone criminally responsible would simply be beyond the capacity of "[e]ven a well-functioning judicial system" to handle.[94]

The situation is far more challenging when there is a weak or non-functioning judicial system.[95] Following the fall of the Dergue regime in 28 May 1991,[96] Ethiopia's transitional government pursued an ambitious plan to prosecute human rights violators. Unfortunately, it inherited a weak judicial system lacking in judicial independence.[97] Many judges were considered "ineligible to serve" because of their ties to the past regime.[98] This resulted in delays in the trials of the defendants; many of whom were already in detention.[99] Although the Ethiopian government reorganized the judiciary in 1993, the lack of resources hampered the court system's effectiveness, independence, and impartiality.[100]

Rwanda's transitional government also embarked on a similar program to try all non-high ranking offenders who committed atrocities during its genocidal conflict in 1994.[101] It faced the daunting task of prosecuting "what are estimated to be over 800,000 perpetrators [—] nearly half the

91. RATNER, ET AL., *supra* note 62, at 371.

92. Orentlicher, *supra* note 2, at 2596.

93. *Id.* (citing ARGENTINE NATIONAL COMMMISSION ON DISAPPEARED, NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 10 (1986)).

94. *Id.*

95. *Id.*

96. Salambo in Addis, Fall of the Derg, *available at* http://salamboinaddis.com/2013/06/03/fall-of-the-derg/ (last accessed July 8, 2014).

97. RATNER, ET AL., *supra* note 62, at 192-94.

98. *Id.* at 194.

99. *Id.* at 193.

100. *Id.* at 194 (citing HUMAN RIGHTS WATCH/AFRICA, ETHIOPIA: RECKONING UNDER THE LAW 11-13 (1994)).

101. The International Criminal Tribunal for Rwanda has jurisdiction over high-ranking offenders. *See* Hannibal Goitom, Rwanda: ICTR Convicts Former High Ranking Rwandan Officials, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402680_text (last accessed July 8, 2014).

adult population of Rwanda in 1994."[102] With a non-functioning court system, trials had to be delayed.[103] And thousands of detainees died because of the appalling prison conditions.[104]

As intimated, the complicity of judges in human rights violations casts doubt on the effectiveness of prosecuting the officials and agents of the former regime. As is often the case in transitional states, "the judiciary [is] severely compromised and [is] very much part of the old system, implementing the repressive policies[,] and wrapping them in the mantle of the rule of law."[105] Consequently, the judiciary suffers from impartiality deficit in the eyes of the public.

Prosecution can also have prohibitive costs, *inter alia*, in monetary terms. And the trials can have mixed results. In 1996, South Africa spent a staggering sum of close to 2 million dollars for the "state-funded [defense]" of former defense minister General Magnus Malan.[106] After more than four months of trial, General Malan was acquitted.[107]

The trial of "Eugene de Kock[,] former commander of a police death squad … cost nearly [one million dollars] and required 18 months of testimony before [he] finally admitted to 121 charges."[108]

To recapitulate, the main thesis of the realistic approach to immunity hinges on the responsibility of the fledgling government to survive even if this has the effect of undermining the rule of law.[109] Steven R. Ratner et al., however, caution that "successor governments can sometimes underestimate their power,"[110] and overstate the danger to their political survival.[111]

IV. SYNTHESIS

102. RATNER, ET AL., *supra* note 62, at 195.

103. *Id.*

104. *Id.* at 195–96.

105. O'SHEA, *supra* note 45, at 32.

106. *Id.* at 32 (citing DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 27 (1999)).

107. *Id.*

108. *Id.*

109. Orentlicher, *supra* note 2, at 2546.

110. RATNER, ET AL., *supra* note 62, at 206.

111. *Id.* at 372.

The divide on the grant of amnesty is not hopelessly insurmountable. International law does not prohibit all amnesties.[112] However, amnesties cannot encompass "enumerated treaty crimes, crimes against humanity, [or] war crimes."[113] Even Chigara concedes that if amnesty was to be granted, it should not cover serious violations of basic human rights such as crimes against humanity.[114] The United Nations' (U.N.) policy adopts a similar view with respect to "genocide, war crimes, crimes against humanity, [and] gross violations of human rights,"[115] also "including gender-specific violations[.]"[116] It has supported peace negotiations with an amnesty package, but with a reservation that the amnesty shall not apply to serious breaches of international law.[117] Other breaches include torture and enforced disappearance (which are covered by specific conventions),[118] slavery,[119] extrajudicial killings,[120] and "gender-specific instances of these violations, such as rape."[121] It has also been the U.N.'s position to treat gross and large-scale human rights violations, whether isolated or perpetrated systematically, as violations that need to be addressed internationally.[122] These types of violations are now considered crimes against humanity under the Rome Statute of the ICC.[123]

The U.N. further requires that the amnesty must not "[i]nterfere with victims' right to an effective remedy, including reparation[,] or [r]estrict victims' and societies' right to know the truth about violations of human rights and humanitarian law."[124] Except for the Inter-American Court of Human Rights, which has categorically pronounced any form of amnesty as

112. Laplante, *supra* note 39, at 943.

113. *Id.* at 971.

114. CHIGARA, *supra* note 8, at 22 & 90.

115. U.N. Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634, ¶ 12 (Oct. 12, 2011).

116. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 7, at 11.

117. *Id.*

118. *Id.* at 18–20.

119. *Id.*

120. *Id.*

121. *Id.* at 20.

122. *See* Global Protection Cluster, Human Rights in Humanitarian Action, *availablet at* http://www.globalprotectioncluster.org/en/areas-of-responsibility/human-rights-in-humanitarian-action.html (last accessed July 8, 2014).

123. Rome Statute of the International Criminal Court art. 7, July 1, 2002, 2187 U.N.T.S. 561 [hereinafter Rome Statute].

124. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 7, at 11.

inconsistent with the American Convention,[125] amnesty may still be considered legitimate provided that the above criteria are met.

As to *hard cases*, where the security apparatus still constitutes an imminent or grave threat to the new government, there is no general consensus among scholars whether to prosecute all human rights violators. Each case has to be examined according to its surrounding circumstances. Ronald Slye suggests, *inter alia*, that amnesty "must not apply to those most responsible for war crimes, crimes against humanity, and other serious violations of international criminal law."[126] He refers to the political and military leaders considered as "effective architects and commanders"[127] of the worst violations of human rights.[128] Elizabeth Ludwin King adds, among others, that "the amnesty must be necessary for the conflict to end."[129]

In such situations, and where the successor government enjoys considerable public support, partial amnesty may be resorted to and prosecution may be undertaken "within principled limits."[130] Prosecutions should be directed at the chief architects and policy-makers, as well as the main implementers of the most serious abuses.[131] They should have definite duration, as the government may not endure protracted criminal litigations.[132] This somehow addresses the competing need of the new government to survive; the desire of society for truth, justice, and peace; the necessity of affirming the rule of law; and the demand of the military for immunity. In the context of hard cases, a grant of "immunity from prosecutions to some perpetrators of human rights abuses" may be

125. The Inter-American Court of Human Rights considers "that all amnesty provisions [are] inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations" and that "[self-amnesty] laws lead to the defenselessness of the victims[; therefore], they are manifestly incompatible with the aim and spirit of the [American Convention]." *See* Case of Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser.C), No. 75, ¶ 41 (Mar. 14, 2001).

126. Ronald Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 245 (2002).

127. *Id.*

128. *Id.* (citing Agnes Heller, *The Natural Limits to Natural Law and the Paradox of Evil*, *in* ON HUMAN RIGHTS 149 (Stephen Shute & Susan Hurley eds., 1993)).

129. Elizabeth Ludwin King, *Amnesties in a Time of Transition*, 41 GEO. WASH. INT'L L. R. 577, 616 (2010).

130. Orentlicher, *supra* note 2, at 2596.

131. *Id.* at 2596-98.

132. *Id.*

considered as "an acceptable[,] [though not necessarily legitimate] transitional justice measure[,] for the attainment of peace in states emerging from a conflict situation."[133]

In extremely hard cases, where there is an absence or insufficiency of international support and commitment, and where prosecution is simply not feasible, a transitional society may act based on strategic imperatives. Although not acceptable to the international community, it may choose to give deference to imposed amnesties dictated by the prior regime, in order to allow for stability and transition. It may then prosecute later and find creative ways around the immunities, when the political climate has changed so as to allow prosecution. Argentina has prosecuted former members of the military regime for crimes not embraced by the amnesty, such as "embezzlement and child kidnapping."[134] Argentine courts would also later on overturn the amnesty.[135] Chile went around the amnesty by "creatively [reframing] the crime of forced disappearance"[136] as an imprescriptible continuing act of kidnapping "where a body [has] not been found."[137] General Pinochet himself would then be stripped of his immunity and placed on the dock, after his return from his London detention.[138] He spent the rest of his life defending himself from criminal and civil cases.[139]

While the political milieu is not conducive to prosecution, the new and fragile government should explore other transitional justice measures. Chile and Argentina resorted to truth commissions, which made possible the discovery of the dark secrets of the previous military regimes.[140] The

133. Note 6.

134. Slye, *supra* note 126, at 242 (citing Jack Epstein, *Legacies of Terror*, HOUS. CHRON., MAY 10, 1998, at A1).

135. King, *supra* note 129, at 586–87.

136. *Id.* at 586.

137. *Id.* (citing PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 97–98 (2001) & Clifford Krauss, *Chilean Military Faces Reckoning for its Dark Past*, N.Y. TIMES, Oct. 3, 1999, at A1).

138. Clifford Krauss, *Pinochet Reportedly Stripped of Immunity in Secret Vote*, N.Y. TIMES, Aug. 2, 2000, *available at* http://www.nytimes.com/2000/08/02/world/pinochet-reportedly-stripped-of-immunity-in-secret-court-vote.html (last accessed July 8, 2014).

139. Cases filed against General Pinochet continue to mount. The total now is about 250 cases. *See* David Sugarman, *From Unimaginable to Possible: Spain, Pinochet, and the Judicialization of Power*, 3 J. SPAN. CUL. STUD. 107, 117 (2002).

140. *Id.* at 586.

military in Chile systematically employed torture as part of state policy.[141] Its counterparts in Argentina maintained secret detention facilities, and caused the disappearance of thousands of individuals.[142]

While "neither prosecutions nor amnesties guarantee peace or the future protection of human rights,"[143] a certain smart mix of transitional justice measures offers a tangible promise at improving human rights.

V. SMART MIX OF TRANSITIONAL JUSTICE MEASURES

Societies undergoing transition from dictatorship or conflict situations may benefit from a smart mix of transitional justice mechanism. Tricia Olsen, et al., disclose in their study that "[o]nly two combinations of transitional justice mechanisms show statistically significant, positive effects on human rights: (1) trials and amnesties[;] and (2) trials, amnesties[,] and truth commissions."[144]

Trials, when pursued in isolation, do not appear to be sufficient at improving human rights.[145] Neither do blanket amnesties[146] and truth for amnesty.[147] Olsen, et al., however, recognize the potential of amnesties to demobilize combatants and end violence.[148] But partial amnesties show positive influence on human rights, as it strikes a balance between accountability and stability.[149] It not only allows the prosecution of some human rights violators, but it also offers some degree of impunity as to others.[150] It also has the added benefit of dividing the perpetrators and depriving those facing charges support in any destabilization effort.[151] A

141. Human Rights Watch, Chile: Government Discloses Torture Was State Policy, *available at* http://www.hrw.org/news/2004/11/29/chile-government-discloses-torture-was-state-policy (last accessed July 8, 2014).

142. *See generally* CNN, 10,000 bone fragments found in former Argentine detention center, *available at* http://edition.cnn.com/2008/WORLD/americas/12/10/argentina.bone.fragments/index.html?iref=nextin (last accessed July 8, 2014).

143. Freeman, *supra* note 4, at 24.

144. Eric Wiebelhaus-Brahm, et al., *When Truth Commissions Improve Human Rights*, 4 THE INT'L J. OF TRANS. JUST. 4, 457, 464 (2010).

145. *Id.* at 470.

146. *Id.*

147. *Id.* at 470-71.

148. *Id.* at 472.

149. *Id.* at 470.

150. Wiebelhaus-Brahm, et al., *supra* note 144, at 470.

151. *Id.*

combination of trials and amnesties thus tend to improve human rights conditions, even in the absence of a truth commission.[152]

It is further intimated that truth commissions have a positive contribution to human rights improvement, as part of the mix of trials and amnesties.[153] But when pursued independent of "any form of accountability from trials or stability from amnesties,"[154] truth commissions may not be effective, and may even have a negative effect.[155] Stated otherwise, truth commissions enhance the balance between the deterrent effect of trials and the stabilizing nature of amnesties.[156] They improve "accountability by exposing systematic patterns of abuse"[157] without undermining the aims of negotiated amnesties.[158]

The experiences of South Korea and Chile serve to illustrate the positive impact of truth commissions as a complement to trials and amnesties.[159] Although South Korean society was split on the relevance of the truth commission,[160] the truth commission actually enhanced accountability by investigating and recommending the prosecution of certain crimes committed during the previous dictatorship.[161] As to Chile, the self-imposed 1978 amnesty of the military regime and the truth commission under the Aylwin government hindered at the first meaningful advancement in human rights.[162] Only the subsequent trials would improve human rights, but the truth commission nonetheless provided crucial infromaton for the prosecutions.[163]

VI. CONCLUSION

The chasm separating the contending sides of the debate is not really unbridgeable and insurmountable. The world desires the idealism of the nonconformists to counterbalance the relativism of the realists. But it likewise needs the pragmatism of the realists in tight situations.

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152. *Id.* at 469.

153. *Id.* at 457.

154. *Id.* at 476.

155. *Id.*

156. Wiebelhaus-Brahm, et al., *supra* note 144, at 475.

157. *Id.*

158. *Id.*

159. *Id.* at 472.

160. *Id.*

161. *Id.* at 472–73.

162. Wiebelhaus-Brahm, et al., *supra* note 144, at 474.

163. *Id.*

International law, as interpreted by international bodies, has set the standards for the legitimacy of amnesties. The standards must be observed because they underpin the international order. Only those perpetrators who are not responsible for serious violations of international law may be granted immunity from prosecution.

In hard cases, partial amnesty may be resorted to, and prosecution may be undertaken "within principled limits"[164] against the chief architects, policy-makers, and main implementers of the most serious abuses.[165] This somehow addresses — as mentioned earlier — the competing need of the new government to survive; the desire of society for truth, justice, and peace; the necessity of affirming the rule of law; and the demand of the military for immunity. In this context, a grant of "immunity from prosecutions to some perpetrators of human rights abuses" may be considered as "an acceptable[, though not necessarily legitimate,] transitional justice measure for the attainment of peace in states emerging from a conflict situation."[166] Even in this situation, a mix of transitional justice measures consisting of principled selective trial, partial amnesty, and truth commission may still result in improving human rights.

With respect to extremely hard cases, a society in transition may act on strategic imperatives and concede to an amnesty proscribed by the international community, in the hope that the gamble will pay off and lead to a stable political climate conducive for prosecution. In these circumstances, it may still find creative ways to sidestep the amnesty, and pursue measures to unearth the truth and provide reparations.[167]

As to General Pinochet's warning, it was effective for some time. Pinochet and his people were eventually "touched" and prosecuted. The state of law did not come to an end. But a hard and difficult choice in the violation of international law had to be struck in order for transition to happen and healing to begin.

164. Orentlicher, *supra* note 2, at 2596.

165. *Id.* at 2596-98.

166. Note 6.

167. Besides, the international community, if it chooses to extend assistance, has the mechanism now under the Rome Statute to go after the worst offenders. International tribunals and foreign courts retain the competence whether or not to recognize a foreign amnesty. *See* O'SHEA, *supra* note 45, at 308.