Legal Status of Amnesty

Third party intervention in the case of *Marguš v. Croatia*, Application no. 4455/10

The present submission examines the international legal status of amnesties granted for international crimes in relation to the declaration of the Chamber of the European Court of Human Rights in the *Marguš* case to the effect that:

> Granting amnesty in respect of "international crimes" – which include crimes against humanity, war crimes and genocide – is increasingly considered to be prohibited by international law. This understanding is drawn from customary rules of international humanitarian law, human rights treaties, as well as the decisions of international and regional courts and developing State practice, as there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.[1]

As researchers and amnesty experts, the interveners,

- William Schabas, Professor of International Law at Middlesex University in London and former Commissioner of the Truth and Reconciliation Commission of Sierra Leone
- Hurst Hannum, Professor of International Law at Tufts University in Medford
- Louise Mallinder, Reader in International Law and Human Rights at the University of Ulster (Transitional Justice Institute)
- Christine Bell, Professor of Constitutional Law at the University of Edinburgh
- Tom Hadden, Professor of Law at Queen's University of Belfast
- Kieran McEvoy, Professor of Law and Transitional Justice at Queen's University of Belfast, Mark Freeman, Lecturer at the KU Leuven Faculty of Law and the Central European University School of Public Policy
- Professor Suzannah Linton, Chair of International Law at the Bangor University Law School
- Yasmin Sooka, Executive Director of the Foundation for Human Rights in Cape Town and former Commissioner of the South African and Sierra Leone Truth and Reconciliation Commissions
- Ronald C. Slye, Professor of Law at the Seattle University School of Law and Commissioner of the Truth, Justice and Reconciliation Commission of Kenya
- Chaloka Beyani, Senior Lecturer in International Law at the London School of Economics and United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons
- Barney Afako, Independent Mediation and Transitional Justice Consultant
- Michael Patrick Broache, PhD candidate at Columbia University
- Josepha Close, PhD candidate at Middlesex University,

[1] *Marguš v Croatia* App no 4455/10 (ECtHR, 13 November 2012), para 74.

wish to draw the attention of the Grand Chamber to a number of weaknesses in the view that the grant of amnesty for international crimes is altogether prohibited by international law.

In the first place, no multilateral treaty expressly prohibits the grant of amnesties for international crimes. The only provision of an international instrument directly addressing the question of amnesty is article 6 § 5 of the second additional protocol to the Geneva conventions, which provides that:

> At the end of 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.[2]

In its decision in the Marguš case, the Chamber of the European Court of Human Rights referred to the interpretation of this provision contained in rule 159 of the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law.[3] This rule provides for a customary exception to article 6 § 5 to the effect that states may not grant amnesty to 'persons suspected of, accused of or sentenced for war crimes'[4]. To support this interpretation, the ICRC Study relies upon a statement made by the USSR during the conference that led to the adoption of the Protocol, and to the practice of states. A number of reservations may be expressed as regards these bases of the ICRC understanding.

From an analysis of the *travaux préparatoires* of article 6 § 5 of the second additional protocol, it emerges that during the debates on that provision the only states to refer to the question of perpetrators of international crimes were the USSR and some of its satellite states.[5] In the early stages of the discussion on the article in the First Committee of the Diplomatic Conference, those states proposed an amendment to article 6 aimed at the inclusion of an additional paragraph providing that 'Nothing in the present Protocol shall be invoked to prevent the prosecution and punishment of persons charged with crimes against humanity or who participate in the conflict as foreign mercenaries'.[6] This amendment was rejected and replaced by an amendment submitted by Belgium, the Netherlands and New Zealand proposing among other things the addition of a paragraph prescribing that 'Anyone sentenced shall have the right to seek pardon or commutation of the sentence. Amnesty,

[2] Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977) 1125 UNTS 609, art 6 (5).
[3] *Marguš v Croatia* App no 4455/10 (ECtHR, 13 November 2012), para 29; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP & ICRC 2005, vol 1) 611.
[4] *Customary International Humanitarian Law* (n 3) 611.
[5] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in armed Conflicts, Geneva (1974-1977).
[6] ibid vol 4, 34.

pardon or commutation of the sentence of death may be granted in all cases.'[7] Although that paragraph was deleted at the final stage of the conference, its adoption in the First Committee reveals that the majority of participating states understood amnesty as potentially applicable even to the gravest offences liable to the penalty of death. The USSR did not oppose the new article as amended in the First Committee but stated that 'it was convinced that the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever'.[8] The question of perpetrators of international crimes was not discussed further during the plenary meetings at which the final version of article 6 was adopted. At that stage, the main opinions expressed by delegations with regard to article 6 § 5 were that amnesty was a sovereign prerogative of national authorities which should not be regulated by international law, that they understood the provision as a mere recommendation devoid of binding force, and that amnesty was desirable in non-international armed conflicts because of its humanitarian motives and since it encouraged national reconciliation.[9]

It appears that, at the time of the adoption of the protocols, the majority of states participating in the debates on article 6 § 5 did not believe that the amnesty prerogative was or should have been regulated by international law. The USSR and some of its satellite states seemed the only ones concerned by the question of perpetrators of international crimes, which they linked to that of foreign mercenaries. In this regard, it is curious that the ICRC Study interprets article 6 § 5 as excluding only war criminals and not perpetrators of other international crimes from its ambit since the USSR statements on which it relies specifically provided for the prosecution of perpetrators of crimes against humanity and crimes against peace. Moreover, it is difficult to see what arguments would justify the exclusion of war criminals but not of perpetrators of genocide and crimes against humanity from the potential scope of application of an amnesty.

In support of rule 159, the ICRC also refers to instances of non-international conflicts where the enactment of amnesty laws was encouraged by the United Nations and/or other political bodies, such as the conflicts in South Africa, Angola, Afghanistan, Sudan, and Tajikistan.[10] In this regard, it must be stressed that the amnesties associated with those internal conflicts all included at least one international crime. For example, the South African

[7] ibid 35.
[8] ibid vol 9, 319.
[9] ibid vol 7, 92-105.
[10] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP & ICRC 2005, vol 1) 612.

amnesty applied to international crimes associated with a political objective, including the crime against humanity of apartheid[11], some of the Angolan successive amnesties applied to war crimes and crimes against humanity, and the Afghan amnesty covered everyone involved in the conflict.[12] Thus, it seems that the instances of state practice referred to by the ICRC in the context of rule 159 contradict the view that states may not grant amnesties in respect of war crimes. Rather, these examples of state practice support a broad interpretation of article 6 § 5 as a general provision applying to all persons convicted for their involvement in an internal conflict, without distinctions or exceptions.

States have not been able to reach consensus on a norm relating to amnesty in other multilateral treaty contexts. For example, during the 1998 Rome conference on the establishment of the International Criminal Court, the amnesty issue was addressed several times but, as the delegations did not agree on how the projected Court should deal with it, several doors were left open in the Statute for the Prosecutor or the Court to take amnesty processes into consideration, such as article 17 on admissibility and article 53 on prosecutorial discretion.[13] Similar difficulty reaching consensus on the amnesty issue arose during negotiation of the International Convention on Enforced Disappearance. It proved impossible to find any agreement on the subject and the drafters consequently opted to omit the issue entirely.[14] During the drafting, the *Fédération Internationale des Droits de l'Homme* urged the adoption of a provision prohibiting amnesty because it said 'The lack of such a provision could be interpreted as a negative precedent in the construction of a customary rule, currently in preparation'.[15]

More recently, the 2012 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels', which expressed the views of the United Nations member states in relation to the rule of law, did not mention the amnesty issue.[16] This omission is surprising since the UN Secretary-General has insisted on

[11] The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations in 1973, has 108 parties.
[12] Louise Mallinder, 'Global Comparison of Amnesty Laws' (August 1, 2009) in M. Cherif Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict* (Intersentia 2010), Available at SSRN: http://ssrn.com/abstract=1586831.
[13] William A. Schabas, *An Introduction to the International Criminal Court* (3rd ed, CUP 2007) 41, 185.
[14] Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Martinus Nijhoff 2007) 328-329.
[15] *Summary of Comments by FIDH on the Draft Text 21 June 2004*, 4 October 2004.
[16] UNGA Res 67/1 (30 November 2012) UN Doc A/Res/67/1.

the condemnation of amnesties granted for international crimes in his prior statements on the rule of law.[17]

The difficulty in negotiating treaty clauses dealing with amnesty confirms the lack of any consensus among States on this issue. This is relevant as evidence of opinio juris when assessing the position at customary international law. In addition, these observations are confirmed with respect to State practice. The Amnesty Law Database compiled by Dr Louise Mallinder, which contains information on 506 amnesty processes introduced since the Second World War in 130 countries, reveals that states have increasingly relied on amnesty laws during the last decades, despite the alleged development of a global accountability norm.[18] Furthermore, as regards amnesties applying to international crimes, Dr Mallinder has found that, for the past three decades, 'although the number of new amnesty laws excluding international crimes has increased, so too has the number of amnesties including such crimes'.[19] Other scholars have conducted empirical studies analysing state practice with regard to amnesties. Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter have recently created a Transitional Justice Database including 848 transitional mechanisms implemented in 129 countries worldwide since 1970.[20] According to this Database, the use of amnesties in transitional settings 'remains steady over time'[21] and this mechanism is 'the most frequently used form of transitional justice'.[22] Similar conclusions were reached by Dr Leslie Vinjamuri and Aaron P. Boesenecker in their 2007 study on peace agreements. As regards the inclusion of amnesties within peace accords between 1980 and 2006, they found that, on the whole, it 'remain[ed] relatively stable'[23]. They summarized their findings by stating that:

> Overall, analysis of the justice mechanisms and amnesty provisions contained in peace agreements between 1980 and 2006 does not support public perceptions that criminal accountability for the crimes of war is on the rise. War crimes tribunals, and also truth commissions, were among the least common mechanisms incorporated in peace agreements. By contrast, amnesty provisions were more commonly found in peace

[17] Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies' (2004) UN Doc S/2004/616, para 64c; Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies' (2011) UN Doc S/2011/634, para 12.
[18] Louise Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide* (Hart Publishing 2008); Louise Mallinder, 'Amnesties' Challenge to the Global Accountability Norm? Interpreting Regional and International Trends in Amnesty Enactment' in Francesca Lessa and Leigh A. Payne, *Amnesty in the Age of Human Rights Accountability* (CUP 2012).
[19] Mallinder, 'Amnesties' Challenge to the Global Accountability Norm?' (n 15) 95.
[20] Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance, Comparing Processes, Weighing Efficacy* (United States Institute of Peace Press 2010).
[21] ibid 101.
[22] ibid 39.
[23] Leslie Vinjamuri and Aaron P. Boesenecker, 'Accountability and Peace Agreements, Mapping trends from 1998 to 2006' (September 2007) Center for Humanitarian Dialogue, 9

> agreements than any of the justice mechanisms evaluated in this report. Moreover, general amnesties were far more common than limited amnesties.[24]

These extensive studies of state practice make it difficult to accept the alleged existence of a custom prohibiting the grant of amnesty for international crimes or the absolute character of treaty obligations requiring the prosecution of these crimes, such as those contained in the Genocide Convention of 1948, the Geneva Conventions of 1949 and the Torture Convention of 1984.[25]

As mentioned by the Chamber of the Court in the Marguš case, several international and regional courts have adopted the view that amnesties granted for international crimes are prohibited by international law.[26] However, inconsistencies in these judicial pronouncements as to the extent of the prohibition and the crimes it covers weaken their authority. For instance, regional human rights courts have often declared that amnesties are incompatible with states' duties under human rights treaties to provide a remedy to victims of human rights violations.[27] However, these courts differ as to whether such obligation to provide a remedy entails a duty to prosecute and punish human rights abusers or merely a duty to investigate those violations and provide for reparations.[28] The Inter-American Court of Human Rights has adopted the former position on several occasions, notably in the Barrios Altos case of 2001 where it ruled that 'all amnesty provisions (…) are inadmissible because they are intended to prevent the investigation and punishment of those responsible for human rights violations'.[29] Nonetheless, in the recent case of the massacres of El Mozote v. El Salvador, the President of the Inter-American Court, with the concurrence of four judges of the Court, nuanced this position by stating that:

> States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.
> Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various

[24] ibid 27.
[25] Geneva conventions (adopted 12 August 1949) 75 UNTS 31, 85, 135 and 287, arts 49/50/129/146; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277, art 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 January 1984) 1465 UNTS 85, art 7.
[26] *Marguš v Croatia* App no 4455/10 (ECtHR, 13 November 2012), paras 33-37, 74.
[27] See Louise Mallinder, *Amnesty, Human Rights and Political Transitions* (n 15) 262-279.
[28] *Ireland v the United Kingdom* (1978) Series A No 122 paras 246; *Aksoy v Turkey* ECHR 1996-VI para 98; *Velazquez Rodriguez v Honduras* Inter-Am Ct HR Series C No 4 (29 July 1988) para 174; *Almonacid-Arellano et al v Chile,* Inter-Am Ct HR Series C No 154 (26 September 2006) para 114.
[29] *Barrios Altos v Peru* Inter-Am Ct HR Series C No 74 (14 March 2001) para 41.

> international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately.[30]

This statement indicates that, even when gross violations of human rights are concerned, requirements to prosecute are not absolute and must be balanced against the requirements of peace and reconciliation in post-conflict situations. Indeed, while international and regional courts often refer to the fact that several Latin American countries (such as Argentina, Peru and Uruguay) have repealed their amnesty law, a number of national supreme courts have upheld their countries' amnesty law because it had contributed to the achievement of peace, democracy, and reconciliation. The most recent example is that of the Spanish Supreme Court which, in the trial of Judge Garzón in February 2012, defended the 1977 Spanish amnesty on the ground that it 'was an integral part of national reconciliation and transition to democracy'.[31] In the same vein, in September 2011, the Ugandan Constitutional Court upheld the constitutionality of the 2000 amnesty act and referred to its continuing importance in bringing that country's long-running civil wars to an end, and encouraging national reconciliation.[32] Similarly, in April 2010, the Brazilian Supreme Court refused to revoke the 1979 amnesty law, notably because it had contributed to the achievement of democracy in Brazil.[33] Lastly, in the AZAPO case, the Constitutional Court of South Africa upheld the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995, which contained a broad amnesty, and defended it on the ground that, in order to end the deep social divisions that had pervaded South Africa and to build a new democratic order, 'a firm and generous commitment to reconciliation and national unity' was necessary, which included the need 'to close the book on that past'.[34]

The fact that international customary law does not absolutely prohibit the grant of amnesty for even the most serious crimes does not mean that such amnesties are uncontroversial. Indeed, in certain instances, an amnesty may lead to impunity and undermine attempts to safeguard fundamental human rights. However, there are strong policy reasons which militate in favour of retaining amnesty where it represents the only way out of violent

[30] *Massacres of El Mozote and nearby places v El Salvador* Inter-Am Ct HR (25 October 2012), Concurring opinion of Judge Diego García-Sayán, paras 37-38.
[31] Naomi Roht-Arriaza, 'The Spanish Civil War, Amnesty, and the Trials of Judge Garzón' (2012) 16(24) American Society of International Law.
[32] *Thomas Kwoyelo alias Latoni v Uganda*, Constitutional Court of Uganda, Petition No. 036/11, 21 September 2011.
[33] Nina Schneider, 'Impunity in Post-authoritarian Brazil: The Supreme Court's Recent Verdict on the Amnesty Law' (2011) 90 European Review of Latin American and Caribbean Studies 49.
[34] *Azanian Peoples Organization (AZAPO) and Others v. President of the Republic of South Africa and Others,* Constitutional Court of South Africa, Case No CCT17/96, 25 July 1996, para 2.

dictatorships and interminable conflicts. Moreover, amnesties may be designed so as to enhance their legitimacy and limit their potential to conflict with human rights.[35] In consideration of the human cost that the continuation of war or dictatorship can entail, the latter course of action seems more desirable than the proclamation of a total ban on amnesties.

For these reasons, we consider that the declaration by the Chamber in the present case goes too far and is not supported by the law. It is also questionable from the standpoint of policy. We urge the Grand Chamber to adopt a more legally sound and nuanced approach that recognizes the uncertain picture presented by custom as well as the weaknesses in the claim that there is any support for the prohibition of amnesty in treaty law. The Grand Chamber should recognize that the state maintains a margin of appreciation in democratically determining how best to meet its sometimes conflicting human rights obligations, and the possibility of amnesties should not be presumptively excluded from that deliberation.

[35] 'Guidelines on Amnesty and Accountability' (forthcoming 2013).