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ARTICLE

Amnesties, Transitional Justice and the Rule of Law

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Abstract

The aim of this paper is to assess an objection to amnesties conferred in transitional justice contexts: that they violate the rule of law. The paper begins by setting out the objection and presenting three possible replies to it. Each is argued to be unsatisfactory. The central contention of the paper, namely that the success of the objection depends on amnesties' terms and the reasons for which they are introduced, as well as on what conception of the rule of law is operative, is then presented. The argument that amnesties violate the rule of law on account of public international law, or national constitutions containing bills of rights, prohibiting their use without exception is then rebutted. Few amnesties violate the rule of law for this reason. Finally, the paper addresses a further rule of law-based objection to amnesties that is related to, yet distinct from, the objection that amnesties violate the rule of law. According to this second rule of law-based objection, amnesties prevent, or at least hinder, the restoration of the rule of law in post-conflict societies. This objection is countered by demonstrating that amnesties do not always promote the rule of law less effectively than trials and punishment and may even, in some cases, be essential for the restoration of the rule of law.

Keywords Amnesty · Transitional justice · Rule of law · International law · Punishment

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1 Introduction

Prior to a society's transition to democracy, authoritarian regimes will frequently have serially and seriously violated the rule of law through the sponsoring of, or their agents engaging in, such unlawful activities as extra-judicial killing, abduction and torture of political opponents. Restoration of the rule of law is usually treated as a desideratum, and often as a priority, in post-transitional societies.[1] Yet the measures implemented to address legacies of widespread, politically motivated human rights abuses committed in the course violent political conflict are often considered to be in tension with the ideal of the rule of law.[2]

The aim of this paper is to re-examine the relation between one such measure – amnesty – and the rule of law. Amnesties conferred in transitional justice settings are extraordinary legal devices conferring immunity from prosecution and punishment, and sometimes civil liability, on groups of perpetrators of politically motivated crimes committed during violent political conflict.[3] Amnesties' being extraordinary does not equate to their being uncommon, however.[4] Amnesty is reported to be the most employed device of transitional justice.[5] Despite democratising states increasingly holding perpetrators of past human rights violations accountable through the use of trials since the 1980s – a trend dubbed 'the justice cascade'[6] – amnesties have, in the words of one commentator, "steadily increased in number and cemented their place as the most popular transitional justice mechanism, ahead of trials, truth

[1] See McAuliffe (2016), p. 76; Yusuf (2022), pp. 55–57. See also Stromseth (2021), p. 515: "Rule of law building has been central to post-conflict stabilization for decades and indeed much longer". Stromseth provides a helpful discussion of what the restoration or building of the rule of law in post-conflict societies and some of the challenges to which it gives rise. See further Postema (2022), p. 17: "Establishing a robust rule of law is widely thought to be the first task in rebuilding nations shaken by civil wars or oppressed by authoritarian rule".

[2] For instance, prosecutions and trials conducted in transitional contexts have been criticised for violating the rule of law on the grounds of their *retroactivity* (see Minow 1998, Chap. 3; Yusuf (2022), pp. 59–61). Retroactivity refers in this context to the criminal prosecution and punishment of defendants for acts that were lawful at the time they were performed. It is at odds with what is often referred to as the 'principle of legality', which includes the requirements that there should be no punishment unless the punishments attaching to crimes are stated by law in advance (*nulla poena sine lege*) and that there should be no crimes without law: that the definition of the crime should be clearly specified by law in advance (*nullum crimen sine lege*). Institutional and procedural respects in which prosecutions and trials in transitional justice contexts have been considered to transgress the rule of law include a range of deviations from due process, relaxations of procedural safeguards, trials in absentia, selection of judges and jurors on the basis of political bias, coercive plea bargaining, and de facto presumptions of guilt (McAuliffe 2010, p. 145; McAuliffe (2016), p. 80).

[3] Transitional justice encompasses the range of practices and mechanisms employed with the aim of achieving accountability, justice, peace and/or reconciliation in the aftermath of violent political conflict. For a recent book-length philosophical treatment of this topic, see Murphy (2017).

[4] Use of amnesties has a history extending back more than two millennia. For a serviceable history of the granting of amnesties, see Close (2019), Chaps. 1–3. For a discussion of the hundreds of amnesties having been instituted in countries across South America, North America, Africa, Europe and the Asia-Pacific region, see Mallinder (2008) and Jeffery (2014).

[5] Olsen et al. (2010), p. 39.

[6] See Sikkink (2011).

commissions, reparation and lustration policies”.[7] Amnesties are often granted as an inducement: to members of rebel groups to defect or surrender or to autocratic regimes and their agents to relinquish power peacefully. Amnesties’ terms vary. Perpetrators desiring amnesty may be required to apply for it individually or members of a group named by an amnesty law as eligible to receive amnesty may be granted it automatically. Amnesties may be contingent upon perpetrators satisfying certain conditions, such as disclosing the nature and extent of their wrongdoing or surrendering their weapons, or they may be conferred unconditionally. They may cover minor crimes exclusively, or only serious human rights violations, or they may extend to crimes of all levels of seriousness. They may apply to perpetrators on both sides of a political conflict or only to those on one side. Prominent recent amnesties include the 2018 Ethiopian amnesty releasing thousands of political dissidents, including senior opposition leaders, from prison; the Nicaraguan amnesty conferred in June 2019 freeing detainees arrested in the course of anti-government protests, and benefitting as well the police who violently suppressed the demonstrations; and the May 2022 Syrian amnesty in favour of individuals accused of acts of terrorism.

Amnesties are commonly adjudged to violate the rule of law, and this judgement is sometimes expressed as an objection to their conferral. The objection that amnesties violate the rule of law tends not to be levelled at amnesties conferred for the purpose of correcting miscarriages of justice.[8] Such amnesties are generally recognised to be consistent with the rule of law or even, by some, as required by it. The objection is instead typically raised against amnesties covering human rights abuses. The rule of law in transitional justice settings is widely considered to demand that perpetrators of human rights violations be prosecuted, tried and, if found guilty, punished.[9] And this for two reasons: trials are considered to be the appropriate means of holding perpetrators *accountable* for their criminal wrongdoing;[10] and they are considered, procedurally, to hold out the promise of a fair and impartial hearing that allows defendants to present arguments in their defence.[11] By contrast, amnesties are frequently deemed a sacrifice of accountability and due process for reasons of political expediency; they

7 Jeffery (2014), p. 3.

8 Amnesties granted to correct a prior injustice include the amnesty granted in Morocco in 1994 in favour of 424 political prisoners, many serving sentences imposed pursuant to unfair trials, for offences under state security laws, membership of banned organizations, distributing leaflets and the like.

9 See, for example, Orentlicher (1991), p. 2540: “the central importance of the rule of law in civilized societies requires, within defined but principled limits, prosecution of especially atrocious crimes”.

10 Ruti Teitel observes: “Punishment dominates our understandings of transitional justice. This harshest form of law is emblematic of accountability and the rule of law” (Teitel 2000, p. 27). See also McAuliffe (2016), p. 78: “Transitional criminal trials in particular are thought to catalyse and instantiate the rule of law. There is a common assumption in the transitional justice literature that accountability for wrongdoers from the prior regime or conflict automatically contributes to building the rule of law in formerly lawless or repressive states”.

11 Minow (1998), p. 25. See also Jeffery (2012), p. 64 (observing that “the pursuit of prosecutions and punishment for perpetrators” is “seen as upholding the demands of justice and the rule of law”), McAuliffe (2010), p. 128 (remarking that “individual accountability for breaches of the law uphold the regularity, stability and adherence to settled law the rule of law requires” and observing a “nexus between the rule of law and punishment”) and Pensky (2008), p. 24 (characterizing trials as “public, procedural demonstrations of the rule of law”).

are widely considered a form of impunity inconsistent with the rule of law.[12] Padraig McAuliffe, for example, refers to the "tendency of transitional responses to past human rights abuses to readily depart from the core values we associate with the rule of law … manifest where criminal accountability is suspended so as not to imperil the transition".[13] Per Sevastik bemoans the Afghan government's granting of blanket amnesty in favour of warlords among others in 2007 on the ground that it "undermines one of the core principles of the rule of law, namely, that the government and its officials and agents, as well as private entities, are accountable under the law".[14] And Robert Parker suggests that "[a]brogating the rule of law by failing to punish certain lawbreakers is a very serious matter indeed. A policy of amnesty seeks to accomplish precisely this", adding that in view of "the destructive impact tampering with the rule of law can have, it is little wonder that … amnesties have been much maligned".[15]

My primary purpose is to assess the force of the objection to amnesties that they violate the rule of law. The structure of this paper is as follows. In Sect. 2, I briefly set out what the rule of law ideal, insofar as it relates to amnesties, consists in, and present the case for considering the conferral of amnesties to violate the ideal of the rule of law. In Sect. 3, I raise three possible replies to the rule of law-based objection to amnesties and argue that none overcomes it. I contend, in Sect. 4, that while some amnesties violate the rule of law and are for this reason objectionable, certain other amnesties do not violate the rule of law on certain attractive conceptions of it; and even if these other amnesties violate the rule of law on other conceptions of it, they may yet be justified, all things considered. In Sects. 5 and 6 I consider and rebut the argument that amnesties violate the rule of law on account of their being prohibited without exception by public international law or national constitutions.

It is as well, before setting out, to distinguish the rule of law-based objection that it is my principal purpose to submit to scrutiny from a related rule of law-based objection with which it may be conflated or confused. The objection on which I will mainly focus – that amnesties violate the rule of law – has to do with their conformity or lack thereof with the ideal of the rule of law. It is not an objection that amnesties will have *the effect* of inhibiting the restoration of the rule of law, but rather that *they themselves* are incompatible with the rule of law. A second objection to amnesties asserts that their conferral has the effect of impeding the restoration or building of the rule of law in post-conflict societies. Charles Call, for example, expresses doubt about whether a transitional regime could "credibly establish the rule of law if its very birth rests in granting impunity or amnesty for morally heinous crimes".[16] I briefly assess this second rule of law-based objection to amnesties in the Sect. 7.

[12] See Stromseth (2021), p. 529: "Countries emerging from sustained conflict frequently bear the scars of horrific violence directed against civilians … Impunity for such violence undercuts the very idea of the rule of law".

[13] McAuliffe (2010), pp. 127, 150–51.

[14] Sevastik (2020), pp. 94–95. Max Pensky, too, characterizes amnesties as a departure from the rule of law (Pensky 2008, p. 8). See also Mallinder (2011), p. 15 (referring to "deviations from the rule of law, such as amnesty laws").

[15] Parker (2001), pp. 71, 81.

[16] Call (2007), p. 14.

2 The Case for Considering Amnesties to Violate the Rule of Law

The rule of law, a moral doctrine, refers to a mode of governance aimed at constraining –'tempering' may be more accurate[17] – the exercise of ruling power to the end of preventing its arbitrary or despotic exercise. It refers to the sovereignty of law and legal institutions and seeks to temper the exercise of power through the instrumentality of law by requiring that governments rule by law, that is, exercise power through or by means of law. It requires in addition that governments exercise power in accordance with the law; that they be bound by pre-existing legal norms. Furthermore, the rule of law mandates that no one is above the law – that everyone, including those who exercise power, are governed by and subject to the law. It affords everyone protection against arbitrary exercises of power; and it allows those who exercise power to be held accountable through law where they act unlawfully or beyond the bounds of their lawful authority. It prescribes, formally and structurally, that the law should conform to certain principles of legality: that it should be tolerably clear and intelligible, non-contradictory, reasonably stable, publicly promulgated, comprised of general rules and standards, applied prospectively and not retroactively, and be able to be complied with.[18]

The rule of law is on influential renderings of it claimed also to incorporate institutional and procedural characteristics in addition to formal ones: legal institutions and their procedures, including courts, should be accessible to everyone so as to protect them against abuses of public and private power, uphold their rights and settle their disputes; the independence of the judiciary must be ensured; the principles of natural justice, including an open and fair hearing and absence of bias, must be adhered to.[19] It is plausible too to consider it to be an essential element of the rule of law that no punishment should be exacted or stigma imposed by the state except through procedures involving an impartial hearing before a legally trained judicial officer in which the rights of the individual to legal representation, to be present, to confront witnesses, to ensure that the evidence presented by government has been appropriately superintended, to present legal argument about the bearing of the evidence and the law to their case, among others, have been respected.[20]

Coming now to the objection that amnesty violates the ideal of the rule of law: the rule of law demands that everyone is equally subject to the law – 'one law for all' – and accountable for breaches of it. A.V. Dicey observes that "the idea of legal equality, or of the universal subjection of all classes to one law" inherent in the rule of law is instantiated when.

> every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as every other citizen. The Reports abound with cases in which officials have been brought before courts, and made, in their personal capacity, liable to

[17] See Krygier (2016), pp. 205–208; Postema (2022), p. 116.

[18] See Fuller (1964), Chap. 2.

[19] Raz (1977), pp. 216-7.

[20] Waldron (2006), p. 6.

> punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.

Dicey contrasts adherence to the rule of law in the England of his day with deviation from the principle that everyone is subject to the same law in certain continental countries, in which, he says,

> officials – under which word should be included all persons employed in the service of the state – are, or have been, in their official capacity, to some extent exempted from the ordinary law of the land, protected from the jurisdiction of the ordinary tribunals and subject in certain respects only to official law administered by official bodies.[21]

At the core of the objection that amnesties violate the rule of law is the claim that they do not treat everyone as subject to 'one and the same law' and as equally accountable for legal transgressions. Their singling out of specific groups of persons – certain officials and agents of the state or opponents of the state – for immunity from accountability under the law appears in tension with the rule of law. Serving as an example is the amnesty granted in Chile in 1978 by the military junta led by General Augusto Pinochet with the aim of shielding the junta and its apparatchiks and amanuenses from criminal liability for serious human rights abuses, including the execution, torture and abduction, committed during the five years following the junta's overthrow of the democratically elected government of Salvatore Allende. That amnesty, instituted through an authoritarian decree, appears starkly inconsistent with Dicey's insistence, implied by his 'one law for all' maxim, that government officials must be answerable under the law for their actions and that the state should not immunize its officials against accountability under the laws they administer.

A related reason to consider amnesties to violate the rule of law emerges when they are considered in the perspective of legal institutions and ordinary legal processes. Perpetrators in favour of whom amnesties are granted are, in Dicey's words, "protected from the jurisdiction of the ordinary tribunals" – the courts – insofar as they are shielded from the operation of the criminal, and sometimes civil, law with respect to their wrongdoing. Where amnesties extend to extinguishing civil liability as well as criminal liability the threat to the rule of law is increased because victims of abuses of power are denied any form recourse against perpetrators for the injuries they have suffered (though they may yet receive reparations from the state). An aspect or implication of the rule of law, Gerald Postema argues, is the 'recourse principle' which provides that individuals have a right to seek relief for the wrongful harms they have suffered at the hands of government or private subjects from a "court or other regular legal process". The recourse principle facilitates accountability – at the heart of the rule of law – by conferring on individuals the right to

[21] Dicey (1982), pp. 114–115.

hold those who injure them accountable to them.[22] Amnesties that extinguish the criminal and civil liability of perpetrators violate the recourse principle by denying victims access to the courts and preventing them from presenting an argument in court for why they should be awarded damages.

Any amnesties granted pursuant to an exercise of unconstrained discretion may be deemed to violate the rule of law. Consider by way of a parallel the United States President's power to pardon under Article II, section 2 of the United States Constitution. The President's pardoning power is unfettered save for being restricted to federal crimes and for impeachment not being a pardonable offence. It is also judicially unreviewable. These aspects of this pardoning power, it is often argued, bring it into collision with the rule of law, which requires that officials' acts conform to legal norms: that law, and not the unconstrained will of officials, rules. The argument is not that the presidential pardoning power in the United States is inconsistent with the rule of law because it involves the exercise of discretion. The exercise of discretion is not in itself contrary to the rule of law.[23] The argument is instead that an *arbitrary and unreviewable* exercise of *unfettered* discretion by an official threatens the rule of law, and that the presidential pardoning power in the United States involves this kind of discretion. T.R.S. Allan's account of the rule of law, for example, includes the principle that "[n]o one, even if convicted of serious crimes, should in any circumstances be subject to the unfettered discretion of a public official, or be dependent on grace or favour, bestowed on idiosyncratic grounds, and vulnerable to personal antagonism or caprice".[24] The rule of law, on Allan's account, requires that the exercise of official discretion be constrained by restrictions of fairness and reasonableness, and that it be subject to judicial review.[25]

Amnesties are often not granted pursuant to exercises of power that are unconstrained by legal norms and judicially unreviewable. Laws providing for amnesty frequently specify with precision the criteria of eligibility for amnesties and the conditions, precedent or subsequent, upon whose fulfilment the validity of amnesties will depend. And even where amnesty laws authorize officials to make decisions about whether to grant amnesty to particular perpetrators, they typically do not confer unfettered discretion. The discretion of officials is usually circumscribed by specified terms and conditions. These terms and conditions usually disallow the granting of amnesties for personal financial or partisan political gain or to benefit the family and friends of officials authorized to grant it or to reward or induce political support – certain of these aims having recently been pursued by Donald Trump in his bestowing of presidential pardons. As well, officials' decisions about whether to grant amnesty are often subject to judicial review. Amnesty laws may specify expressly that conferral or refusal of amnesty is subject to judicial review such that where discretion has been exercised arbitrarily the decision to grant or refuse

[22] Postema (2022), pp. 63–64.

[23] Language, and therefore legal rules, are inevitably to some degree vague, necessitating the exercise of discretion. See Endicott (1999), p. 17: "There is no coherent way to characterize the rule of law as an ideal that is intrinsically opposed to discretion".

[24] Allan (2001), p. 176.

[25] Allan (2001), p. 43.

amnesty may be quashed.[26] And so, while amnesty laws that confer on officials unfettered discretion in granting amnesties and those that exclude judicial review could be deemed to violate the rule of law, there is nothing inevitable about amnesty laws violating the rule of law on these grounds.

3 Three Unsatisfactory Replies

In this section I briefly consider and rebut three unsatisfactory replies to the case for considering amnesties to violate the rule of law. The first arises from Ruti Teitel's account of the rule of law in transitional justice contexts. The conception of the rule of law applicable to transitional societies is in her view at variance with "understandings of the rule of law in ordinary … times" and with "idealized" models of the rule of law.[27] The rule of law in transitional justice contexts is, she argues, "socially constructed" and "historically and politically contingent" insofar as its content is determined by the character of the injustice of the previous, illiberal regime, and the role of law in facilitating that injustice.[28] If Teitel is right about this, the rendering of the rule of law ideal which I presented in Sect. 2 may be inapplicable to transitional societies and so too may be the reasons of which the case for considering amnesties to violate the rule of law consists. In the perspective of Teitel's "transitional rule of law", resort to amnesties may instead 'affirm' the rule of law.[29]

I do not, however, consider Teitel to be correct in her view that the rule of law ideal applicable to ordinary societies is inapplicable to transitional settings and that a conception of the rule of law whose content is contingent and context-specific is applicable instead. I agree with Padraig McAuliffe in thinking that "[i]deal (or as some would argue, ordinary) rule of law should be retained as the yardstick by which to judge transitional justice" and that the circumstances of transition, to the extent that they are exceptional, "do not make the rule of law contingent".[30] As McAuliffe observes, it does not follow from the fact that the mechanisms of transitional justice may in certain respects deviate from the rule of law ideal as it is ordinarily understood that we should embrace an "extraordinary 'transitional rule of law'".[31] Assessment of the mechanisms and devices of transitional justice with respect to their conformity with, or deviation from, the rule of law ideal as it is ordinarily understood is appropriate because it reminds us of the cost that is paid when the rule of law is deviated from.[32] And once the applicability of the rule of law ideal

[26] Examples of amnesty laws that expressly provide for judicial review include the Law on the Rehabilitation of Victims of Political Repression, 18 October 1991, as amended 17 December 1992 (Russia), and Proclamation No. 347, 1994 (Philippines), Sect. 4.

[27] Teitel (2000), pp. 7, 12, 227.

[28] Teitel (2000), pp. 19, 224.

[29] Teitel (2000), pp. 19, 66–67.

[30] McAuliffe (2013), pp. 104-5.

[31] McAuliffe (2013), pp. 101.

[32] McAuliffe (2013), pp. 106.

as it is ordinarily understood to the circumstances of transitional justice is conceded, the case for considering amnesty to violate the rule of law is undiminished.[33]

A second reply to the case for considering amnesties to violate the rule of law posits that because amnesties are legally authorized, that is, they are granted through or in accordance with amnesty *laws*, they cannot accurately be deemed to violate the rule of law. But this is incorrect. Rule by law does not, on the most attractive conceptions of the rule of law, equate to the rule of law. There may appear something paradoxical in rule by law undermining the rule of law, but there need not be a genuine contradiction, since the legislature or executive can decide to govern arbitrarily rather than consonantly with the rule of law ideal. Even if amnesty laws are clear, intelligible, stated in general terms, prospectively enacted and impartially administered, so that they do not formally violate the rule of law, they make an exception for a special category of 'political offender' that in effect amounts to an abandonment of the principle that everyone should be subject to the same law. As Jeremy Waldron observes, "legislation can sometimes undermine the Rule of Law, by purporting for example to remove legal accountability from a range of official actions".[34] That amnesties have a statutory or other legal warrant does not entail that they are consistent with the rule of law.

According to a third reply to the case for considering the granting of amnesties to be at odds with the rule of law, at the core of the case is the failure to hold amnesty's recipients accountable. Yet amnesties need not be incompatible with the rule of law, this reply insists, since certain amnesties can and do hold perpetrators accountable. That is, even if 'blanket' amnesties violate the rule of law by failing to hold perpetrators accountable – the Mozambican amnesty declared in 1992 following the 15-year civil war in that country and the amnesty granted in Spain in 1977 covering Francoist human rights violations serve as examples – certain 'conditional' amnesties can facilitate accountability. Amnesties that are combined with a truth commission and granted contingently upon perpetrators publicly disclosing the details of their wrongdoing, as the post-apartheid South African amnesty was, are often claimed to hold perpetrators accountable. Thus Lucy Allais, commenting on the amnesties granted by the South African Truth and Reconciliation Commission (SATRC), observes that while "perpetrators were not punished, the public and individual nature of the amnesties meant that the process upheld the idea of individual accountability: individuals were called on to give an account of what they had done, which would be placed on a public record".[35] Some may be tempted to infer from conditional amnesties' providing a measure of accountability that they adhere after all to the prescripts of the rule of law.[36]

It is true that amnesties do not necessarily immunize their recipients against liability to account to others for wrongdoing, as the example of the SATRC illustrates. Perpetrators who sought amnesty from the SATRC were held to account by being required not only to publicly provide a comprehensive factual account of their

[33] McAuliffe (2013), pp. 102–3.

[34] Waldron (2020), § 4.

[35] Allais (2011), p. 356; see also Greenawalt (2000), pp. 75–79.

[36] See McAuliffe (2016), p. 79.

misdeeds but also to present a narrative of the reasons (establishing, among other things, a political motive) for doing what they did. However, the rule of law calls for more than this, by way of accountability, in response to criminal wrongdoing. It normally demands that perpetrators be required to answer in ordinary courts for their transgressions of the criminal law, and be punished if found guilty,[37] and that victims be afforded access to ordinary civil courts to enable them to claim remedies for the injuries visited upon them. The post-apartheid South African amnesty did not fully satisfy these requirements of the rule of law; and, moreover, the processes of the SATRC, a non-judicial body, were criticised for deviating from due process and procedural constraints demanded by the rule of law.[38]

Under the Timor-Leste immunity scheme, established in July 2001, immunity from criminal and civil liability was conferred on perpetrators of less serious crimes contingently upon their not only publicly providing an account of their offences, but also making reparations – termed 'acts of reconciliation' – including community service or compensation.[39] This dispensation conforms more closely to the rule of law than the SATRC inasmuch as it not only provides a measure of accountability but also redress for victims. Such amnesties are, however, rare. No amnesty covering serious human rights violations has been granted contingently upon perpetrators making reparations. Furthermore, like the SATRC, the procedures of the Timor-Leste Community Reconciliation Process, being more informal than court processes, deviated from due process and procedural constraints demanded by the rule of law.

4 Why the Rule of Law Objection Succeeds in Relation to Certain Amnesties Only

One of the main arguments contributing to the case for considering amnesties to be inconsistent with the rule of law ideal is that by exempting certain politically motivated malefactors from accountability for their transgressions of the criminal law, amnesties violate the demands of equality, a principle central to the rule of law on attractive conceptions of it. However, equality does not forbid discrimination

[37] The South African Constitutional Court, having previously upheld the constitutional validity of the post-apartheid amnesty concedes that amnesty's "promise not to punish those who have flagrantly violated the law seems to be at odds with one of the basic features of the South African constitutional order: namely, the rule of law … The rule of law requires, among other things, that the law should punish those guilty in terms of the law and absolve those who are not. This principle not only protects against the arbitrary exercise of public power, but also points to the correct way to treat those who act contrary to the law" (*Du Toit v Minister for Safety and Security and Another* (2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC), paras 23–24)).

[38] Among the criticisms were that victims' statements used to make accountability findings against individuals and organizations were not given under oath; few, if any, statements were tested under cross-examination; and the principles of *audi alteram partem*, and that reasons must be provided in support of accountability findings, were not respected (Jeffery 1999).

[39] Under the immunity scheme implemented in Timor-Leste in 2001, for instance, it was made a condition of perpetrators of less serious crimes receiving immunity from criminal and civil liability that they not only provide an admission of guilt and a comprehensive description of their crimes, but also that they carry out an "act of reconciliation" such as community service or compensation.

by the government *tout court*. As Allan observes, "[i]t is not necessarily an objection, therefore, that either privileges or sacrifices are enjoyed or borne by particular groups or classes under certain conditions; but the relevant distinctions must be capable of reasoned justification consistent with a defensible view of the common good as a whole".[40] Laws' consistency with the rule of law, on Allan's account, "depends on whether the relevant distinctions between persons are sufficiently closely related to *legitimate government purposes*" reflecting "an intelligible view of the common good".[41] It is, he says, incumbent on *the government enacting these laws* to justify these distinctions to those they affect.[42] Furthermore, for laws to be consistent with Allan's understanding of the rule of law their purposes and the conception of the common good they are designed to serve "must themselves be open to public debate, allowing those affected to question the justice of the measures concerned, challenging the associated vision of the public good or the truth about what that vision entails in the prevailing circumstances"; and, moreover, the content of these laws "should be settled by a deliberative process sufficiently detached from everyday pressures and immediate political ambitions".[43]

Let us turn now to the implications of Allan's account of the rule of law for amnesties. Many 'self-amnesties' issued by repressive authoritarian regimes after contemplation of the possibility of regime change are not intended or designed to further the common good; their purpose is instead to protect dictators, their officials and their agents, from being prosecuted and punished as well as, in some cases, to prevent the truth about human rights abuses emerging through prosecutions.[44] Allan agrees with F.A. Hayek's view that laws containing special legal dispensations for a particular group will escape the imputation of arbitrariness or abuse of power "if they are equally recognized as justified by those inside and those outside the group" in the sense that the desirability of the law "will not depend on whether the individual is in the group or not".[45] Yet the desirability and justifiability of a self-amnesty laws are often, if not usually, dependent on whether an individual considering their merits is inside or outside the group exempted from criminal accountability. Those outside the group of the self-amnesty's recipients and their supporters frequently have no reason to consider the self-amnesty law to be justified. Furthermore, self-amnesty laws enacted by dictatorial regimes will frequently not be open to public debate; and, moreover, their content will often not be decided through a deliberative process detached from 'immediate political ambitions'.

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[40] Allan (2001), p. 22.

[41] Allan (2001), pp. 3, 22.

[42] Allan (2001), pp. 21–22.

[43] Allan (2001), pp. 40, 47.

[44] In his concurring judgment in *Almonacid-Arellano et al. v Chile* (Merits) Inter-American Court of Human Rights Series C No 154 (26 September 2006), Justice Cançado-Trindade observes that self-amnesties are "devoid … of the search for the common good. They do not even seek the organization of regulation of social relations in furtherance of the common good. They are only designed to keep certain facts from justice, cover gross rights violations and ensure impunity for some individuals" (separate concurring judgment, para 7).

[45] Hayek (2012), pp. 222–223; see also Allan (2001), pp. 39–40.

The 'self-amnesty' granted by the autocratic and repressive Pinochet regime in 1978 to shield officials and agents of the junta from criminal liability for serious human abuses must be considered inconsistent with Allan's conception of the rule of law for many if not all of the reasons set out in the immediately preceding paragraph. Victims and opponents of the Pinochet regime had no reason to consider the amnesty justified and many have since challenged its validity. The same is true of the amnesty law granted in secret and without debate by the Peruvian congress at the instigation of the repressive Fujimori regime in 1995, immunising the regime and its agents from liability for serious human rights abuses, including those committed by a 'death squad' established to eliminate opposition to the regime.[46]

It may be countered that self-amnesties are consistent with Allan's conception because they are susceptible to justification by appeal to the common good insofar as they facilitate peaceful transition to democracy.[47] But even setting aside the requirements of public debate and deliberation, for an amnesty law to be consonant with the rule of law on Allan's account, the government enacting it must be aiming thereby to achieve a legitimate governmental purpose; and a dictatorial regime which enacts a self-amnesty law foreseeing, without desiring, regime transition, need not intend, in shielding its officials and agents from criminal liability in respect of serious human rights abuses, to promote the peaceful transition to democracy. Its sole aims are often to secure immunity from criminal accountability and to prevent the details of wrongdoing from being publicly exposed. Nor can that regime accurately justify self-amnesty as being *necessary* to preserve peace and facilitate transition, for it could, instead of conferring an amnesty, do the morally right thing: simply relinquish power and accept criminal liability for its wrongdoing. This is very different from an amnesty passed by an incoming, democratic regime because the outgoing, authoritarian regime retains sufficient power to block, or delay by some years, transition to democracy if an amnesty covering its gross human rights violations is not bestowed. The incoming regime may have no choice, short of the continuation of the authoritarian regime or bloody civil war, but to grant the amnesty – the alternative being sufficiently dire as to be morally unacceptable. [48]

By contrast, amnesty laws enacted for legitimate reasons of justice and aimed at promoting the common good may in some cases be consonant with Allan's conception of the rule of law.[49] Amnesties conferred because they are necessary to bring an end to a tyrannical, rights-violating regime or to forestall sanguinary political

[46] Making matters even less defensible in this case, from a rule of law perspective, was the passing of a second amnesty law soon after the first with the aim of preventing judicial review.

[47] I am grateful to an anonymous reviewer for pressing me to respond to this counter.

[48] In more colloquial terms, the outgoing regime granting a self-amnesty usually does not have a 'gun to its head' in the way that the incoming regime that grants self-amnesty does. In fact, the outgoing regime that grants self-amnesty usually holds a gun to the 'head' of the regime that succeeds it, the threat being 'either you honour the terms of the self-amnesty law, and the amnesty (or amnesties) conferred in accordance with it, or we will stand in the way of a peaceful transition'. General Pinochet is reported to have threatened thus: "No one is going to touch my people. The day they do, the rule of law will come to an end" (Quinn 1994, p. 905).

[49] I am grateful to Professor Allan for confirming that this is an implication of his account of the rule of law (email on file with author).

conflict, for example, need not violate the rule of law on this conception. Governments granting such amnesties can accurately justify them to all affected as being necessary for peaceful transition. Whether an individual considers such amnesty laws to be justified need not depend on whether that individual is inside or outside the group exempted from criminal accountability. The extent to which amnesty laws of this kind are consistent with the rule of law will depend in part on whether they are enacted pursuant to appropriate deliberation and debate and otherwise properly implemented. Relevant also will be their terms, that is, whether they specify the crimes covered by it, the perpetrators eligible to receive it, and the conditions upon which they are granted, sufficiently precisely to restrict the discretion of officials authorised to grant amnesty, and whether they authorise judges to review the decisions of officials to withhold or confer amnesty, or at least do not exclude judicial review.

It may be, however, that on other conceptions of the rule of law (other than Allan's and those resembling it, that is), even amnesties granted in furtherance of some purpose that fosters the common good would violate the rule of law on account of their immunising certain groups of perpetrators against prosecution and disallowing victims' access to ordinary courts or tribunals. This, however, cannot count as a fatal objection, for if these accounts of the rule of law are to be considered tenable, they must recognise that amnesty's deviation from the rule of law does not entail that its conferral is always unjustified, all things considered.[50] The rule of law is an important principle of political morality, but it is not the only one. The demands of the rule of law may be defeated by other values or principles of political morality. This may occur when amnesty is necessary, in transitional justice settings, to bring an end to violent conflict or when it is indispensable for a peaceful transition from a repressive, rights-violating regime liberal democracy. What is more, violation of the prescripts of the rule of law in transitional circumstances may be considered, however paradoxically, to *honour* the rule of law; that is, the requirements of the rule of law may be violated in transitional justice settings "in hopes of preserving or promoting greater commitment to the ideal and its institutional realization in the long run".[51] In certain circumstances, to which I will recur in Sect. 7, the conferral of amnesty may be a *prerequisite* for the restoration of the rule of law. Hence, even if amnesty is deemed to violate the rule of law, it may yet be justified on rule of law grounds because of its being necessary (though not, of course, sufficient) for restoration of the rule of law in the future.

[50] On Raz's well-known conception of the rule of law, "rule of law principles state *pro tanto* reasons which can be overridden by conflicting considerations" such that violations of the rule of law may sometimes be morally justified (Raz 2019, pp. 8, 14; see also Raz (1979), p. 228). McAuliffe agrees with Raz about this (McAuliffe 2013, p. 103).

[51] Postema (2022), p. 139.

5 Does International Law Prohibit Amnesties?

Someone might object that the contentions I have advanced in Sect. 4 do not take account of a further important argument for the view that amnesties violate the rule of law. Observing that the rule of law requires that the government must exercise power in accordance with law, they might argue that national institutions – legislatures and executives – are prohibited by public international law, or by domestic law in the form of national constitutions, from instituting amnesties.[52] In this section, I assess the argument that international law prohibits amnesty; the possibility of national constitutions prohibiting amnesty will be brought under scrutiny in Sect. 6.

Until relatively recently, the power to grant amnesties was generally, if not universally, considered a sovereign prerogative of states, and therefore insusceptible of international law's intrusion. The power to confer amnesties in respect of less serious crimes continues to be viewed in this light by everyone whose opinion is worthy of consideration.[53] But when it comes to graver wrongdoing, opinion has shifted appreciably: since the 1990s an increasing number of international and regional judicial and quasi-judicial human rights organizations and institutions, including the United Nations, as well as several international law scholars, have condemned amnesties covering serious human rights violations on the ground that they contravene public international law.[54] These organizations, institutions and scholars have for the most part urged that international law places an obligation on states, and post-conflict states in particular, to prosecute and punish those responsible for 'international crimes': that is to say, war crimes (serious violations of the laws of war), crimes against humanity (including extermination, imprisonment, rape and murder committed as part of a systematic attack on a civilian population) and genocide (crimes committed with the intention to destroy, wholly or in part, a national, ethnic, religious or racial group). It follows, on this reasoning, that for such crimes amnesty is ruled out. Some, like the United Nations, go further, extending to other gross human rights abuses the putatively amnesty-excluding duty of states to prosecute.

By contrast, I side in what follows with those international law scholars who contend that public international law can reasonably be construed as permitting states at least sometimes to grant amnesties covering serious crimes – where, for instance,

[52] With respect to public international law, Waldron writes: "to the extent that we take international law seriously, it will be the case that national legislatures, like other national institutions, will appropriately regard themselves as bound and constrained by law in what they do (whether or not they have a national Bill of Rights) … The character of that constraint will no doubt be determined, formally and procedurally (if not substantively), by the ideal of the Rule of Law, adapted to the international context" (Waldron 2006, p. 26). Mattias Kumm defines "the international rule of law … to mean literally what it says: that nations, in their relationships to one another, are to be ruled by law. The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions" (Kumm 2003, p. 22).

[53] A point recently affirmed by the European Court of Human Rights in *Makuchyan and Minasyan v. Azerbaijan and Hungary* Application 17,247/13, Judgment, 26 May 2020, para 160: "amnesties are primarily matters of member States' domestic law and are in principle not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights".

[54] See, for example, Office of the United Nations High Commissioner for Human Rights (2009); Bassiouni (1992); Roht-Arriaza (1990).

amnesty is deemed necessary to end violent political conflict or where it is viewed as indispensable to inducing an authoritarian, human rights-violating regime to relinquish power peacefully; or who hold that amnesty's status in public international law is unsettled.[55] If the arguments I present in support of this view are sound, certain amnesties may violate the rule of law on account of being prohibited by public international law but others do not.

5.1 Is There a Treaty-Based Prohibition on Amnesties?

An international law duty on states to forbear amnesties could arise in either of two ways. It could have its source in a treaty specifying a non-derogable obligation – 'derogation' referring to the temporary suspension of, or deviation from, certain rights in times of public emergency – upon states parties either to eschew amnesties for certain serious crimes without exception or to prosecute perpetrators of these crimes come what may. Alternatively, customary international law, defined by Article 38(1) of the Statute of the International Court of Justice as "evidence of a general practice accepted as law", could place a duty upon states to prosecute certain crimes in such a way as to rule out amnesties. I will examine each possibility in turn.

No multilateral convention expressly prohibits states parties from granting amnesties or, mentioning amnesties, discourages their use. Foreseeing the potential for amnesty to be beneficial in certain contexts, and intent on the protection of their sovereignty, states have generally been unwilling to accept in treaties phraseology that expressly disallows the use of amnesties.[56] The only explicit mention of amnesty in any international treaty crops up in the 1977 Additional Protocol II to the Geneva Conventions. Not only does the Additional Protocol II not require the prosecution of serious human rights violations perpetrated in the course of internal (non-international) armed conflicts, but Article 6(5) in fact *encourages* the granting of amnesties on their cessation in order to foster reconciliation: "At the end of

[55] See, e.g., Trumbull (2007); Freeman (2009); Freeman and Pensky (2012); Pensky (2013); Mallinder (2011); Mallinder (2012); Close (2019). These scholars draw support from certain pronouncements by courts, tribunals and commissions appearing to suggest that in some circumstances the bestowal of amnesty could be consistent with international law. For three relatively recent examples, see the following judgments: the concurring opinion of the President of the Inter-American Court of Human Rights, Judge Diego Garcia-Sayan, and four other judges, collectively a majority of the court, in *The Massacres of El Mozote and nearby places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012) (a judgment implying that certain amnesties could be justified, namely amnesties aimed at ending violent conflicts extended to perpetrators of serious human rights violations in exchange for admissions of guilt and disclosure of wrongdoing, as well as their making reparations that are lenient relative to their presumptively deserved punishment); the concurring judgement of three ECHR judges (Ŝikuta, Wojtyczek and Vehabović) in *Marguŝ v Croatia* [GC] ECHR 2014-III (expressing support for permitting states "a certain margin of manoeuvre in this sphere, in order to allow the different parties to conflicts engendering grave human rights violations to find the most appropriate solutions" (para 9); and *Thomas Kwoyelo v Uganda* Communication 431/12 (17 October 2018) (in which the African Commission on Human and People's Rights determined, *obiter dictum*, that amnesties conditional upon perpetrators admitting guilt and disclosing the details of their wrongdoing, could be consistent with the African Charter on Human and People's Rights if they "constitute justifiable and proportional limitations acceptable under international law" (para 291).

[56] Freeman and Pensky (2012), p. 44.

hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".

Opinions are divided about how Article 6(5) ought to be interpreted. The International Committee of the Red Cross (ICRC) has construed it as sanctioning amnesty only for combatants who have participated in hostilities while respecting the laws of war and not for those who have committed serious crimes under international humanitarian law.[57] However, most domestic courts, when they have had occasion to appeal to it, have interpreted Article 6(5) as upholding amnesties covering serious crimes.[58] Furthermore, the ICRC's interpretation has been criticized for being at variance with the plain meaning of the language of the Article, which does not expressly exclude certain categories of perpetrator, and for being inconsistent with the *travaux préparatoires* of Article 6(5), which, according to one commentator, do "not support the view that its drafters intended it as a provision excluding certain categories of offenders. Its drafting history seems rather to confirm a literal interpretation of the provision as applying broadly to all persons having taken part in an internal conflict without distinctions or exceptions".[59]

The argument most frequently enlisted in support of the claim that amnesties are forbidden without exception by certain multilateral conventions asserts that they expressly impose an obligation on states to prosecute serious crimes and that this precludes the granting of amnesty. Several widely ratified treaties undeniably specify a duty to prosecute, including the Geneva Conventions of 1949 (the Geneva Conventions), the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention), and the International Convention for the Protection of All Persons from Enforced Disappearances (the Disappearances Convention). Yet the applicability of this duty is limited in several ways.

The Geneva Conventions require signatory states to prosecute and punish persons responsible for "grave breaches" of the Conventions, including murder, torture, inhuman treatment and serious bodily injury. Yet the fact that they pertain only to *international* armed conflicts very significantly limits their relevance to transitional justice settings. The vast majority of conflicts that have occurred since the Second World War have taken place within the boundaries of particular states.[60]

The Genocide Convention prescribes that a person charged with genocide must be prosecuted and, if convicted, punished. However, its definition of genocide as consisting in acts performed with the intention "to destroy, in whole or in part, a national, ethnical (sic.), racial or religious group" (Article 2) excludes much serious wrongdoing that lacks this genocidal intention. It also excludes acts not directed at any of the four groups named but targeting *political* groups instead. These exclusions narrowly

[57] See Cassel (1996) p. 218 (quoting a letter from the head of the ICRC legal division).

[58] Freeman (2009), p. 34.

[59] Close (2019), p. 133.

[60] Freeman and Pensky (2012), p. 47.

restrict the scope of the duty to prosecute under the Genocide Convention which, while it would apply to post-conflict settings such as Bosnia and Rwanda, would not have relevance to most others, including Latin America's 'dirty wars'.[61]

Article 7 of the Torture Convention obligates state parties – non-derogably, since there is no clause in the Convention permitting derogation by states in emergency circumstances – either to extradite persons alleged to have committed torture or to submit them "to its competent authorities for the purposes of prosecution". The scope of this duty to prosecute is limited to acts of torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (Article 1, specifying the definition of torture). Excluded by this formulation from the purview of the Convention are non-state torturers, including members of groups opposing the regime in power. As well, there is disagreement about whether the wording of Article 7 places an inflexible obligation on states to prosecute or accords to them discretion about whether to prosecute.[62]

Forced 'disappearances' under the Disappearances Convention involve victims' arrest, detention, abduction or other deprivation of liberty by agents of the state followed by refusal to acknowledge as much, or concealment of the fate or location of 'disappeared' persons. Article 11(1) of the Convention repeats verbatim the Torture Convention's phrasing of the obligation to prosecute perpetrators of forced disappearances. Accordingly, a signatory state that declines to extradite or to surrender to an international criminal tribunal a person alleged to have committed forced 'disappearances' incurs an obligation "to submit the case to its competent authorities for the purposes of prosecution". Given the identical wording in the two Conventions regarding the obligation to prosecute, the debate about whether the language used imposes a strict obligation to do so is much the same in both cases. In both Conventions, moreover, the obligation to prosecute applies only to state officials.

Human rights treaty bodies have asserted the existence in international human rights law of an obligation to prosecute grounded in the provisions of general human rights treaties that require states to make available a *remedy* to victims of human rights violations. Article 13 of the European Convention on Human Rights (ECHR) and article 2(3) of the International Covenant on Civil and Political Rights (ICCPR), for instance, require states to provide an "effective remedy" for victims of human rights violations. Whether the duty to provide a remedy expressed in these treaties gives rise to a duty on the state to prosecute is, however, contentious. Some commentators argue that the purpose of victims' right to a remedy is to afford them access to reparation, and this could take the form of compensation made available through non-criminal or even non-judicial proceedings.[63] The language in which the right to a remedy is expressed in the ECHR and ICCPR – "an effective remedy before a national authority" (Article 13 of the ECHR) and "any person claiming

[61] See Mallinder (2011), p. 12; Trumbull (2007), p. 289.

[62] For the view that the wording of Article 7 accords to states discretion about whether to prosecute, see Mallinder (2011), pp. 15–16; Freeman and Pensky (2012), p. 47. For the contrary view that Article 7 should be construed as imposing, failing extradition, a strict obligation to prosecute, see Scharf (1996), pp. 46–47.

[63] Freeman and Pensky (2012), pp. 48–49.

such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State" (article 2(3) of the ICCPR) – does not indicate an intention on the part of the drafters (and states parties) to impose an obligation on states to criminally prosecute and punish perpetrators. The wording used in these treaties instead confers discretion concerning which national body or institution should determine the type and magnitude of the remedy. International human rights law pertaining to remedies for human rights violations is not inconsistent with states' discretion to choose remedies other than prosecution and punishment.[64] The granting of amnesties, similarly, need not preclude civil remedies or the payment of reparation to victims: "not all amnesties would conflict with a literal interpretation of the remedy provisions of general human rights conventions".[65]

Treaty-based prohibitions on statutory limitations for certain crimes are sometimes appealed to in support of the claim that there exists a treaty-based proscription of amnesties owing to an alleged parallelism between amnesties and statutory limitations. The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (the Statutory Limitations Convention) prohibits states parties from applying statutory limitations to the prosecution and punishment of war crimes and crimes against humanity, while Article 29 of the Rome Statute stipulates that genocide, crimes against humanity and war crimes "shall not be subject to any statute of limitations". An argument that these provisions effectively prohibit amnesties in respect of such crimes runs as follows: because amnesties extinguish criminal liability for such crimes, and because statutory limitations on their prosecution and punishment also extinguish criminal liability, prohibitions on statutory limitations for genocide, crimes against humanity and war crimes are effectively also prohibitions on amnesties in respect of those crimes. But this train of argument is flawed. Amnesties and statutory limitations are in fact two distinct mechanisms that operate differently: statutory limitations do not immediately extinguish criminal liability but simply restrict the time within which perpetrators of certain categories of crimes may be prosecuted, whereas amnesties immediately extinguish criminal liability for perpetrators of specified categories of crimes. Consequently, a prohibition on statutory limitations for certain crimes does not equate to a prohibition on amnesty in respect of those crimes. States had an opportunity during the negotiations leading to the Statutory Limitations Convention to prohibit amnesties as well as statutory limitations, but "though the issue was raised … it was deliberately sidestepped".[66] There is also no evidence from the negotiations relating

[64] Shelton discusses the remedies available for human rights violations under international human rights law as follows: "Substantive redress can have several aims, from victim-oriented *restitutio in integrum* to full compensation for pecuniary and non-pecuniary losses to deterrence of violations for the benefit of society. The types of remedies will depend on the nature of the case, but a growing consensus on minimum standards includes restitution where possible and compensation where not and the right to truth" (Shelton 2006, p. 9).

[65] Close (2019), p. 183.

[66] Close (2019), p. 123.

to Article 29 of the Rome Statute's prohibition on statutory limitations that it was envisaged by any state as having to do with the prohibition of amnesties.[67]

Finally, it is sometimes argued that the absoluteness and/or non-derogability of certain human rights, such as the right to be protected against torture, for example, gives rise to so exigent a duty to prosecute their violation as to rule out amnesty in all circumstances. But to reason thus is to reason erroneously, for correlative to absolute and/or non-derogable human rights is not an absolute and/or non-derogable duty to prosecute violations (even to the point of placing a veto on amnesty), but rather an absolute and/or non-derogable duty on the part of states to refrain from violating human rights. A duty to prosecute and punish perpetrators of violations of absolute and/or non-derogable rights that is so formidably demanding as to rule out amnesties covering these violations in all circumstances is not a correlative of, or in any way entailed by, such rights.[68]

Two arguments have force sufficient, in my view, to cast serious doubt on the proposition that the treaty-based obligation to prosecute, to the extent that it exists, rules out amnesties in all circumstances. According to the first, if in the negotiations leading to a treaty an article explicitly forbidding states from granting amnesty was proposed *and rejected*, that fact constitutes evidence of states' unwillingness to renounce or waive their prerogative to confer amnesty in exceptional circumstances.[69] So, for example, in the case of the Disappearance Convention, an article proposed in an earlier version that prohibited the granting of amnesty was removed owing to states' concerns that its inclusion would be out of step with the development of international law at that time and also because of the expressed desire of certain states to retain their prerogative to grant amnesties in case, at a future time, they might be a salutary expedient in the aftermath of conflict.[70] Since treaties represent agreements among states parties, and since no agreement has been reached with respect to the prohibition of amnesties, it follows that the agreement reached regarding an obligation to prosecute should not be interpreted as proscribing the granting of amnesties without exception.[71]

The second argument begins with the observation that various treaties and conventions, including the Genocide Convention and the Torture Convention, place an obligation on states to protect the fundamental rights of their populations.[72] But situations may arise in which this duty, colliding with a state's obligation to prosecute and punish human rights violations, forces the latter to give way. Consider a situation where, in order to induce an autocratic regime engaged in widespread and serious rights violations to relinquish power peacefully, it is necessary to extinguish the criminal liability of the regime's officials through an offer of amnesty; or a situation in which the granting of amnesty is necessary to end a violent internal

[67] Freeman (2009), p. 42.

[68] Freeman and Pensky (2012), p. 51; Jackson (2018).

[69] Freeman (2009), pp. 55–6; Close (2019), pp. 138–140.

[70] Close (2019), pp. 136–140.

[71] This argument cuts no ice with respect to the Geneva, Genocide and Torture Conventions, however, since no provision expressly prohibiting amnesties was broached during their negotiation.

[72] For a version of this argument, see Freeman (2009), pp. 56–63.

conflict. Manifestly, states' duty to protect people within their jurisdictions from widespread, serious human rights abuses is more stringent than their duty to prosecute and punish perpetrators of even the most serious crimes. It may be bad or even wrong for states to forbear the prosecution and punishment of perpetrators of serious crimes, but it is worse for states to eschew recourse to amnesty when its conferral is necessary to the discharge of their duty to protect the population against the perpetration of widespread and grave wrongs. Amnesty may in some cases be indispensable to a transition to liberal democracy, a dispensation in which the background conditions for the protection of fundamental human rights are enshrined.[73] In those post-conflict societies in which amnesty is a pre-requite for peaceful transition to liberal democracy, or in which transition to liberal democracy would likely not have occurred had amnesty not been agreed to,[74] an emphatic concern with the protection of fundamental rights powerfully justifies the granting of amnesty.

5.2 Does Customary International Law Prohibit Amnesties?

It is commonly claimed that customary international law includes an anti-impunity norm that prohibits states, under any circumstances, from granting amnesty bearing upon serious human rights violations. This is an important claim in part because treaty-based obligations to prosecute bind only states parties to these treaties, and only with respect to crimes committed after their entry into force in the signatory states, but also because the international crimes most likely to be amnestied nowadays – crimes against humanity and war crimes committed in internal armed conflicts – are not subject to any treaty-based obligation to prosecute.

Among the trends adduced as evidence of the crystallization of a customary international law anti-amnesty norm are the following two: the increasingly insistent demands, since the 1990s, emanating from the United Nations, international non-governmental organizations and other international and regional human rights bodies and institutions that perpetrators of war crimes, crimes against humanity, genocide and other serious human rights violations be held criminally accountable;[75] and, second, the jurisprudence of transnational and international courts which have, in many cases in the last three decades, ruled that amnesties extended in respect of international crimes and gross human rights violations are inconsistent with

[73] As Darrel Moellendorf observes, "arguably only in liberal democratic society are the full rights of individuals recognised. The political and legal institutions of liberal democracy are background requirements of the full recognition of individual rights" (Moellendorf 1997, p. 288).

[74] Here the standout example is South Africa, whose historic transition to democracy would likely not have occurred had not the negotiating parties embraced the expedient of amnesty, accepting it as a necessary condition for a peaceful change of regime (see e.g., Van Zijl (1999); Lodge (2003), p 176).

[75] United Nations policy on such amnesties, for instance, has for more than two decades been that they are impermissible, in violation of international law, and in no way to be encouraged or condoned (Office of the United Nations High Commissioner for Human Rights (2009), pp. 11, 27) – a position entrenched by the proviso the Special Representative of the UN Secretary General appended to his signature on the Lomé Peace agreement of July 1999. The proviso states that "the United Nations holds the understanding that amnesty and pardon in Article IX of the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".

international law.[76] However, neither the outlook of the United Nations nor judicial decisions determine customary international law's bearing on amnesties. United Nations reports and the judgments of courts can call attention to international law but their pronouncements are not constitutive of it.[77] It follows from neither the United Nation's antipathy towards amnesties nor from judicial pronouncements, that customary international law prohibits amnesties without exception.

It is sometimes contended that the *jus cogens* status of international crimes, including crimes against humanity and war crimes committed in the course of internal conflicts – *jus cogens* referring to norms universally accepted by, and expressing the fundamental values of, the international community, from which no derogation is permitted – entails an *erga omnes* (owed to everyone) obligation on the part of states to prosecute them under customary international law on an exceptionless basis.[78] However, as number of scholars have maintained, it is highly questionable whether the *jus cogens* status of certain crimes in international customary law entails either that the duty to prosecute these crimes has *jus cogens status* or that there exists a non-derogable obligation to prosecute.[79]

For a non-derogable prohibition of amnesties under customary international law to exist, an anti-amnesty norm must have crystallized; and demonstrating the existence of a crystallized norm prohibiting states from granting domestic amnesties requires proof of an extensive and consistent *state practice* of abstention from them, as well as proof that doing so reflects the *opinio juris* of states: meaning that they act in conformity with the prohibition out of a belief that they are under a legal obligation to eschew amnesties. Yet, as several international law scholars have observed, there are several reasons to doubt that state practice lends support to the claim of a crystallized anti-amnesty norm.[80] State practice does not appear sufficiently uniform to give rise to an exceptionless obligation to prosecute international crimes. With respect to crimes against humanity, there is "scant evidence that a rule prohibiting amnesty … has ripened into a compulsory norm of customary international law" and "to the extent any state practice in this area is widespread, it is the practice of

[76] With respect to the amnesty jurisprudence of transnational and international courts, the Inter-American Court of Human Rights (IAHCR) has been the court most consistent in declaring domestic amnesties to be in contravention of the American Convention on Human Rights (ACHR) (as it has in several Latin American countries, including Peru, Chile, Uruguay and El Salvador). See *Barrios Altos v Peru* (Merits) Inter-American Court of Human Rights Series C No 75 (14 March 2001), *Almonacid-Arellano v Chile* (Merits) Inter-American Court of Human Rights Series C No 154 (26 September 2006), *Gelman v Uruguay* (Merits and Reparations) Inter-American Court of Human Rights Series C No 221 (24 February 2011), *Gomes Lund et al. v Brazil* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 219 (24 November 2010) and *The Massacres of El Mozote and nearby places v El Salvador* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 252 (25 October 2012).

[77] See Freeman (2009), p. 47.

[78] For a discussion, see Scharf (2007), p. 254.

[79] See, e.g., Jacobs (2012), p. 344; Seibert-Fohr (2009), p. 253; Scharf (2013), pp. 52 – 3.

[80] In Max Pensky's view, indeed, the claim that a "customary norm barring domestic amnesties as violating states' non-derogable duties to criminally prosecute is *decisively refuted* … by state practice" (Pensky 2013, p. 172, emphasis added).

granting amnesties or de facto impunity to those who commit crimes against humanity".[81] Prosecution of perpetrators of war crimes committed in non-international (domestic) conflicts is also far from unfailingly carried out: "crimes committed as part of civil wars, insurrections, or periods of civil unrest are often covered by general amnesties, casting doubt on the existence of a customary obligation to prosecute this category of crimes".[82] While it may be true that the number of perpetrators of grave human rights violations brought to trial by states has increased in recent decades, the rate at which amnesties have been granted has also increased. A study by Louise Mallinder finds that between 1979 and 2011 "amnesty law enactment has continued at a steady rate" and that "throughout this period, although the number of new amnesty laws excluding international crimes has increased, so too has the number of amnesties including such crimes".[83] What also bears mentioning is the dearth of criticism by states of other states' conferral of amnesty. On the contrary, states are quite often prepared to participate in the brokering of, or to express support for, peace negotiations in which amnesties play a role.[84] Further casting doubt on the existence of a crystallized anti-amnesty norm is states' reluctance to agree to any express prohibition on the granting of amnesties during treaty negotiations, a chariness traceable to a concern to protect state sovereignty with respect to how to deal with human rights violators in post-conflict settings and to the appeal of amnesty as a possible solution to a potentially thorny problem.[85]

6 Amnesties and National Constitutions

Might the granting of amnesties be prohibited by national constitutions? No: few national constitutions expressly disallow or otherwise obstruct amnesties. National constitutions often bear on the power of the legislature or executive to bestow amnesty. Most United Nations member states have constitutions that explicitly authorise the granting of amnesty, a power usually vested in national legislatures.[86] The constitutions of most other member states refer to the extending of pardons, which they typically empower the executive to confer. Exclusive reference to pardons in these national constitutions need not rule out the granting of amnesty, which in common law countries is conceived of as a 'general pardon': in other words, the same concept, only under different names.

Certain constitutions contain bills of rights that spell out fundamental rights which the granting of amnesty may be deemed to infringe. In the transitional justice

[81] Scharf (2006), p. 360.

[82] Close (2019), p. 142.

[83] Mallinder (2012), p. 95. Someone might invoke the trend in South America to narrow or revoke previously enacted amnesty laws for international crimes and other serious human rights violations in support of a customary law prohibition of amnesties for these crimes. However, as Mallinder observes, this trend does not extend beyond South America (Mallinder 2016, pp. 671–680).

[84] Mallinder (2011), p. 13; Trumbull (2007), p. 291.

[85] Freeman (2009), p. 33.

[86] Close (2019), pp. 80–81.

literature, the most commonly referenced decision in which a national court has ruled on the constitutional status of an amnesty law is *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others (AZAPO)*. In this landmark case, the South African Constitutional Court held that victims of gross human rights violations "have the right to obtain redress in the ordinary courts of law … An amnesty to the wrongdoer effectively obliterates such rights".[87] Yet, despite being deemed to trespass upon victims' right to redress, South Africa's amnesty law was upheld as constitutionally valid by the Court, and this chiefly on the following two grounds: first, that amnesty is explicitly authorised by the interim South African Constitution; and second, that the limitation of victims' right to redress occasioned by the granting of amnesty is justifiable under the interim Constitution's limitation provision.

The relevance of the *AZAPO* judgment for other jurisdictions in which rights enumerated in a national constitution may be deemed to be infringed by amnesty is unmistakable. An amnesty could be upheld as constitutionally valid notwithstanding its infringement of basic rights on the grounds that amnesty is authorised by the constitution, and that the limitation of these rights is justified by considerations of great import. There is potential for the justification of amnesty's limitation of rights to occur under a constitution's limitation provision, if one exists; limitation provisions typically specify that most rights are subject to limitations that are justified and reasonable in a democratic society for the realization of certain common goods such as social justice, social reconciliation or for the protection of the rights of others.[88]

Are amnesties inconsistent with national constitutions that have incorporated international law? By no means necessarily. The argument of Sect. 5 is that international law is susceptible of being interpreted as permitting amnesties covering serious human rights abuses in certain circumstances. The most well-known decision declaring an amnesty to be unconstitutional on international-law grounds is the ruling of the Argentine Supreme Court in the *Simon* case.[89] The Supreme Court found that Argentina's two amnesty laws, the Due Obedience Law and the Full Stop Law, were enacted in breach of international law treaties and (in the view of some judges) customary international law – international human rights law having been incorporated into the Argentine Constitution when it was revised in 1994. Yet the decision has met with criticism on among other grounds that the amnesty laws were not inconsistent with Argentina's obligations under international law.[90] Moreover,

[87] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015, para 9.

[88] A number of other national courts have upheld amnesties, including Brazil's Supreme Court in *Argüição de Descumprimento de Preceito Fundamental*, (ADPF 153), merits, Supremo Tribunal Federal, August 6, 2010 (refusing to invalidate Brazil's 1979 amnesty law, which it characterised as the result of a political process aimed at facilitating national peace and reconciliation). The Constitutional Court of Uganda's upholding of the constitutionality of the 2000 Amnesty Act in *Thomas Kwoyelo alias Latoni v. Uganda* [2011] UGCC, affirmed on appeal in *Uganda v Kwoyelo* [2015] UGSC 5, serves as a further example.

[89] Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/ illegal deprivation of liberty, etc., Causa 17.768, Order of 14 June 2005.

[90] See, e.g., Elias (2008), pp. 628–644; Mallinder (2016), pp. 669−70.

for reasons set out in Sect. 5, there is no necessity for other domestic courts to reach the same conclusion as Argentina's Supreme Court about amnesty's status under international law: much depends on the aims and character of particular amnesties.

7 Does Amnesty Impede Restoration of the Rule of Law?

I want in this section briefly to consider the charge that amnesty impedes restoration of the rule of law in post-transitional societies.[91] For although the primary purpose of this paper is to re-assess the objection to amnesties that they violate the rule of law, its broader purpose is to re-examine the relation between amnesties and the rule of law. This broader aim cannot achieved without addressing the objection that amnesties frustrate the restoration of the rule of law. And besides, as we saw at the conclusion of Sect. 4, whether amnesty inhibits or promotes the rule of law may bear on whether amnesties that are considered to violate the rule of law on certain conceptions of it can nonetheless be justified.

The objection that amnesties impede the restoration of the rule of law can be challenged from several perspectives. The granting of amnesty is accurately viewed as a *prerequisite* for the restoration, or introduction, of the rule of law in certain transitional contexts. Among these contexts are those settings in which the *ancien regime* retains sufficient power to insist upon amnesty as a condition of peaceful transition from a society characterised by serious and routine human rights violations and authoritarian rule to a liberal democracy.[92]

Additionally, it is doubtful whether amnesties are necessarily less efficacious than trials in establishing or re-establishing the rule of law in post-transitional societies. Trials, to be sure, can promote the restoration of the rule of law.[93] Kathryn Sikkink and Carrie Booth Walling remark that "building the rule of law has coincided with human rights trials" in much of Latin America. They furnish as an example the trials of the Junta in 1985 in Argentina, which, they say, demonstrated to ordinary citizens that "law could be used to hold the most powerful leaders of their country

[91] Freeman and Pensky, for instance, characterize amnesty covering serious crimes as "potentially a blow to the longer-term prospects of establishing and strengthening legal institutions and the rule of law in transitional states" (Freeman and Pensky 2012, p. 42).

[92] Reflecting on the amnesty previously granted by the South African TRC, the South African Constitutional Court characterises the amnesty previously granted by the South African Constitutional Court as "part of a restorative and prospective process of transitional justice, heralding the coming-of-age of the proper rule of law in a society emerging from conflict" (*Du Toit v Minister for Safety and Security and Another* ([2009] ZACC 22; 2010 (1); 2009 (12) BCLR 1171 (CC), para 21). See also Vinjamuri and Snyder (2003/4), p. 6): "Preventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses (or so-called spoilers). Amnesty—or simply ignoring past abuses—may be a necessary tool in this bargaining. *Once such deals are struck, institutions based on the rule of law become more feasible*".

[93] Antony Duff argues that trials can contribute to the restoration of the rule of law in transitional justice circumstances inasmuch as "by claiming and exercising the authority to.

call alleged perpetrators to answer, the law reasserts itself as the governing law of the polity, and thus assures citizens that they live – still or again – in a law-governed polity" (Duff 2014, p. 14).

accountable for past human rights violations".[94] But it does not follow from trials having the potential to contribute to the restoration of the rule of law that they necessarily do so, or that they necessarily promote the establishment of the rule of law more effectively than amnesties.[95] Jane Stromseth agrees with Sikkink and Walling's view that trials can help to build the rule of law in post-conflict societies in part through what she calls their 'demonstration effects' – their potential to "demonstrate credibly that previous patterns of impunity have been rejected, that law can be fair, and the political position or economic status does not immunize a person from accountability" – which can help to build public confidence.[96] Yet she qualifies her view with the observation that criminal trials of perpetrators may "have very little, if any impact on strengthening the domestic rule of law in a post-conflict society".[97] In some cases, she points out, criminal proceedings may be widely perceived to be biased, especially if certain perpetrators are punished while others, no less guilty of comparably serious wrongdoing, are allowed to go free. Once this occurs the impression that the law is unfair, and that previous patterns of impunity are continuing, may be created or reinforced. Trials could also, in some cases, have a divisive effect, eliciting resentment on the part of perpetrators and their sympathisers which, if sufficiently intense, could produce a backlash resulting in violent conflict that could prevent the restoration of the rule of law.

Confident pronouncements about the effects of transitional justice mechanisms, including trials and amnesties, on the building of the rule of law in post-conflict societies are unwarranted given variations in historical and present-day contingencies of particular societies that in part determine their efficacy and considering also the paucity of available empirical information about their effects. As Stromseth observes, "we are relatively early in the process of understanding the longer-term impacts of accountability process – such as criminal proceedings … – in different post-conflict societies; furthermore, the unique circumstances and obstacles in each society attempting to overcome horrific atrocities make generalizations risky".[98] Available evidence about the effects of amnesties on restoration of the rule of law is likewise too meagre and murky to support confident pronouncements.[99]

It is sometimes contended that prosecutions and punishment communicate to members of the public the value placed by the state on the rule of law, whereas amnesty, by publicly staging deviation from criminal justice processes for reasons of political expediency, is likely to breed "cynicism about the rule of law".[100] Two

[94] Sikkink and Walling (2007), p. 441.

[95] The example of post-Franco Spain could perhaps be invoked as a counter to Sikkink and Walling's insistence that "it is difficult to build a rule of law system while simultaneously ignoring recent gross violations of political and civil rights and failing to hold past and present government officials accountable for those violations" (Sikkink and Walling 2007, p. 441).

[96] Stromseth (2007), p. 263.

[97] Stromseth (2007), pp. 255–256.

[98] Stromseth (2007), p. 256.

[99] As Geoff Dancy observes, "[i]t remains unclear whether amnesties are effective … Few studies conduct systematic studies of amnesty performance" (Dancy 2018, p. 389).

[100] Scharf (2007), p. 252.

replies to this argument are available. Where amnesties have been granted because they are necessary to ensure a peaceful transition from an autocratic regime to a democracy, or to put an end to violent conflict, they may, as we have seen, be indispensable to restoration of the rule of law. The necessity of amnesties for restoring the rule of law in these circumstances may be communicated to the public at large, and it would be disrespectful, and perhaps even cynical, to imagine that ordinary people are unable to comprehend, and recognise the truth of, that message. Mark Freeman expresses the point thus: "the public may be intelligent enough to appreciate that an amnesty's purpose may be precisely to help create the conditions necessary for the rule of law. This especially holds true when the government in question is viewed as a decent one that is oriented towards the public interest".[101] A second reason for doubting that allowing perpetrators to go unprosecuted and unpunished need have the effect of stimulating cynicism about the rule of law is that it may have the opposite effect of making people value the rule of law even more. In an analysis of Cambodians' attitudes towards the rule of law, James Gibson, Jeffrey Sonis and Sokhom Hean find "no evidence whatsoever that disrespect for the rule of law is a legacy of the impunity the KR leaders enjoyed for decades. Instead, it seems that the failure to bring the miscreants to account for their misdeeds has made ordinary Cambodians value the rule of law more, not less".[102] Furthermore, where amnesty is granted conditionally upon perpetrators making a full and public disclosure of their wrongdoing before a truth commission, that could have the effect of drawing the public's attention to transgressions of the rule of law, thereby underscoring the rule of law's value and the importance of adhering to it.

8 Conclusion

I have argued that whether amnesties violate the rule of law depends on the terms on which they are conferred, on whether governments that enact amnesty laws are thereby aiming at attaining some aspect of the common good, and on what conception of the rule of law is operative. While many self-amnesties violate the rule of law on any tenable conception of it, some amnesties implemented for the purposes of ending an autocratic, rights-violating regime or ending bloody political conflict may not violate the rule of law on certain conceptions of it. And even if they violate the rule of law on other conceptions, it does not follow that they are illegitimate, in part because they may be indispensable for restoration of the rule of law in the long term.

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[101] Freeman (2009), p. 22.

[102] Gibson et al. (2009), p. 14.

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