



Amnesties for International Crimes

Between legality and reality

Guan Schaiko

Supervisor: Prof. Dr. Carmen Márquez-Carrasco

Universidad de Sevilla

Academic Year 2009-2010

Abstract

This thesis examines the question whether amnesties for international crimes are valid under international law both from a legal and normative perspective. It does so by putting the debate on amnesty in a broader context and assessing the normative developments in international human rights law and international criminal law. The conclusion is that there is nowadays a generally agreed anti-amnesty norm for genocide, war crimes committed in international armed conflicts and crimes against humanity. This position is also perceptible in legal doctrine, the UN and the case-law of human rights monitoring bodies. Although amnesties are not per se banned under the Rome Statute, it remains unclear how the ICC will deal with amnesties in future cases.

This thesis also asserts that the current state of the law does not correspond with the reality of many transitional societies. A normative analysis reveals that the normative foundations of prosecution are not justified in the context of transitional societies. This thesis therefore proposes to de-emphasise the emphasis on prosecution and shift to the broader notion of accountability. Furthermore, it argues that the primer duty of the State in transitional societies is to bring basic security and a minimum rule of law in order to deliver justice, both as a thin and thick notion. Peace and justice are therefore not contradictory but mutually reinforcing. The validity of an amnesty should therefore be judged by the nominal contribution it makes towards basic security and the rule of law. This approach would grant transitional societies with more flexibility in dealing with past periods of violence.

Acknowledgements

I would like to extend a word of thanks to several people without whom this thesis would not have been possible at. In the first place, Prof. Carmen Márquez-Carrasco, for her tirelessly mentoring and encouraging during the writing of this thesis. I appreciate her many useful comments on my work, but even more I appreciate her willingness to discuss and exchange ideas with me. I am also grateful to the other members of the Academic Staff of the Universidad de Sevilla, Dr. L. Rodríguez-Piñero and Dr. M. Álvarez Ortega who reserved many hours for personal guidance and other interesting extra-academic moments.

I am also grateful to my beloved parents, who gave me, my brothers and sister a warm and tender nest to grow up in. They gave me the opportunity to concentrate on my studies and develop an open and critical mind. I owe them deep gratitude for making all this possible.

This thesis is the result of a wonderful year of my life that I shared with many others. I am grateful to the whole academic team in Venice for their help, support and for making the first semester in Venice even more interesting. I want to thank and hug in particular Michael, Yseult and Federica, who were an essential part of my experience in Andalusia and made that time unforgettable.

Last but not least I thank Ellen, for overcoming the many lonely moments far away from me and for the many more beautiful moments we had and will have. The writing of this thesis would not have been possible without her daily care, patience and love.

List of Abbreviations

ACHR - American Convention of Human Rights
AP - Additional Protocol to the Geneva Conventions
ECHR - European Convention on Human Rights
ECtHR – European Court of Human Rights
ECOSOC - United Nations Economic and Social Council
GAOR - General Assembly Official Records
GC - Geneva Convention
HRC – Human Rights Committee
IACtHR - Inter-American Court of Human Rights
IACHR -Inter-American Commission of Human Rights
ICC - International Criminal Court
ICCPR - International Covenant on Civil and Political Rights
ICJ - International Court of Justice
ICTR- International Criminal Tribunal for Rwanda
ICRC - International Committee of the Red Cross
ICTY - International Tribunal for the Former Yugoslavia
IHL - International Humanitarian Law
ILC - International Law Commission
OAS - Organization of American States
Rome Statute - The Rome Statute of the ICC
UDHR - Universal Declaration of Human Rights
UNGA – United Nations General Assembly
UNSC – United Nations Security Council
OHCHR -Office of the United Nations High Commissioner for Human Rights
UN - United Nations
OTP - Office of the Prosecutor
Res - Resolution

Table of Contents

Abstract.....	2
Acknowledgements.....	4
List of Abbreviations	5
Introduction	8
Research Question	10
Methodology.....	10
Chapter I: Amnesty in an International Context.....	12
1.1. Introduction	12
1.2. Towards a definition of amnesty and international crimes.....	13
1.2.1. Amnesty	13
1.2.2. International Crimes	14
1.3. On self-amnesties and transitional amnesties: why States introduce amnesty.....	15
1.4. Amnesty between peace and justice	17
1.4.1 Developments in international law.....	18
1.4.2. The evolving UN Position	19
1.4.3. State practice	20
1.4.4. Legal doctrine.....	23
1.5. Case-studies	24
1.5.1 Argentina.....	25
1.5.2. Spain.....	28
1.5.3. Uganda	30
1.6. Conclusion.....	31
Chapter II. The legality of Amnesties under International Law	33
2.1 Relevant Principles of International Law	33
2.2 Duty to prosecute International Crimes under International law	35
2.2.1. International Criminal Law.....	35
2.2.2. International human rights law.....	50
2.2.3. Conclusion.....	58
2.3. Legal defences under international Law	59
2.3.1. Derogations and limitations.....	59
2.3.2. Vienna Convention on the Law of Treaties.....	61

2.3.3. Circumstances precluding the wrongfulness of an act	62
2.4. Consequences	64
2.4.1. Internal consequences: Contesting amnesties	64
2.4.2. Horizontal consequences	65
2.5. Conclusion	67
Chapter III: Bridging the gap between legality and reality	69
3.1. Introduction	69
3.2. Prosecution and punishment: a normative account.....	71
3.2.1. Deterrence theory.....	71
3.2.2. Retribution and impunity.....	73
3.2.3. Right to justice	74
3.2. Basic security and the rule of law	76
3.2.1. Some legal underpinnings.....	78
3.2.2. Duty to prevent.....	80
3.3. Conclusion.....	82
Conclusion.....	83
Bibliography	89
Books.....	89
Articles	89
Treaties	97
UN Documents.....	98