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CONTENTS

INTRODUCTORY PAPERS

VOLUME I

I DEVELOPMENT OF POLICE EDUCATION

VOLUME II

III THE RULE OF LAW, POLICE AND CRIME SUPPRESSION

IV POLICE AND CONTEMPORARY SECURITY CONCEPTS

AMNESTY AND INTERNATIONAL CRIMINAL COURT[1]

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Abstract: During the past few decades the international community intensified the efforts to create mechanisms to prosecute and punish the offenders of serious crimes. This paper discusses the complex relationship between the permanent International Criminal Court and amnesties which are usually granted by the countries within their national legislations following the end of internal (civil) conflicts or in order to protect the people who have committed serious crimes. This is rather a delicate issue which has not been clearly determined by the Rome Statute. This is why the author discusses the notion and historical context of amnesty in the first part of the paper. The second and central part of the paper refers to the relationship of national amnesties and the International Criminal Court (ICC) with a special review of diplomatic conference in Rome, preparatory meetings held before the adoption of the final text of the Rome Statute, its Preamble, provisions on complementariness (Article 17) and the principle *ne bis in idem* (Article 20). The author also pays due attention to the provisions which represent the alternative possibilities for the relationship towards national amnesties: to defer an investigation or criminal prosecution (Article 16) and discretion of the attorney to stop prosecution even in cases which are within the jurisdiction of the International Criminal Court (Article 53).

Key words: amnesty, International Criminal Court, Rome Statute, Truth and Reconciliation Commission, international community, serious crimes, signatory countries, jurisdiction

INTRODUCTORY NOTES

There are a certain number of impediments for conducting criminal procedures for international crimes. Many impediments are of practical and political nature, ranging from the lack of political willingness to prosecute those who have committed international crimes to problems related to collecting evidence due to insufficient resources, small number of trained professionals and the need to assign material assets to more urgent needs such as reconstruction and construction following after-war conflicts. However, the attention is also drawn to many obstacles which are of legal nature and which influence the establishment of jurisdiction for trials before the International Criminal Court. In theory, these are amnesty, out-of-datedness, pardon, immunity from criminal prosecution, *ne bis in idem* and the misuse of legal process.[2]

Legal impediments with which the courts are faced within their jurisdiction for international crimes have certain common characteristics. These are all impediments which both national and international courts might face when making deci-

1 This paper is the result of the realisation of the Scientific Research Project entitled „Development of Institutional Capacities, Standards and Procedures for Fighting Organized Crime and Terrorism in Climate of International Integrations". The Project is financed by the Ministry of Science and Technological Development of the Republic of Serbia (No 179045), and carried out by the Academy of Criminalistic and Police Studies in Belgrade (2011–2014). The leader of the Project is Associate Professor Saša Mijalković, PhD.

2 Yasmin Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, Hague, Asser press, 2010, p. 13.

sions whether to initiate criminal procedures for international crimes. It seems that the international criminal law does not offer a clear and unambiguous answer to the question of their legality. As a result of this, various opinions have surfaced within scientific circles. On the one hand, there are claims that these impediments prevent jurisdiction of the International Criminal Court and thus contribute to the general atmosphere of non-punishing, which is contrary to the current trends to exercise jurisdiction over international crimes without any exceptions. On the other hand, there is a tendency to find rational solutions in such cases and to make balance between the interests which are protected by impediments in conducting criminal procedure with the interests of the trial. Oxford English Dictionary defines an impediment as "a hindrance or obstruction in doing something".[3]

Within the framework of international criminal law the use of such an expression suggests that initiation of criminal procedure and trial has been blocked due to understated and mutually contradictory rules of international criminal law sources (primarily the Rome Statute). At the very beginning we wish to point out that the impediment should not be observed as an unsolvable problem only which disturbs the functioning of international criminal law but as a legal problem that the court should consider in a right manner when deciding whether to exercise its jurisdiction. Our attention in this study is focused on the question of amnesty.

The concept of amnesty and historical context

From the etymological point of view, the word "amnesty" comes from the Greek word "amnestia" which means "forgetfulness". Within the contemporary context, amnesty refers to the act of sovereign government of a country which exonerates persons from criminal prosecution for previously committed crimes. Amnesty is therefore granted by a state to a group or a circle of people and it most often refers to the crimes against state sovereignty, i.e. to political crimes for which pardoning is considered more appropriate for the sake of the general good than trial and punishment.[4] During the past few years Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay and South Africa granted amnesties to the members of former regimes who committed the international crimes and all as a part of peace agreements.[5] Many countries have included the provisions on amnesty for certain international crimes into their legislations as a means of re-establishing peace and rule of democracy. The clauses on amnesty are often constituent parts of peace agreements by which crimes are forgotten and forgiven in order to stop an internal conflict in majority of cases. This paper investigates whether national amnesties are a means to avoid punishment or their meaning is to put an end to conflicts which have already had severe consequences. It is obvious that sometimes justice and peace are incompatible goals. In order to stop an international or internal conflict, it is often necessary to carry out negotiations with leaders who have committed war crimes and crimes against humanity. In such cases insisting on criminal prosecution may prolong a conflict, resulting in more deaths, more destruction and more human suffering. The leaders of opposing parties involved in a conflict must cooperate in order to end fights and violations of international criminal law. It is not realistic to expect that these leaders would agree to peace agreements if directly following the agreement they would face life sentences together with their associates.[6] The rea-

3 Ibidem, p.11.
4 *Black's Law Dictionary*, St. Paul, Thomson West, 2004, p. 93.
5 Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court,*Cornell International Law Journal*, Ithaca, The Cornell Law Association, Cornell Law School, Vol. 32, 1999, p. 507.
6 Ibidem, p.508.

sons for granting amnesty reduce to the fact that following the period of turbulence and deep divisions which come after the armed conflicts, civil wars or revolutions, it is best to heal social wounds by forgetting and crossing out previous serious crimes ("international crimes") committed by any side. It is believed that this is the fastest way to forget hatred, animosities and thus reach national reconciliation.[7] However, there are a large number of papers that have appeared recently which advocate the stand that amnesties for international crimes undermine the basic principles of democratic and stable society which is founded on the rule of law.

From the historical point of view, amnesties for serious crimes, especially those committed during wartime, have had a long and rich history. Aristotle in his famous work "Athenian Constitution" proposes that hardship is taken as a starting point for consensus. The oldest record of a peace agreement, which ended the battle at Kadesh between the Egyptians (led by the Pharaoh Ramses II) and the Hittites in 1296 B. C. can be considered exclusively as a form of amnesty for fugitives who were returned to their homeland.

The law on amnesty was also brought by Thrasybulus after the civil war in Athens in 404 B. C. It included both sides, except the leader of the conquered party (the thirty tyrants) and his worse agents. The Roman commanders have also used amnesties to appease their opponents, such as Julius Caesar did and that practice gradually became the common feature of peace agreements. The European history of the 17th and 18th centuries shows that the amnesties were most probably part of peace agreements when there was not a clear victor or when the conflicting sides had a true wish to establish a stable and long-lasting peace. In the 20th century two most important wars were ended by a determined victory of one side and therefore the efforts to prosecute the conquered side were of primary importance which made amnesty within peace agreements a less acceptable option. However, proclaiming amnesty was followed by 1923 Lausanne Peace. It included the Turks who committed massacre over the Armenians and annulled the previous 1920 Sevres Agreement, which provided for the trial for these crimes.[8] At the end of World War II, the prosecution of war criminals led to Nurnberg and other trials after that, and the peace agreements concluded with the Axis Powers did not include the clauses on amnesty. On the other hand, General Douglas MacArthur, the Commander-in-Chief of the Allied Forces in Japan amnestied some Japanese state and military officers who were condemned to death and also amnestied the Japanese Emperor, which was the move considered to have contributed to the reconciliation between the USA and Japan, but made angry those who considered the Emperor Hirohito the main organizer of aggressive Japanese war and war crimes committed.[9]

In the 20th century amnesties started being used by governments as a means to end civil wars. During the last decades we have witnessed a large spectrum of amnesties which marked the process of transition from dictatorship into democracy (Haiti in 1993, Angola in 1994, South Africa in 1995, Sierra Leon in 1996, Algeria in 1999 and 2006). We shall mention only some cases of amnesties. In the period from 1990 to 1994, there was a military regime in Haiti headed by General Raol Cedras and Brigade General Phillipe Biamby, who murdered more than 3,000 civilian political opponents and also tortured a large number of them. The United Nations mediated the negotiations at Governor's Island. By this agreement the military leaders renounced of the power and made it possible for the return of democratically elected civilian president Jean-Bertrand Aristide in return for full amnesty for the members of the

7 Antonio Cassese, International Criminal Law, Oxford, Oxford University Press, 2003, p. 335.
8 Yasmin Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, op. cit, p. 77.
9 Ibidem.

regime. Under the pressure of the UN mediators, Aristide agreed to the amnesty clause. The UN Security Council immediately "reported their readiness to give the greatest possible support to the signed agreement" for which it was later pointed out that "it constituted the only valid framework for solving the Haiti crisis." When the military leaders broke the agreement on July 31, 1994, the Security Council undertook the extreme measure and approved the invasion of Haiti by the international forces. On the evening of the invasion General Cedras agreed to withdraw his command when the Law on general amnesty was passed in the Parliament of Haiti. The negotiations on amnesty led to the desired results: Aristide could return to Haiti and re-establish the civilian rule, the military leaders left the country, the majority of soldiers handed over their weapons, but this was also the end of the longest period of misuse of human rights, practically without bloodshed or resistance.[10]

In the period from 1960 to 1994 thousands of dark-coloured South Africans were in much more unfavourable positions under the apartheid system in the country. In order to prevent the bloody civil war to outweigh the negotiations, the leaders established some form of amnesty for those who were responsible. The leaders of the majority black population decided that it was the obligation when guaranteeing amnesty to have a corresponding price for a relatively peaceful transition to full democracy. In accordance with the agreements among bigger parties, South African Parliament established the Truth and Reconciliation Commission[11] on July 19, 1990, which consisted of the Committee on Human Rights Violations, the Committee on Amnesty and the Committee on Reparation and Rehabilitation. Within this process, amnesty was available only to those individuals who have completely revealed all the facts related to their crimes of apartheid. After 140 public hearings and having considered 20,000 written and oral statements, the South African Truth and Reconciliation Commission published the report on 2,739 pages about their discoveries on October 29, 1998.

Sierra Leon faced the crisis related to human rights violations which lasted for almost a decade (1991-1999). The results of this fight were tens of thousands of dead people and even more cases of tortures, mutilations, amputations and rapes. The conflict emanated from the fight for the control over diamond mines. The rebellious groups used children as soldiers and the great numbers of them were victims of forced amputation. The government of Sierra Leon and the rebellious groups known as the Revolutionary United Front finally made attempts to end violence by signing the Lome Peace Agreement in July 1999. This Agreement guaranteed amnesty to the individuals who participated in the conflict. This Commission started to work only in 2002. Despite the peace agreement, the violence in Sierra Leon reoccurred in May 2000. The forces of the Revolutionary United Front captured a group of UN peace troops stationed in Sierra Leon, which incited Britain to intervene on behalf of peace forces. After that, the government of Sierra Leon asked the United Nations to establish a court which would help in criminal prosecution

10 In 2000, Aristide won the great majority of votes at the elections which in addition to international observers the Haitians themselves estimated as illegitimate, so the violence, corruption and protests ruled Haiti. This led to the great political crisis and armed attacks in the course of 2004, after which Aristide resigned and left Haiti under mysterious circumstances. By the USA plane he flew to Central African Republic on February 29, 2004, and he is now in exile in South Africa. Although he continues to claim that he is democratically elected President of the country, the international community has rejected such a claim. Some observers report that the amnesties might have sent the wrong signal to Aristide and his followers and Haiti is still poor and with small chances for the improvement of the situation as long as the rebels dream of armed comeback. At the very end, the example of Haiti suggests that the"exchange of amnesty for peace" might lead to increased violence and future destablization. See: Leila Nadya Sadat, Exile, Amnesty and International Law, Notre Dame Law Review, University of Notre Dame, Vol. 81, 2006, p. 128.

11 Simon M. Meisenberg, Legality of amnesties in international humanitarian law: The Lome Amnesty Decision of the Special Court for Sierra Leone, International Review of the Red Cross, International Committee of the Red Cross and Cambridge University Press, Vol. 86, 2004, p. 838

and trial of the perpetrators of most serious crimes. The trial started in 2002. This newly-founded *ad hoc* criminal tribunal is considered a new category of international criminal courts and it is mainly considered a hybrid tribunal since its Statute includes various national elements. The UN Secretary General mandate to initiate the negotiations with Sierra Leon in order to establish an independent international court which would prosecute the serious forms of international humanitarian law violations was based on the UN Council Resolution 1315. The Agreement on Special Court and the Statute of the Special Court were ratified by the Sierra Leon Assembly in March 2002, based on the Law on ratification which explicitly says the following: "Special court will not be a part of Sierra Leon criminal justice system." Article 10 of the Agreement on establishing the court is important because it states that every amnesty granted for crimes which are within the court jurisdiction will not be an obstacle for prosecution . This actually means that the Court will not acknowledge the amnesties resulting from the Lome Agreement. This decision is of key significance for the development of the international criminal law since it represents the first decision of an International Criminal Court that says that amnesties are not impediments for trials for international crimes.[12]

In the countries of Latin America there were not any Truth Commissions but the amnesties were granted by military regimes of their own initiative. This is why during 1970s the campaign was launched for avoiding punishing foreign dictators for human rights violations, particularly in Latin America. Self-proclaimed amnesties to which military dictators, who were renouncing of power and wanted to protect themselves, referred to met a storm of protests by groups of victims such as Mothers of the Plaza de Mayo and Latin American Federation of Associations of Relatives of Disappeared Detainees. The UN Human rights commission published a report in 1997, whose author was Louis Joinet, which identified three elements essential for the fight against eluding punishment. These are: the right of the victims to know what happened to them and their compatriots, the right to justice (including the right to legal remedy) and the right to compensation.[13] Although they do not explicitly mention criminal prosecution as *sine qua non* of the campaign against eluding punishment, there is no doubt that they, as well as the groups of victims worldwide, identified the criminal law as the corner stone of this fight. Criminal law, naturally, does not represent the only element of this campaign, as highlighted by the Joinet's report. The additional component is knowledge. At the beginning of 1970s many countries established Truth Commissions as transition mechanisms of justice in order to focus on the overall opus of violations of the previous regime and not on the act of individual crimes. Although the amnesty may follow after the Truth Commissions, it may also serve to alleviate responsibility because they precede the adoption of measures which include the compensation to victims and may serve as therapeutic and powerful form of re-establishing justice, since they make it possible for the victims to talk about the terror they experienced without painful circumstances brought by the usual criminal prosecution procedures. The decision of the South African Government to establish the Truth and Reconciliation Commission prompted the interest of the international community. The South African Truth and Reconciliation Commission was unique when compared with the previous ones, because it was formed by the democratically elected legislative body which included the representatives of the victims of apartheid and it was not just a command to be obeyed.[14] In the course

12 Manisuli Ssenyonjo, The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty, International Criminal Law Review, Martinus Nijhof Publishers, 7 (2007), p. 380.
13 Leila Nadya Sadat, Exile, Amnesty and International Law, Notre Dame Law Review, University of Notre Dame, Vol. 81, 2006, p. 123.
14 Ibidem.

of this process there were debates between those who favoured unconditional amnesties and those who opposed amnesty of any kind. The South African Truth and Reconciliation Commission attempted to find a compromise between these two extremes. Out of 7,112 requests for amnesty that the Commission received, 849 were granted and 5,392 declined. The perpetrators who did not admit to committing the crimes could still be prosecuted. The procedure for granting amnesty is more legitimate if it does not include prosecution of perpetrators who have not admitted the most serious crimes. The South African Truth and Reconciliation Commission, due to the great support it enjoyed in both South Africa and beyond it, states that in some cases carefully worded provisions of amnesty combined with the threat of prosecution may be desirable means to improve justice.

We can conclude in this part of the paper that amnesties granted as a part of democratic parliamentary and consultative processes, in which both the victims and community are involved, can be characterised as appropriate more than those situations when national leaders grant amnesties to themselves before they renounce of power. The difference should be made between the so-called "self-amnestying" laws and amnesties which are the result of peace process based on democracy, which exclude criminal prosecution for crimes or acts of the members of opposing fractions, but leave possibility for punishing the most serious crimes.

Amnesty and the roman statute

What standpoint should the International Criminal Court take regarding the national amnesties? Despite the thorough description of international crimes within its jurisdiction, the Statute does not have a provision which refers particularly to the question whether the International Criminal Court shall observe the amnesties for such acts. Depending on the situation the International Criminal Court (ICC) chooses the weapons among those at its disposal according to the Rome Statute (it makes the decision whether to assume jurisdiction for the international crime or it will consider that the states parties to the Statute have resolved the dispute in their respective countries in a satisfactory manner which includes implicitly the acknowledgment of amnesty). Article 16, 17 and 53 are of special importance to that effect. There is a standpoint that failure to include the provision on amnesty into the Rome Statute is intentional, since in the Preamble the International Criminal Court took obligation to oppose to eluding of punishment for serious crimes. [15]

It would therefore be inconsistent to acknowledge national amnesties. It is our opinion that the lack of the provision on amnesty in the Rome Statute is the result of opposing attitudes and impossibility to reach consensus among the countries which participated in the diplomatic conference. Namely, during the stage when the future status of the International Criminal Court was negotiated there were heated debates on amnesties, the status of Truth Commissions and the requirements to provide for unhindered transition from authoritarian to democratic systems. A number of countries, South Africa and the USA among them, were of the opinion that national amnesties should be included by the Rome Statute but in such a manner as to exclude the jurisdiction of the International Criminal Court in corresponding situations. For

15 In brief, the Preamble of the ICC Rome Statute says the following: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,... Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,... Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes... Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,...We have agreed as follows...."

instance, South Africa particularly insisted on the introduction of alternative forms of responsibility, worried that the approach taken by their Truth and Reconciliation Commission (which offered amnesty in exchange for honest confession) will be rejected as a proof of lack of willingness of a country to prosecute the case.[16] The USA delegation made an informal proposal for the Court to take into account national amnesties when deciding whether to exercise its jurisdiction or not. According to the USA standpoint, the policy favouring prosecution of perpetrators of international crimes must be balanced with the need to close "the door of conflicts from the past era" and to "encourage the surrender of armed groups" and thus alleviates transition towards democracy.[17] One of the reasons stated in their decision dated May 06, 2002, in which the USA notified the UN Secretary General of their intention not to become a signatory, was that the Rome Statute did not accept amnesties under certain circumstances, that according to their opinion it should allow for democratic choice between prosecution and national reconciliation and that the International Criminal Court is not the institution which should make such a decision.[18]

Other countries responded by expressing fear that national amnesties might be used by dictators and war criminals who were attempting to avoid application of legal norms and that this would degrade the Court.[19] Some authors point out that national amnesties are directed towards protection of perpetrators of war crimes, genocide and crimes against humanity and that it is really a pity that the proponents of the Roman Statute missed a possibility to state clearly and unambiguously in it that such amnesties are inadmissible.[20]

Ambiguity and freedom of interpretation, as we are about to see, still make it possible for amnesties to be taken into account. A certain number of provisions of the Rome Statute of the International Criminal Court are sufficiently widely set so the amnesty can find its place. [21]

In the provision titled "Admissibility" in Article 17, the Statute deals with complex relationship between national judicial systems and the International Criminal Court. Pursuant to provision 10 of the Preamble and Article 1 of the Rome Statute, the powers of the International Criminal Court in exercising its jurisdiction over individuals accused of international crimes are complementary with national criminal courts. The term "complementary", according to one opinion, is the expression denoted the wrong meaning because basically the relationship between the international and national judiciary which is established is far from complementary. The two systems operate more one against the other and to a certain extent show animosity towards each other.[22]

Pursuant to the principle of complementariness, conducting the procedure is within the jurisdiction of the states parties to the Rome Statute and only under specific circumstances this would be the International Criminal Court. In order for the International Criminal Court to initiate and conduct criminal procedure it is

16 William A.Schabas, *An introduction to the International Criminal Court*, Cambridge, Cambridge University press, 2001, p. 68.
17 Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, op. cit, p. 508.
18 Anja Seibert-Fohr, The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions, *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003, p.556.
19 Naomi Roht-Arriza, Amnesty and the International Criminal Court, in *International crimes, peace, and human rights: The Role of the International Criminal Court,* New York, Transnational Publishers, 2000, p. 79.
20 Christine Van den Wyngaert & Tom Ongena, Neb is in idem Principle, Including the Issue of Amnesty, in: Cassese A., Gaeta P., Jones J.R.W.D. (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford, Oxford University Press, 2002, p. 727.
21 This is where there is the greatest difference between national criminal justice provisions and the international criminal law which can be observed through the prism of the Rome Statute and the Statue of ad hoc tribunal. While the national criminal laws respect consistently the principle of legality and its segment lex certa, the same cannot be said for the international criminal law which is the result of its underdevelopment but also of the lack of consciousness that would suggest the great importance of respect for the basic criminal justice principles.
22 William A.Schabas, *An introduction to the International Criminal Court,* op. cit, p.67.

necessary that there are not any obstacles which refer to functioning of the principle of complementariness. Therefore, a certain barrier for the acceptance of national amnesty is the provision specifying the situations which refer to functioning of the principle of complementariness in which the procedure will not be conducted before the International Criminal Court. According to this provision, the International Criminal Court will decide that the case is inadmissible when: a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; c) person concerned has already been tried for conduct which is the subject of the complaint, and there are not any conditions to depart from the principle *ne bis in idem*, and d) The case is not of sufficient gravity to justify further action by the ICC. It is important to point out here that this Article does not speak about the legality of national amnesties but about the place of jurisdiction of the International Criminal Court. But, in the absence of specific provision on amnesty, the International Criminal Court must determine if the case is admissible according to Article 17. Judging by paragraph 1, sub-paragraph a) the case is inadmissible if there is an ongoing criminal investigation or the criminal prosecution has been initiated, except in case when the country does not want the case or is not capable of conducting a proper investigation or undertaking prosecution. According to Schabas, the country is unwilling and does not want to conduct investigation when the national court acts "superficially and for their own sake" in order to make an impression that the investigation and prosecution are in progress, although the determination for their conduct is missing. While the question of whether the country is capable of conducting a proper investigation is observed through the prism of whether it can capture the accused or provide the necessary evidence and similar [23], whether the "case has been investigated" (sub-paragraph b) must be evaluated from case to case. This actually means that if amnesty prevents investigation, the inadmissibility of the case cannot be discussed. Sub-paragraph c) points out that a person will not be tried by the ICC if he/she was already tried by another court. If a national trial has already been completed, the judgment pronounced by the court represents an obstacle to court procedure which would be conducted by the ICC, except in case of framed or so-called "performance" trials. They are defined as trials conducted so that the accused would be protected from being declared guilty, or those which are not conducted independently and impartially and in the manner which "in the circumstances is inconsistent with an intent to bring the person concerned to justice." When amnesty was not preceded by the trail, it is clear that this provision cannot be applied. However, it is possible, if amnesty is granted prior to trial or in the course of the trial the jurisdiction of ICC is established according to sub-paragraphs a) and b). The problem is, however, what to do with the individuals who were amnestied after they were sentenced in the given country. Is there *res judicata* here since the trial is over? Article 20 specifies only inadmissible manners of conducting criminal procedure, but not what should be done with inadmissible measures brought after the procedure is over. One of the solutions is extensive interpretation of the notion "procedure", which would allow for the amnesties to be treated as "performance" trials.[24] The Statute also provides for as inadmissible the case which is "not of sufficient gravity to justify further action by the Court (sub-paragraph d)." It is questionable whether this sub-paragraph can be applied to all cases of amnesty. Gravity must be determined based on characteristics of a particular crime. Taking into account that

23 Ibidem.
24 Christine Van den Wyngaert & Tom Ongena, Neb is in idem Principle..., op. cit, p. 727.

the ICC is competent for crimes considered the most serious, inadmissibility based on the gravity of the case should be interpreted restrictively providing for the exception in only a limited number of cases.[25]

Equally difficult question is whether the other forms of "reconciliation", such as amnesty granted by the Truth and Reconciliation Commission, have any effect *res judicata* on the International Criminal Court. Taking into account that Article 17 pays special attention to conducting investigation, the question may be asked if the procedure carried out by the Truth and Reconciliation Commission, as a form of out-of-court procedure, fulfils the requirements of complementariness which exclude the trial by the ICC. The Court judges may consider that the project of the Commission of honest confession is taken as a form of investigation which means that they do not interpret this as "true unwillingness or impossibility" of the country to exercise justice. However, it is not possible to predict in advance what standpoint will be taken by the actors of judicial system. Judges and prosecutors may decide that the cases such as South African are just the cases where the line must be drawn and say that the amnesty for such crimes is inadmissible.[26]

When the amnesty procedure is conducted by some Truth and Reconciliation Commission, the solution to the problem may be sought in application of Article 53, which in some cases may lead to acceptance of amnesty. This is so-called prosecutor's discretion. Namely, if the case has been referred to the prosecutor pursuant to Article 13 of the Roman Statute, the prosecutor may decline to investigate if "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice" (Article 53). After the investigation, the prosecutor may decline to proceed with prosecution when "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 and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime." The final decision will be made by Pre-Trial Chamber. It is important to point out here that in some cases where the case was not referred to the prosecutor for political reasons, the prosecutor may initiate investigation at his own request (*proprio motu*), based on notification that the crime from the ICC jurisdiction was committed. The expression "may initiate investigation" should be understood as his right to initiate investigation which is not conditioned by anything and which is based on his discretionary judgment and activated on the basis on his free decision and not through the action of any other party, such as any country or the UN Security Council.[27]

Finally, there is another option which will prevent the ICC from considering the case covered by amnesty even when it is acceptable according to the Rome Statute. This option is called deferral of investigation or prosecution and it is regulated by Article 16. Namely, "no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect. That request may be renewed by the Council under the same conditions." The Statute imposes the condition that when deferral of investigation or criminal prosecution is requested, the Security Council acts in accordance with the Chapter VII of the UN Charter. This means that the Council must determine the existence of "any threat to the peace, breach of the peace, or act of aggression", in accordance with Article 39 of the Charter. Indeed, it is hard to imagine a situation in which refusal to acknowledge national amnesty represents

25 Anja Seibert-Fohr, The Relevance of the Rome Statute..., op. cit, p. 566.
26 William A.Schabas, *An introduction to the International Criminal Court,* op. cit, p. 69.
27 Милан Шкулић, *Међународни кривични суд-надлежност и поступак*, Београд, Правни факултет, 2005, стр. 431.

a threat to international peace. But, if the ICC continues with the process despite the amnesty which represents a part of the UN peace agreement and as a means to end serious conflicts, transition to peace might be made more difficult due to mass protests in these countries. This represents a sufficient argument for the Security Council to demand deferral of prosecution in order not to compromise the peace agreement which includes the provision of amnesty.[28]

CONCLUDING REMARKS

The Rome Statute does not mention amnesty explicitly. However, it is not completely ignorant of this issue. A certain number of provisions offer the possibility to the ICC to accept or reject such situations. When making a decision whether to apply Article 16, 17, 20 or 53, a great help has come from the practice so far, which includes both the situations when amnesties were justifiable and the situations which suggest they were inadmissible from the point of view of the international criminal law. The Court shall particularly take into account certain principles which have crystallized recently in treating such situations.

First of all, there is an obligation of the countries to prosecute and punish perpetrators for serious crimes within the jurisdiction of the Court. This offers a certain insurance that the countries will not let a serious crime be forgotten by undertaking measures aimed at forgiveness or exoneration from culpability. Second, the standpoint is highlighted that the victims have the right to truth and compensation and therefore it must be made sure if the country or international community have established a mechanism to find the truth about the victims and provided for the corresponding compensation. Also, it is a very important question whether the fighting will end and transition initiated without the agreements which include amnesty. It could be proved with arguments that amnesties which fulfil these conditions are consistent with international sources and should be acknowledged by both national and international courts. According to the opinion of Michael Scharf, it is still necessary to determine whether a country has implemented important steps to provide for the prevention of further violations of international criminal law provisions and whether it has undertaken steps through alternative manners of perpetrators sanctioning (losing a job, losing a government or military retirement compensation, and similar).[29]

Therefore, the difference is made on the one hand between the self-proclaimed, unconditional amnesties, which were particularly prominent in various countries of Latin America when a large number of military juntas amnestied themselves for all crimes committed during their government or they forced civil governments to do so before they handed over power, and on the other hand, amnesties which provide mechanisms for investigation and forgiving in the process of national reconciliation by resulting from a particular decision of the court or Truth and Reconciliation Commission.[30] By this we do not want to claim *a priori* that the conditional forms of amnesty, such as the process of the South African Truth and Reconciliation Commission which was reached after many years of disturbances and the goal of which was for the society to face its past and starts on the path of democracy, is in accordance with the requirements of the international criminal law. This must be determined in each specific case. As we have seen, some provisions of the Rome Statute provide for dealing with the issue of amnesty. They indirectly allow acknowledge-

28 Anja Seibert-Fohr, The Relevance of the Rome Statute..., op. cit, p. 583.
29 Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, op. cit, p. 527.
30 More about this in: Antonio Cassese, *International Criminal Law*, op. cit, p. 335; Garth Meintjes, Domestic Amnesties and International Accountability, in *International crimes, peace, and human rights: The Role of the International Criminal Court,* New York, Transnational Publishers, 2000, p. 86.

ment of amnesties guaranteed within the context of Truth Commissions, such as in South Africa, and rejecting of unconditional amnesties, i.e. that the ICC reaches the decision that the case of amnesty without an investigation conducted is admissible, which means that it will initiate the criminal proceedings and that it is inadmissible when it refers to amnesties followed by the investigation and determination of truth by the appropriate Commissions. The solution today may be reached only by careful analysis of every individual situation, while eventually an additional protocol to the Rome Statute is brought which will regulate the question of amnesty. Only time will show if this is too optimistic a view of the development of the international criminal law, taking into account that even those who were involved in writing the Rome Statute could not agree on certain provisions on amnesty.

REFERENCE:

1. Аристотел; Устав Атински, Београд, Плато, 1997.
2. *Black's law dictionary*; St. Paul, Thomson West, 2004.
3. Cassese A.; *International Criminal Law*, Oxford, Oxford University Press, 2004.
4. Meisenberg S; Legality of amnesties in international humanitarian law: The Lome Amnesty Decision of the Special Court for Sierra Leone, *International Review of the Red Cross,* International Committee of the Red Cross and Cambridge University Press, Vol. 86, 2004.
5. Meintjes G; Domestic Amnesties and International Accountability, in *International crimes, peace, and human rights: The Role of the International Criminal Court,* New York, Transnational Publishers, 2000.
6. Naqvi Y; *Impediments to Exercising Jurisdiction over International Crimes*, Hague, Asser press, 2010.
7. Roht-Arriaza N; Amnesty and the International Criminal Court, in *International crimes, peace, and human rights: The Role of the International Criminal Court,* New York, Transnational Publishers, 2000.
8. Sadat L; Exile, Amnesty and International Law, Notre Dame Law Review, University of Notre Dame, Vol. 81, 2006.
9. Schabas W; *An introduction to the International Criminal Court*, Cambridge, Cambridge University press, 2001.
10. Scharf M; The Amnesty Exception to the Jurisdiction of the *International Criminal Court, Cornell International Law Journal*, Ithaca, The Cornell Law Association, Cornell Law School, Vol. 32, 1999.
11. Ssenyonjo M; The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty, *International Criminal Law Review*, Martinus Nijhof Publishers, 7 /2007.
12. Seibert-Fohr A; The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions, *Max Planck Yearbook of United Nations Law*, Vol. 7, 2003.
13. Шкулић М; *Међународни кривични суд-надлежност и поступак*, Београд, Правни факултет, 2005.
14. Totten C; The International Criminal Court and Truth Commissions: A Framework for Cross-Interaction in the Sudan and Beyond, *Northwestern Journal of International Human Rights*, Northwestern University School of Law, Vol. 7, 2009.
15. Wyngaert C. & Ongena T, Neb is in idem Principle, Including the Issue of Amnesty, in: Cassese A., Gaeta P., Jones J.R.W.D. (ed.), *The Rome Statute of the International Criminal Court: A Commentary,* Vol. II, Oxford, Oxford University Press, 2002.