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Transitional Amnesties: Can They Be Prohibited?

Amnistie transizionali: possono essere vietate?

Amnistías Transicionales: ¿Pueden ellas ser prohibidas?

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Abstracts

This article addresses the controversy concerning amnesty in international law. Traditionally, amnesty was seen as the substance of peace and there was a presumption of the legitimacy of amnesty under international law. During the past two decades, some scholars and regional human rights courts have reached the opposite conclusion, claiming the existence of a prohibition against amnesty for gross human rights violations. In this view, amnesty would not be a legitimate option in order to allow a pacific post-war or post-dictatorship transition to democracy. The article describes such an evolution and analyses both the motivations of those who support such a prohibition and the consequences on the concept of punitive power, the relationships between individual rights and law in general, and criminal law and democracy.

Questo articolo affronta la controversia sull'istituto dell'amnistia nel diritto internazionale. Tradizionalmente, l'amnistia era considerata la sostanza della pace e sussisteva una presunzione di legittimità dell'amnistia nel diritto internazionale. Nelle ultime due decadi, parte della dottrina e le corti regionali per i diritti umani hanno raggiunto la conclusione opposta, affermando l'esistenza di un divieto di amnistia in relazione alle gravi violazioni dei diritti umani. In quest'ottica, l'amnistia non sarebbe più un'opzione legittima al fine di consentire una pacifica transizione alla democrazia, in seguito a un conflitto o in seguito a una dittatura. L'articolo descrive tale evoluzione e analizza sia le motivazioni di chi sostiene un tale divieto, che le conseguenze sul concetto di potestà punitive, le relazioni fra diritti individuali e diritto, nonché fra diritto penale e democrazia

El presente artículo aborda la problemática de la amnistía en el derecho internacional. Tradicionalmente, la amnistía era vista como la sustancia de la paz, existiendo una presunción de legitimidad bajo el derecho internacional. En las últimas dos décadas, algunos autores y cortes regionales de derechos humanos han llegado a la conclusión opuesta, sosteniendo la existencia de una prohibición de amnistía en casos de graves violaciones a los derechos humanos. Bajo esta perspectiva, la amnistía ya no sería una opción legítima para lograr una transición pacífica a un gobierno democrático luego de un periodo de guerra o de dictadura. El artículo describe esta evolución y analiza tanto las motivaciones de quienes sostienen tal prohibición, así como las consecuencias sobre el concepto de potestad punitiva, las relaciones entre derechos individuales y derecho en general, y entre derecho penal y democracia.

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1. Introduction.

Traditionally, amnesty was seen as the substance of peace and there was a presumption of the legitimacy of amnesty under international law. During the past two decades, some scholars and regional human rights courts have reached the opposite conclusion, claiming the existence of a prohibition against amnesty for gross human rights violations. In this view, a transitional amnesty – meant as a tool to allow a pacific post-war or post-dictatorship transition to democracy – would not be a legitimate option anymore.

This article addresses the controversy concerning amnesty in international law and analyses both the motivations of those who support such a prohibition and the consequences on the concept of punitive power, the relationships between individual rights and law in general, and criminal law and democracy.

2. Amnesty and International Law.

What do we call an amnesty law? Technically, amnesties are a bar to investigation and prosecution for certain categories of crimes or individuals. The term is derived from the Greek notion 'amnēstia' which means 'forgetfulness' or 'oblivion'.[1] In practice, the term "amnesty" subsumes, in practice, drastically different measures.[2] In transitional justice scholarship, the admissibility of an amnesty is often assessed in the light of interests at stake in the transition, such as peace and reconciliation, and also the victims' right to the truth about past abuses and the right to compensation. Amnesty is therefore declared acceptable, depending on whether and how it relates to such claims. This approach does not seem fully inclusive. An amnesty actually intervenes in the criminal prosecution of certain facts, or in the actual punishment of the convicted. Criminal prosecution and punishment are not the means by which a transition is made, although they may serve as instruments that contribute to a complex process that also consists of non-judicial mechanisms and constitutional, political, anthropological, and cultural elements. The goals and the effects of criminal prosecution and amnesty are more limited. Judging amnesty or criminal prosecution with respect to the outcomes of transition disproportionately privileges criminal trials over all other and equally significant transition instruments.[3] Respect for such interests should, rather, be assessed in relation to the transition as a whole.

The ICC Statute contains no reference to amnesty.[4] Of course, the purpose of the Statute is to combat impunity; to this end, the Member States have an express duty to prosecute,[5] whereas the crimes within the jurisdiction of the Court are subject to no statute of limitations (Article 29, ICC Statute). Nonetheless, the Statute does not impose on States an explicit duty to punish; on the contrary, it leaves margins for the exercise of discretion to both the Prosecutor and the Court. These are to be found within various provisions, beginning with Article 17, ICC Statute, where the conditions for the intervention of the Court's complementary jurisdiction are regulated, at the expense of the jurisdiction of the Member States. In light of such conditions, what were to happen if a State provided amnesty? Would that State be considered unwilling to prosecute? The answer would most likely be straightforward in cases

[1] Stahn (2019), p. 259
[2] A comparative approach is offered, among many others, by Lessa and Payne (2012); Della Morte, et al (2007).
[3] Malarino's assumption is to be shared: "the consolidation of peace, reconciliation and the strengthening of democracy have much less to do with criminal law than it is usually supposed". Malarino (2013), p. 213.
[4] See Werle and Jessberger (2014), p. 89; Ambos (2013), p. 419; Schabas and El Zeidy (2016), p. 806; Cryer (2014), p. 569; O'Keefe (2015), p. 462; Fronza (2016), p. 53; Maculan, (2019), p. 95; Stahn (2019), p. 259; Vv. AA. (2003). On the drafting history, see Holmes (1999), pp. 41 and ff., 52; Roth-Arriaza (2000), pp. 77 and ff.
[5] See paras. 5 and 6, Preamble. See also Schlunck (2000), p. 30; Ambos (2009), p. 31.

of self-amnesty or blanket amnesty: the Court would exercise its complementary jurisdiction. What happens, though, with a conditional amnesty providing, for instance, for a truth and reconciliation commission (TRC) or a form of restorative justice? It has been argued that such a conditional amnesty could be evaluated positively by the Court within its overall assessment of State conduct.[6] The Rome Statute also contains a provision permitting the Prosecutor not to initiate investigations even if the conditions for the intervention of the Court are satisfied. This is provided in Article 53, ICC Statute, which refers to the eventuality that "A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims".[7] Last, the ICC Statute provides to the United Nations Security Council the power to suspend the investigations or proceedings of the ICC (Article 16, ICC Statute).

2.1. *Amnesty as the substance of peace.*

Traditionally, there was absolutely no doubt about the legitimacy of amnesty under international law. Amnesty was seen as the substance of peace and serving the cause of reconciliation. As has been written, "For one, the Athenian case suggests that amnesty can be declared for the public."[8] Since antiquity, armed conflicts have ended with amnesties; hence the maxim, "*in amnestia consistit substantia pacis*".[9] Even the 1648 Treaties of Westphalia, which many believe mark the birth of modern international law, contained an amnesty. As has been argued, "until the German-Russian peace of Brest-Litovsk in 1918 the amnesty clause was so frequent that jurists supposed it was tacitly agreed upon even when it was not present in the text of the treaty".[10] At the time, because there was no individual accountability for international crimes, amnesties related to the categories of conduct that today are known as "war crimes" and "crimes against humanity" were uncommon; there existed no assumption that State officials could be held accountable for such acts. In this classical perspective.

The long-lasting tradition of amnesty as peacemaking tool breaks down with the Treaty of Versailles[11] after World War I. Not only is amnesty absent from that treaty, but it seems that the parties intended to pursue quite the opposite: to put the German Emperor on trial for a supreme offence against international morality and the sanctity of treaties. After the Second World War, a political debate about the desirability and scope of amnesty[12] developed. The general presumption of the legitimacy of amnesty under international law is not ques-

[6] Ibid., p. 70. "It would be difficult to argue, for example, that a state, which opts for an effective TRC with the ultimate goal of peace in mind, is 'genuinely' unwilling". Ibid., p. 78. In the same vein, Werle and Jessberger (2014), p. 90.

[7] On one hand, this is a safety valve for the whole system, on the basis of "policy considerations" (Ambos, (2009), p. 84); on the other, the concept of "interests of justice", instead of "interests of peace", does not explain which interests of justice could be against prosecution.

[8] Doxtader (2003), p. 9.

[9] According to other versions, the maxim states "*in amnesia consistit substantia pacis*". Among the political scientists in favor of amnesty, it is worth recalling Carl Schmitt (1888-1985). See Schmitt (1995). It has been pointed out that amnesty represents a victory of law, for "With its decree of amnesty, law acts but acts as if it is not". Doxtader (2003), p. 129. An Italian political scientist admits that amnesty is "rather a declaration of impotence of law to solve the great social and political conflicts by answering the victims' claim for justice [...] as it avoids the issue of accountability". Portinaro (2010), p. 141: "amnesty is predominantly the political act of a weak winner [...] it is ultimately the political act of a morally compromised winner". Ibid., p. 143.

[10] Quaritsch (1995), p. 93.

[11] Signed by forty-four States on 28 June 1919 at the Versailles Peace Conference at the end of World War I.

[12] Schmitt considers it the highest form of justice, "the last remain of divine justice", in opposition with what he calls "cold civil war", where "the victorious side treats the opponents as criminals, assassins, saboteurs, gangsters. The civil war becomes, in a particular sense, a just war [...] each one makes their own revenge in the name of law". Schmitt (1995), p. 218. Freund described amnesty as an exceptional, radical, political measure, nonetheless necessary in order to put an end to a pre-existing state of exception. Freund (1971), p. 175. "Without amnesty, war continues and one cannot speak of a true Rechtsstaat". Ibid., p. 117; "Amnesty is the price, sometimes a high price, that you have to pay for normality, a condition in which everyone can freely recognise their mistakes and remedy them, that is, as affirmed in Shakespeare's CXX sonnet, '*But that your trespass now becomes a fee / Mine ransoms yours, and yours must ransom me.*'". Ibid., p. 189.

tioned until the "third wave of democratization".[13] This has led today,[14] according to some,[15] to the presumption of the illegitimacy of amnesty.[16]

The debate about amnesty has shifted from a political to a purely legal level. It has become highly theoretical, virtually ignoring both the practice[17] and the political contingency in which transitions occur.[18] However, this evolution has developed in the total absence of positive provisions. There is no prohibition in international law against amnesty. [19]

2.2. *Amnesty as illegitimate solution.*

No international treaty ever prohibits amnesty or affirms a duty to punish. A general prohibition against amnesty has been inferred from three types of international treaties: (1) treaties conferring upon a State the duty to criminalize and the duty to prosecute;[20] (2) treaties excluding the application of any statute of limitations for serious crimes;[21] and (3) treaties obliging the State to protect human rights.[22] Such instruments, which never explicitly prohibit amnesty or affirm a duty to punish, are used to infer the existence of a customary norm (Article 38(b) of the Statute of the International Court of Justice [ICJ Statute] or a general

[13] See Huntington (1991).
[14] In 1997 Special Rapporteur Louis Joinet described four phases:
1) 1970s: while many dictatorships are still in power, NGOs and the public opinion mobilise for granting amnesty to political prisoners (emblematic the name of *Amnesty International*, founded in 1961, today one of the main advocates of the fight against impunity);
2) 1980s: from a tool for limiting the abuses of power, amnesty turns, especially in South America, into an instrument for granting impunity to the affiliates of the dictatorial power itself;
3) 1990s: exasperation of the relationship between oppressors and victims and attempts to find an unattainable balance between oblivion and justice;
4) present phase. See Joinet (1997).
[15] This has been defined as a "challenger approach". See Olsen et al. (2012), p. 337.
[16] See Bell (2009), p. 124.
[17] See Mallinder's database, which indicates an increase in the use of amnesty. Mallinder (2012).
[18] It has been recognized that many theoretical proposals "depart from the premise that post-authoritarian elites can actually make choices. However, the first lesson our comparative analysis […] has given us is that the actions of such elites is a function of the circumstances of the passage to democracy". Huyse (1995), p. 76. In fact, transitional justice operates in "hyper-politicized moments". Teitel (2014), p. 4.
[19] On the contrary, Article 6(5), Additional Protocol II (AP II) to the Four Geneva Conventions states: "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". The majority of scholars, on the basis of the principle of unity of international law, affirms that it only allows amnesty for those facts that, on the basis of international law, are not the object of a duty of criminalization. Ambos (2013), p. 425. This would be confirmed by the Travaux préparatoires. Ibid. See also Ambos (2009), p. 65. In a similar way, Werle and Jessberger affirm that Article 6(5) only involved freedom from punishment for legal military operations, Werle and Jessberger (2014), p. 88; see also Tomuschat (2002), p. 348. This interpretation has been followed by the IACtHR (IACtHR, *El Mozote Massacre vs. El Salvador*, 25 October 2012, para. 286). A wider interpretation has been given by the Constitutional Court of South Africa in the AZAPO case (Constitutional Court of South Africa, *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96), 25 July 1996); nonetheless, the Court justifies it because Article 6(5) only applies to internal armed conflicts, where no duty of punishment appears to be, but a wide margin for the State in order to achieve internal peace. For a critical approach see Bennun (2003), p. 99.
[20] First in relation to humanitarian law and the grave breaches, as defined in the four Geneva Conventions of 1949 and in the 1977 I Additional Protocol, for which an obligation *aut dedere aut iudicare* is foreseen. See Schlunck (2000), p. 34. Analogous obligations can be found in Article 5, Convention for the Prevention and Punishment of the Crime of Genocide of 1948 (ibid., p. 30) and Article 7, UN Convention against Torture of 1984 (ibid., p. 33). At the regional level, consider the 1994 Inter-American Convention on Forced Disappearance. From a duty to prosecute is inferred the existence of a duty to punish and consequently its intransgressibility through amnesty. The scholarship on this point is substantial and divided; Schlunck recognizes such an obligation only for genocide. Ibid., p. 32; Ambos just for torture. Cf. Ambos (1999), p. 117. As Slye points out, it is necessary to meditate on the relationship between adjudication and punishment. Slye (2002), p. 186. Between these two terms, the promoters of restorative justice claim a space. On the contrary, the IACtHR seems to suggest their indissociability. Ibid., p. 188; therefore, the duty to prosecute becomes a duty to prosecute and punish. On the contrary, Werle and Jessberger deny the existence of a duty to prosecute; the duty to protect human rights may be extended only to include an obligation to provide for a criminalization of serious violations, but this ends at the borders of national sovereignty. Werle and Jessberger (2014), p. 83; in the same vein, Fornasari (2014), p. 566. According to Cryer, "Still, international law has not yet developed so far as to prohibit all amnesties in all situations". Cryer (2014), p. 571; see also Cassese (2013), p. 309. According to Du Bois-Pedain, the IACtHR solution has no universal value. Du Bois-Pedain (2007), p. 316. For an overview of the different positions, see Maculan (2018).
[21] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and the Crimes Against Humanity and the analogous 1974 European Convention.
[22] This is the most controversial point. Consider the 1966 International Covenant on Civil and Political Rights and regional instruments such as the 1950 European Convention on Human Rights (ECHR) and the 1969 American Convention on Human Rights (ACHR).

principle of law [Article 28(c), ICJ Statute]) introducing a duty to punish for certain crimes.[23] Such a rule would have a "cogent character" (indicating compliance with *jus cogens*).[24]

Three main arguments are frequently used to uphold the unlawfulness of amnesty for gross human rights violations.[25] These are, namely, that amnesty would violate:

the duty of the State to prosecute certain criminal conduct;

the duty of the State to protect the human rights of its citizens. In the event of serious violations, this duty corresponds to a right to justice for the victims. This, in turn, consists of various rights:[26] the right to a judicial remedy, the right to the truth,[27] the right to punish those guilty, the right to a fair trial, the right to mourning, and the right to compensation.[28] In particular, in the Inter-American context, these rights are considered to be directly justiciable and it has also been affirmed that they can be guaranteed only through criminal proceedings;[29]

the rule of law principle.[30]

It is today believed that all transitional purposes (including true reconciliation) may and must only be achieved through criminal proceedings. Nonetheless, if such conclusions are presented not as an opinion of criminal policy, but as a norm of international law, one must ask how it has been possible to reach such jurisprudential developments, particularly when assessing the *opinion iuris*. In fact, there is "overwhelming"[31] State practice of continuing to grant amnesties.

The answer is in the motivational process of those decisions. "Within the original notion of *opinio iuris*, [the courts redefine] the very concept of State practice and substitute its original content, based on reality, with a new one: the conduct of representative bodies in international organizations, as well as the decisions and opinions of such bodies and the decisions of international courts".[32] In this way, international courts affirm the enshrinement of a norm against amnesty on the basis of decisions taken by other international courts.[33] Such a reasoning reveals a goal-oriented rhetorical construction employed to disguise the creative

[23] In addition to the few treaty-based references, the basis is mainly the practice of international organizations and human rights bodies, the case law of regional human rights courts (mainly, the IACtHR) and international criminal tribunals (primarily the first-instance judgment in the *Furundzija* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the *Kallon and Kamara* case before the Special Court for Sierra Leone (SCSL)) and soft law instruments. See Della Morte (2011), p. 181. On the contrary, with the remarkable exception of Argentina, "in every case in which a state judiciary has evaluated its own government's amnesty for human rights violations, it has upheld the amnesty". Slye (2002), p. 180. The Uruguayan exception was added in 2009, albeit with the proviso that the constitutional decisions in Uruguay have no erga omnes effect.

[24] *Jus cogens* is a broad and controversial category in international law. It seems correct that "The process by which a legal norm is granted customary status is not merely and perhaps not even predominantly legal but ultimately political in nature". Freeman and Pensky (2012), p. 54.

[25] Slye (2002), p. 182.

[26] Ibid., p. 192.

[27] On one hand, this right is evidently violated by amnesty. Ibid., p. 193; on the other, the same right is used by States as an argument in favor of amnesty, presented as an instrument of truth when associated with a TRC. It is argued that a TRC requires peace and that this in turn requires an amnesty. Ibid., p. 195. This argument has been rejected by the IACtHR, according to which the quality of truth produced by a TRC is not sufficient. IACtHR, *Almonacid-Arellano and others vs. Chile*, 26 October 2006, para. 150.

[28] This right is not necessarily violated by an amnesty, which does not eliminate civil obligations derived from the offense.

[29] The IACtHR has already derived, from the obligation in the ACHR, the concept of right to remedy. IACtHR, *Velásquez Rodriguez vs. Honduras*, 29 July 1988, as right to prevention of violations, to serious investigations, to adequate sanctions on those responsible and to ensure a proper compensation to the victim. Ibid., para. 174. In 2001 the Court initiated its case law on amnesty. IACtHR, *Barrios Altos vd. Peru*, 14 March 2001, which lead, in subsequent decisions, to the clear affirmation of the incompatibility of amnesty (not only self-amnesty) with the ACHR. This case law then involved Chile (where the amnesty had not impeded proceedings, on the basis of the so-called "Aylwin doctrine"), Brazil (recently engaged in a TRC and in the adoption of monetary remedies), and Uruguay (where amnesty has been twice confirmed by popular referendums). The Court reached those conclusions on the basis that the abovementioned rights can be guaranteed only through criminal proceedings. The most significant decisions are IACtHR, *Almonacid-Arellano vs. Chile*; IACtHR, *La Cantuta vs. Peru*, 29 November 2006; IACtHR, *Gomes Lund vs. Brasile*, 24 November 2010; IACtHR, *Gelman vs. Uruguay*, 24 February 2011, IACtHR, *El Mozote Massacre vs. Chile*. See Ambos (2009), p. 34; Gutiérrez Ramírez (2014), pp. 38-44. Among those who criticized this case law, see Malarino (2009).

[30] There are positions in sharp contrast. According to Quaritsch, "in exceptional situations, law is not the only action rule". Quaritsch (1995), p. 144. Marxen always justified transitional amnesty, as emanated in an exceptional situation of lawlessness and constitutive of the legal order. See Schlunck (2000), p. 25. Schlunck, instead, believes that there is never lawlessness in a society; it can happen that law is not enforced, but it does not cease to exist: "Criminal conduct does not abolish the rules, it contradicts them. […] The fact that those crimes occur frequently does not change their criminal character. Consequently, each amnesty is […] embedded in a legal context" (ibid.) Therefore, "the decision to grant amnesty has to be taken in the context of the national and international law applicable". Ibid., p. 26.

[31] Slye (2002), p. 176.

[32] Ambos (1999), p. 81.

[33] Freeman and Pensky (2012), p. 57.

role of the judge.[34]

Legal doctrine and judicial practice appear, by developing clear and rigid rules, to have replaced a presumption of the legitimacy of amnesty with a presumption of its illegality. Bell[35] highlights the ambiguities and the absence of a true prescriptive value with reference to specific cases. While she acknowledges that the "new law" on transitional justice brings some advantages for accountability and is better than giving politics a free hand to grant amnesty, she rejects rigid schemes and a general presumption of prohibition against amnesty, proposing instead a "defense of mess"[36] and a necessary degree of inconsistency in law in relation to political transitions. This seems to be confirmed by the heterogeneous outcomes of the practical application of many amnesty laws through the years.[37]

3. Probative Importation as argumentative reasoning.

The abovedescribed rigid approach of the theory of "justice at all costs" has been criticised as a form of "neo-Kantianism of the International human rights establishment, which refuses to entertain the possibility that when they call for justice, above all an end to impunity, the long-term consequences may prove to have had abidingly negative effects."[38] Such a goal-oriented reasoning reflects the rhetorical-argumentative technique known as "probative importation".[39] Usually, this expression refers to the importation, in the reasoning of a judicial decision, of extra-systemic parameters[40] (normally, these are decisions rendered in other jurisdictions), without these really constituting the basis for the rationale. They have, instead, "the function of adding rhetorical and evidentiary force to the interpretation"[41] of the court, and are "used for reinforcing (or legitimizing) the choice of interests or principles at stake".[42] This is particularly evident when, in relation to amnesty, the Inter-American case law is referred to, by the Strasbourg Court or the Special Court for Sierra Leone, as an "extra-systemic parameter".[43] Within the case law of the Inter-American Court of Human Rights, the importation of the precedents is not extra-systemic. Nonetheless, the Court seems to use its precedents as a rhetorical means in support of its own assertions and thus the reasoning appears self-referential. Some have argued that this reveals an attitude of activism and creativity.[44]

Whether it is possible to support the argument of the general prohibition against amnesty without falling into the aforementioned fallacy remains open to discussion. Such a choice seems possible, assuming that a participant in the debate will accept the full consequences implicit in the aforementioned case law of the IACtHR. The real motivation behind these decisions lies not solely in the violation of a certain treaty or of a particular regional case law, nor does the solution lie in analyzing amnesty from the perspective of the functions of punishment. While this has consequences for the admissibility of amnesty, it does not highlight the full significance of the matter.

As already noted, the IACtHR affirmed the prohibition against amnesty on the basis of a duty to prosecute and a duty to punish certain crimes; this in turn stems from the duty to protect human rights, as provided in the ACHR. Therefore, the State would, first, have a duty

[34] A recent example is provided by ECtHR, Grand Chamber, *Marguš vs. Croatia*, Application no. 4455/10, 27 May 2014, where the Court offers a detailed analysis of IACtHR case law (paras. 60 to 66), as well as that of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and of the SCSL. The Court is motivating its decision in this case (relating to a Croatian amnesty) on the basis of IACtHR case law which "excludes its application in respect of the perpetrators of war crimes and crimes against humanity" (cf. ibid., para. 131) as representative of the "growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights" (ibid., para. 139). However, the Court leaves open the possibility that amnesties could may be possible in particular circumstances, not present in the given case.
[35] Bell (2009), p. 124.
[36] Ibid., p. 123.
[37] Ibid., p. 124.
[38] Rieff (2016), p. 89; He calls it Neo-Kantianism because it recalls Kant's view that "no right action could ever have a wrongful element" and because "the human rights movement is first and foremost grounded in law; its proponents have imbibed not just Kant's idealism but another element in the Kantian worldview that holds that the imperative of justice "outranks" all other moral claims". Ibid., p. 90.
[39] Lollini (2007), p. 65.
[40] Ibid.
[41] Ibid.
[42] Ibid., p. 70.
[43] See ECtHR, *Marguš vs. Croatia*.
[44] See Malarino (2009), p. 26.

to protect citizens against violations of these rights; furthermore, in the event of a violation, a number of additional State duties arise, including an effective investigation and search for the truth, and a trial and possible punishment of the perpetrators. The effective rights of victim family members and of society as a whole correspond with such duties. According to the IACtHR, these rights are directly justiciable and may be enforced only through criminal proceedings.[45]

4. A victim's right to punishment, truth, and justice?

The theoretical construction described above has a necessary prerequisite: that "the non-punishment of a human rights violation is itself in turn a human rights violation".[46] The IACtHR speaks not of a simple "legitimate claim for punishment"[47] of the victims and society, but of justiciable rights. The result is a "theory of criminal law focused on the victim [which] is centered on neutralizing the permanent, moral damage that the victim continues to suffer as a result of the crime".[48] Victim groups, which have for political reasons been subject to the use and abuse of criminal law during dictatorial regimes, claim the use of criminal law against political power itself, by turning criminal law into a means of managing social problems and of transforming society.[49] The phenomenon goes beyond transitional justice and transitional societies. The mistrust of amnesty is symptomatic of a general mistrust of political power that deeply involves the relationship between governors and the governed.[50] This mistrust corresponds to an increase in expectations from the criminal trial, almost "messianic" expectations.[51] The courts and not the parliaments have become the place where a citizen's claims for the transformation of society may be addressed.

A consequence of this evolution appears in the problematic issues of the "obligations to punish", where criminal law is linked to "the welfare *Rechtsstaat*",[52] the realization of which is not left to the discretion of political power. The issue can be read as a meeting point between a crisis of politics "and a judicial ideology that in the crisis has gained the awareness of the strength and the reasons for its specific role of protection. [...] The extreme point of a logic of a substitutive role".[53] The amnesty issue seems to be an example of this substitutive role of the courts. It arises during an absence of confidence in a political power that has often used discretion, in the transitional stage, in order explicitly to guarantee broad areas of impunity for its affiliates. Pulitanò[54] sees the risk of ethical and theological implications of such a substitutive

[45] Think of the right to the truth (as declared in IACtHR, *Almonacid-Arellano and others vs. Chile*, para. 148), which required "the judicial determination of the most complete historical truth possible" (cf. IACtHR, *La Rochela Massacre vs. Colombia*, 11 May 2007, para, 195; see also IACtHR, *Valle Jaramillo and others vs. Colombia*, 27 November 2008, para. 102), "with the aim of identifying, trying, and punishing all the masterminds and other persons responsible" (cf. IACtHR, *Case of the Gómez-Paquiyauri Brothers v. Peru*, 8 July 2004, para. 231). This right belongs directly to the victims' relatives, but it has also a "collective dimension" (cf. IACtHR, *La Rochela Massacre vs. Colombia*, para. 195). For an overview of the development of this right, see Naqvi (2006); Ambos (2009), p. 35. In support of this right, among many others, see Méndez (1997); for the right to the truth as a collective right, see Oliveira and Guembe (1997); for a critical view of the right to the truth as a justiciable right, see Maculan and Pastor (2013); Pastor (2005).

[46] Sancinetti (2004), p. 814.

[47] Silva Sanchez (2008), p. 877.

[48] Ibid., p. 884.

[49] Silva Sanchez (1999), p. 72. The author speaks about a transformation of the notion of criminal law from *Magna Carta* of the alleged offender to *Magna Carta* of the victim. Ibid, p. 52. Criminal law is used not only in "function of shield", but also in "function of sword". Tulkens (2011), p. 578. This issue is linked to the fundamental ambiguity of criminal law as an instrument of both "threat and protection of fundamental rights and freedoms". Delmas-Marty (1996), p. 368. There is, therefore, a change in the relationship between human rights and criminal law, where the former are no longer just the "bad conscience" of the latter. By contrast, human rights also become a "good conscience", which uses criminal law as a means to ensure the protection of human rights. This involves the development of a growing irritation towards the procedural guarantees for the accused, with the significant risk that "the legitimacy of the end pursued once again justifies the choice of means […] through […] the replacement of crimes 'against divinity' by crimes 'against humanity'". Tulkens (2011), p. 593.

[50] Applying this to the new experiences of transitional justice, Lollini speaks of a "*depoliticization* of the mechanisms of construction of the new democratic States", realized through a "*hypertrophy* of the judicial system during the political-constitutional transitional phases – which - produces a substantial *atrophy* of the political construction of new democracies". Lollini (2004), p. 361. In the "tendency to *internationalization* (or *de-nationalization*) in a *retributive* perspective [...] of post-conflict justice", he sees the emergence of a "*other-directed* constitutionalism [...] a new form of external intervention (or *other-influence*) on *transitional* Countries". Lollini (2007), p. 135.

[51] About the concept of "messianic faith" in criminal law, see Pastor (2005), p. 73. About the expectations towards law as a means to deal with political transitions, Teitel speaks about "Bringing the Messiah through Law". Teitel (2012), p. 81.

[52] Pulitanò (1983), p. 488.

[53] Ibid.

[54] Ibid., p. 498. A religious approach to human rights is mentioned by Tulkens (2011), p. 593. Regarding the guarantee of the right to the truth through the criminal trial, Pastor sees analogies with the Inquisition and speaks of a "totalitarianism of the truth". See Pastor (2007).

approach. He affirms the existence of a basic principle: that the legislator, and only the legislator, should be responsible for political guidance. This implies the necessity of a phase of "technical" political evaluation based on predictive elements, which only the legislator can grant.[55]

Affirming a victim's right to punishment, truth, and justice brings the analysis back to the broader relationship between fundamental rights and criminal law. Victim rights have an intrinsic individualistic nature[56], whereas in criminal law "evil has priority"[57] and therefore "duties represent the originating deontic figure, while rights do not".[58] In other words, the "State service offered by criminal law has a different nature and functions from those of the welfare state. [...] The protection that criminal law intends to provide is not the kind of protection granted by the welfare state, meant as actual enjoyment of given rights, but it is the one that defines in general terms the functions - and the enforcement – of the legal system".[59] This function is intrinsically linked to the principle of legality, which places criminal law together with democracy, rights with law; it means that what "integrates the original individualism of rights in a social dimension"[60] is the policy choice made by the legislators.

5. Conclusions.

Recent jurisprudence recognizes a right of society and the victims to the establishment of the truth exclusively through criminal proceedings.[61] It affirms a right to the punishment of the perpetrators. Furthermore, it believes that these rights are directly justiciable and may be brought before the criminal court even where legislative measures affirming the opposite, such as amnesty, exist. The real topic becomes evident. There is no question whether a treaty is being respected. This jurisprudence implicitly affirms that, in these cases, the holder of the punitive power is not the State. On the contrary, the real holder is, on one hand, specifically society as a whole. This is, though, a vague concept, because society is democratically represented through legislative power and not through judicial power. On the other hand, the holders are the victims, private individuals, who have the right to bring punitive power into action even against the will of the legislator. Thus, the issue is more radical and profound. It penetrates to the conception of criminal law, beyond transitional justice, and involves a redefinition of the concept of punitive power.[62]

The concept of a substantial "subjective right to punish" was abandoned by the mainstream of legal scholarship at the beginning of the twentieth century.[63] In contrast, the aforementioned doctrinal writings and the jurisprudence of the IACtHR implicitly impose the notion of a subjective right onto the punishment of the guilty person, which is a right of the community and, above all, of those private individuals who may claim that punishment: the victims.[64] If the current trend continues, the consequences could be wide ranging. It could be said that the evolution of criminal law would be subverted. In fact, criminal law has developed precisely in order "to neutralize the victim".[65] This is aimed at denying their claim for revenge by excluding the victim from the criminal trial. Such exclusion corresponds to a State monopoly through the role of the prosecution. Even the term "victim" does not exist

[55] Ibid., p. 512. Fiandaca emphasizes that, as far as international crimes are concerned, there is a "fundamental role of the *political dimension*: in the sense that the basic choice remains political, even when the judicial solution is chosen" (Fiandaca (2009), p. 18).
[56] "The discourse of rights is individualistic by definition: it concerns the empowerment of individuals". Pulitanò (2010), p. 84.
[57] Ibid., p. 88.
[58] Bobbio (1996), p. 4.
[59] Pulitanò (1983), p. 515. Zimring critically defines the "privatization of criminal law" as a conception which considers it as "another public service, like street clearing or garbage removal, where the government is the servant of the community rather than its master". Zimring (2003), p. 62.
[60] Pulitanò (2014), p. 112. The author emphasised that "The ethno-political background of human rights civilization is an individualism open to the conceptions of the good not unobtrusively individualistic, whose horizon is not limited to the claim of rights". Ibid., p. 113. The "reduction of criminal law *um der Freiheit Willen* is an *indefinite* possibility [...]. The criminal law *of human rights* remains a dramatically open and ambiguous issue". Ibid., *p. 114.*
[61] This is affirmed starting with the IACtHR, *Almonacid-Arellano and others vs. Chile*, para. 150.
[62] On the transformation of the ius puniendi into an officium puniendi, see Gil Gil (2016), p. 4.
[63] See Vassalli (1942), p. 16; Cordero (1957), p. 25.
[64] For a clear example, see Juzgado Nacional en lo Criminal y Correccional Federal n° 5 de Buenos Aires, *Resolucion declarativa de los sucesos históricos conocidos como el genocidio del pueblo armenio - años 1915/1923*, 01 April 2011.
[65] Silva Sanchez (2008), p. 884. Literature on this topic is too vast to be summarized here. Specifically on the symbolic function of international criminal law provisions (in English doctrine this function is often described as "expressive criminal law"), see Fronza, (2007); Koskeniemmi (1989) ; Damaska (2006).

legally as such in criminal proceedings, precisely because of the lack of a proven "wrongful (and beyond a doubt, blameful)" act.[66] Being denominated a victim of a crime requires that the existence of such a crime be established in a final, legal decision. For as long as a trial is proceeding, the crime remains alleged. Thus, no one can actually be designated a "victim". Moreover, for as long as the accused is presumed innocent, at best there is an "alleged victim".[67]

A theory of criminal law based on the victim has moved in the opposite direction within the development of modern criminal law. It may be affirmed that such a theory implies that "the core of said theory should be formed by symbolic and expressive (moral) responses: a declaration of blame and a guilty verdict".[68] The indivdualization of justice may therefore have disturbing implications, in particular, the fact that the community is increasingly disappointed with political power and chooses to delegate increasing numbers of tasks to the criminal courts. This is a general tendency, although in the case of amnesty its results are more evident. The basis of such an evolution is the simplification resulting from the intrinsic nature of the criminal trial. First, the judgment is final: the interpretation of the facts accepted and affirmed therein has an immutable strength, bringing all discussion to an end. The content of the judgment is straightforward and, therefore, highly communicative: guilty or not guilty. The criminal trial itself has the characteristics of a "pedagogical theatre": a solemn, formal and artificial place for the *ius dicere*[69], another level of simplification.

Returning to the question as to whether it is possible to support the argument requiring a general prohibition against amnesty, Bell's defence of an element of legal "mess"[70] in relation to transitional contexts seems to be shared. Hence, there must be an operative area for amnesty,[71] which could allow a differential treatment. Criminal prosecution could be reserved for serious crimes, whereas amnesty could cover less serious conduct connected with general participation in the policy of the previous regime.[72] Certain forms of amnesties may be 'necessary evils'[73] to ensure short-term peace. Amnesties may be seen as an option to pacify conflict or deal with the sheer impossibility of a full criminal justice response. Amnesties can serve as incentives for truth-seeking or accountability. violations. Some forms of amnesties are thus aimed at providing truth recovery or ensuring some form of accountability.[74] As rightly cautioned by Kai Ambos, it is unhelpful to overestimate "the restorative effect of amnesty and forgiveness" or to underestimate "the reconciling power of (criminal) justice."[75]

In contrast, a general prohibition against amnesty would lead to the position of the Enlightenment philosophers, who saw amnesty, always and in any case, as an instrument of discretion and arbitrary use in the hands of political leadership. The latter attitude seems a capitulation of law; also, it acts as a rejection of the possibility of using the potential benefits of amnesty. This is achieved by submitting the notion of amnesty to legal regulation and by orienting it to a purpose, as has been done with criminal liability and punishment. There is, in such an approach, a hope that law may control and guide the granting of amnesties (not only with respect to the process of passing the amnesty law, but also the content of any amnesty). It contains a hope for working space for politics to exist in the transitional phase and for a renewed trust in politics as a place for taking even hard and unpopular long-term decisions oriented towards the common good. "The ethos of politics demands that it is able to overcome even the most terrible cruelty. Politics also involves facing decisive moments, in which theoretical-ethical conceptualizations are put to the test of practical decisions in the struggle

[66] Silva Sanchez (2008), p. 882.
[67] Ibid., p. 883.
[68] Ibid., p. 884. The author added that "the imposition and enforcement of a penalty that is […] justified on account of the victim's needs, would merely constitute institutional revenge hiding under the veil of apparent rationality". Ibid.
[69] See Osiel (2005); Id. (2008); Id. (2009). See also Garapon (1995).
[70] Bell (2009), p. 123.
[71] To recognize a free space for politics does not mean to require an area of exemption from law, such as that invoked by the former United States Secretary of State, Henry Kissinger. Kissinger (2001). For an answer to Kissinger in the same review, see Roth (2001).
[72] Such a mixed model has ancient origins. It was described by Thucydides with reference to the civil war of Corcyra in the Second Peloponnesian War. He explained the reasons for the choice between "decisions based only on positive abstract law, on the one hand, and decisions based on all relevant moments of a particular situation and, therefore, the rational weighting of what is useful and what is needed, on the other". Bucheim (1991), p. 333.
[73] Expression by Freeman (2009).
[74] Stahn (2019), p. 260.
[75] Ambos (2009), 19 and 26.

with the chain of events."[76]

On the contrary, those who aim to support a general prohibition against amnesty should avoid shortcuts. This means that their argumentation should not be limited to the respect of this or that treaty, this or that judicial precedent; the challenges ahead must be faced. They should find a way to combine the removal of a significant portion of punitive power from State sovereignty with the guarantees provided by criminal law and the founding principles of the *Rechtsstaat* and democracy. The protection of human rights through criminal law must find limits within the basic principle of democracy, such as that of legality, the separation of powers, and the protection of the human rights of the accused within the criminal trial.

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[76] Freund (1971), p. 189. This does not mean sharing the unlimited scope that Carl Schmitt and his disciples claim for amnesty, sometimes from an anti-Marxist perspective, in order to stop the class conflict, as in the case of conservative sociologist Freund. Such a space for politics always requires a prescriptive framework that must be provided by law.

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