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Transitional Amnesties: Footsteps to Change

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So is everything okay? No. Far from.
We have got long journeys to travel
and they will never be complete ever.

– David Venter

ABSTRACT

This Master's thesis seeks to uncover the attitudes of international law and literature on the granting of transitional amnesty and how they have evolved over time. Along with an examination of whether an international duty to prosecute exists and whether granting amnesty is compatible therewith, it is researched how the opinions on amnesty within the literature itself have changed over time. In this regard, the South African amnesty scheme served as a starting point and is used as a case study to illustrate developments and to facilitate uncovering evolutions in international law and literature concerning amnesty. In addition to this descriptive examination, a normative part analyses the impact of the South African amnesty and points to several cautions in this regard. Lastly, the acceptability of granting amnesty is researched, based on the evaluation of different criteria contained in an assessment framework.

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INTRODUCTION

Transitional justice is "the study of societies in the process of transition from a relatively stable but unjust regime to a stable and just regime."[1] Therefore, it deals with "how a country seeking to escape from an unjust past should use law in the attempt both to come to terms with the past and to promote a better future."[2] It entails a "process of acknowledging, prosecuting, compensating for and forgiving past crimes during a period of rebuilding after conflict."[3] During these periods of transition, amnesty is often granted to (members of) the former regime. The concept of 'amnesty' is described as "an official act prospectively barring criminal prosecutions."[4] Elsewhere it is explained that "amnesty, granted by the executive or the legislature, removes the punishability of certain acts; amnesty thus abrogates crimes and punishment; it can be used to foreclose prosecutions but also to cancel the sanctions already imposed."[5] This issue of granting amnesty during transition has already gained much attention. Different aspects have thereby been examined and research has been undertaken to answer questions such as whether amnesty can lead to reconciliation, disclosure of the truth, peace, etc.

One of the most well-known examples of such a transitional amnesty is the case of South Africa. For this Master's thesis, the South African amnesty scheme served as a starting point which raised different questions. Since this thesis is part of a Research Master of Law, these questions arose mostly from regarding the topic from a legal point of view. The issue which therefore immediately arose, was whether or not the granting of amnesty is compatible with an international duty to prosecute, if this exists at all. When studying international law relating to a duty to prosecute and amnesty, it becomes clear that besides being not clear-cut and leaving much space for debate and appreciation, international law also evolved over time. However, it is necessary to not only focus on international law, but also on the literature relating to a duty to prosecute and amnesty, since in this field evolutions have taken place as well, which, more interestingly, seem to go against the evolutions in international law.

When studying the literature, fundamental differences can be uncovered in how authors, academics and experts in the field regard amnesty. Moreover, these different evolutions can

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[1] A. SARAT, *The limits of law*, Stanford, Stanford University Press, 2005, 25-26.
[2] A. SARAT, *The limits of law*, Stanford, Stanford University Press, 2005, 25-26.
[3] United States Institute of Peace, *Transitional Justice: Information Handbook*, Washington, USIP, 2008, 1.
[4] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2543, footnote 14.
[5] L. HUYSE, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry* 1995, Vol.20(1), 55, footnote 3.

be roughly classified in different periods over time. In particular, developments can be noticed after certain experiences in practice. This is in fact logical, since practice might show new possibilities and either confirm or contradict existing theoretical convictions. It was shown that amnesty schemes could vary enormously, which forced the international community to be more nuanced and to consider each amnesty scheme individually and within its own context. Since South Africa served as a point of departure for formulating questions about transitional amnesties, the initial hypothesis and assumption was that this amnesty scheme, given its ground-breaking differences in comparison with its predecessors, was influential for the literature. Therefore, besides studying the literature on amnesties and the way it evolved over time, it will be researched in this thesis how the South African amnesty scheme might have fuelled these evolutions.

Thus, this thesis not only focuses on the notion of amnesty itself, but also on how this topic has been looked at and (re)shaped by law and literature, how this has changed over time and in which way this might by influenced by experiences in the field, in this case the South African amnesty scheme. Besides this descriptive part, this thesis also includes a normative part, in which it is discussed whether amnesty can be acceptable and whether or not it should therefore be allowed.

The methodology used for this thesis varies according to the respective research question. Since the status of amnesty in international law is already examined extensively, it is sufficient to examine the literature on this topic. To find out the possible influence of the South African experience on international law, it was researched if and how preparatory works of international conventions refer to the South African case. Since they reflect the debates which precede the drafting of treaties, they show which factors and experiences have been taken into account before reaching the final text. Hereby, the Rome Statute gained particular attention. To analyse how attitudes in the literature have changed, the literature itself was researched. Different authors who are academics or experts in the field because of their involvement in some way in an amnesty scheme were included. The term ‘literature’ thus refers to scholarly research in this field. In order to uncover the possible influence of the South African case in this regard, the literature is categorised chronologically, whereby a division is made between literature before and after the South African amnesty scheme. Different authors explicitly focus on, or at least refer in their research to, the South African case. This shows in which way the attitude of these authors was shaped by this practical example. Moreover, three expert interviews were conducted, which contributed to gaining an insight in how attitudes in the literature have evolved and how the South African case should be framed herein. However, it is explained later in this

thesis why establishing a causal link between South Africa's amnesty scheme and the evolutions in both areas of international law and the literature is highly difficult and problematic.[6]

To answer the question of whether amnesty can be acceptable more objectively, an assessment framework is created. This framework consists of different criteria which are considered as important goals to be reached by the newly formed democracy. By researching whether amnesty might contribute to reaching these goals, the permissibility of granting amnesty is evaluated. The criteria selected to be included in the framework largely appear throughout the research in this thesis. Given that questions such as whether amnesty schemes can lead to reconciliation, whether they can actually uncover truth, etc., are empirical and sociological in nature and therefore not feasible for this thesis to answer by carrying out primary research, already existing studies and research are used. Also the expert interviews conducted unquestionably contributed in this regard.

Before giving an overview of the state and evolution of international law and literature concerning the granting of amnesty during transition, the South African amnesty scheme is briefly discussed in the first Chapter of this thesis. That way, when referring to this case while discussing international law and literature, it will be clear what is aimed at and an understanding thereof is necessary in order to fully appreciate the claims that are made in the following chapters. Next, Chapter 2 analyses the position of international law on the granting of amnesty, by examining whether or not there exists a duty to prosecute in international law and if so, whether the granting of amnesty is compatible therewith. In Chapter 3, the attitudes towards amnesty in the literature are investigated. As further illustrated in this chapter, notable disagreement can be uncovered in how amnesty is regarded in the literature. Moreover, it is demonstrated that these attitudes have evolved over time. As explained, these evolutions are roughly classified in different periods of time to enable the revelation of South Africa's possible influence within this field.

Chapter 4 discusses the impact as well as the possible future of transitional amnesties. In Section 1, difficulties concerning attempts to establish causal links between these three chapters, thus between the South African amnesty scheme and the evolutions in international law and literature on the granting of amnesties, are illustrated. Moreover, this section examines whether or not this experience can be considered as a successful example from which lessons can and should be drawn. Lastly, in Section 2 of this chapter, the

[6] See Chapter 4, Section 1.

acceptability of amnesty is researched by evaluating whether it can contribute to reaching the criteria contained in the assessment framework. On the basis of the research conducted in this thesis, some suggestions are made and it is indicated how this has shown the advantages and possibilities of amnesty, which are increasingly recognised by the international community. By discussing whether amnesties are capable of achieving these aims, it is illustrated whether amnesty schemes should be upheld. When executing this assessment, the South African amnesty scheme is used as a practical example to better illustrate different arguments and concerns.

CHAPTER 1. THE SOUTH AFRICAN AMNESTY SCHEME

In this chapter, the amnesty scheme that South Africa designed is investigated. After an introduction on how this amnesty scheme was created and a general description of what it exactly entailed, it is explained why this example is regarded as innovative and what goals it was expected to reach. Thereafter, a discussion on the amnesty's compatibility with South African constitutional law and international law follows. Lastly, a brief overview is given of the criticism on this amnesty scheme.

1. The creation of the South African amnesty scheme

The transformation of South Africa from a society governed by apartheid into a relatively stable democracy was the result of political negotiations.[7] The negotiating parties reached a peace deal, of which a provision on the granting of amnesty was an important part. The final clause of the Interim Constitution of 1993 states that:

> "In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed."[8]

On the basis thereof, the Promotion of National Unity and Reconciliation Act[9] ("TRC Act") was enacted, by which the Truth and Reconciliation Commission ("TRC") was established. The objective of the TRC was to promote national unity and reconciliation. This objective had to be reached through:

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[7] For more detailed information about the political negotiations and the establishment of the Truth and Reconciliation Commission and the amnesty process, see: J. DE LANGE, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 14-31; A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 1-7; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, XIII, 441 p.

[8] Constitution of the Republic of South Africa Act 200 of 1993. The cut-off date was later changed from 6 December 1993 into 10 May 1994 by the Constitution of the Republic of South Africa Amendment Act 35 of 1997 in an amendment of Schedule 6 to the 1996 Constitution: "(…) the date '6 December 1993', where it appears in the provisions of the previous Constitution under the heading 'National Unity and Reconciliation', must be read as '11 May 1994'."

[9] Promotion of National Unity and Reconciliation Act 34 of 1995, *Government Gazette* No. 16579, 26 July 1995.

> "(a) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, (…) by conducting investigations and holding hearings;
> (b) facilitating the granting of amnesty (…);
> (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them;
> (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights."[10]

The TRC consisted of three separate Committees: (1) a Committee on Human Rights Violations, which dealt with matters pertaining to investigations of gross violations of human rights, (2) a Committee on Amnesty, which dealt with matters relating to amnesty and (3) a Committee on Reparation and Rehabilitation, which dealt with matters relating to reparations.[11] In contradiction to the other TRC Committees, the Amnesty Committee continued its activities after the publication of the TRC's 'Final Report' in 1998,[12] until 2002. The Commission had a broad range of investigatory powers at its disposal.

2. Innovations

The amnesty scheme of South Africa is often referred to as being unique, in the sense of never seen before[13] and never repeated again. Although neither the enactment of amnesty laws during transition nor the establishment of a truth commission was exceptional, the South African amnesty scheme promised to be different from its predecessors. Prior to the South African case, amnesties had always taken the form of blanket, mostly self-granted pardons,[14] which characterised most Latin American transitions.[15] Thereby, the government in power itself would, before relinquishing power, grant amnesty for the atrocities and crimes

[10] Section 3(1) TRC Act.
[11] Section 3(3) TRC Act.
[12] *Truth and Reconciliation Commission of South Africa Report*, Cape Town, Juta & Co, 1998.
[13] R. SLYE, "Justice and amnesty" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 182.
[14] J. DANIEL, "The Truth and Reconciliation Commission Process: A Retrospective" in C. JENKINS & M. DU PLESSIS, *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 83.
[15] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 11.

the government and its agents committed, as happened in Argentina.[16] An amnesty is referred to as a blanket amnesty if it implies that entire categories or groups of perpetrators are granted amnesty unconditionally, as was the case in El Salvador.[17] This time, however, no blanket nor self-amnesty but instead a conditional and individual amnesty would be granted. It was unequalled that so many requirements had to be fulfilled in order to be qualified for being granted amnesty and that amnesty was used as a tool in the broader framework of truth seeking. That way, "the TRC's amnesty process was a unique innovation breaking with the international pattern of blanket amnesty through offering a limited and conditional amnesty if perpetrators participated in a public process and met specified conditions."[18]

Instead of being granted to entire groups or categories of individuals, perpetrators could only be granted amnesty individually and on application. In order for this application to be valid, one had to apply before the cut-off date and had to satisfy all conditions. The crime amnesty was applied for needed to be committed between 1 March 1960 and 10 May 1994 and ought to be an act, omission or offence associated with a political objective.[19] Moreover, the applicant had to make full disclosure of all relevant facts. Consequently, the South African amnesty scheme is often referred to as an amnesty in the exchange for truth.[20] In case of gross human rights violations, public hearings were held, in which victims could participate.[21] Not only the linkage of amnesty to truth telling was innovative, but also the fact that the

[16] In Argentina, the former regime enacted a self-amnesty law before leaving power. Nevertheless, this law was thereafter nullified by the newly elected government. K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 168; D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2549. Other examples of self-amnesty are the amnesties which were granted in Peru and Chile.

[17] K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 168; C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 30; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 415; D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 11.

[18] A.R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: Did the TRC Deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 10.

[19] Section 20(2) and (3) of the TRC Act describes in detail what 'act associated with a political objective' exactly entails and by whom it can be committed. Factors the Amnesty Committee should take into account were, among others, the motive, context, objective of the act and whether it was carried out in execution of an order. It did not include crimes committed for personal gain or out of personal hatred.

[20] L. MALLINDER, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide,* Oxford, Hart, 2008, 131.

[21] It was claimed that the South African amnesty scheme created the most extensive participation rights for victims seen so far: L. MALLINDER, "Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice" in D. PHILPOTT & J.J. LLEWELLYN, *Restorative Justice, Reconciliation and Peacebuilding,* 2012, 26.

Amnesty Committee, and thus the TRC itself, had the power to grant amnesty if all conditions were fulfilled. It was the first time that the investigatory and recommendatory functions of a truth commission were combined with this function of granting amnesty.[22] Thereby, a relatively safe and encouraging environment was created for perpetrators to actually disclose the full truth about their crimes. Moreover, perpetrators were stimulated to come forward by use of the so-called 'carrot and stick approach', since those who did not apply for or were denied amnesty, were supposed to be prosecuted.[23]

3. Objectives and justifications

The reasons why South Africa favoured this particular amnesty scheme are diverse. In the first place, it is argued that the amnesty was used to achieve a reasonably peaceful transformation from an oppression regime to a stable democracy.[24] Indeed, amnesty laws are often used as a tool during peace negotiations, especially if the oppressing government is still in control and is not willing to relinquish power or might remain part of a newly formed, power-sharing government. The threat of possible prosecutions might encourage the oppressing regime to remain in power and does not create any motivation to cooperate or negotiate with any opposing party. Prosecuting the government and its agents might lead to a continuation or renewal of the conflict. Therefore, it is said that amnesty is the necessary incentive for the oppressing regime to hand over power. Especially in the case of South Africa, where tensions were still omnipresent, it was said that "had the miracle of the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa."[25]

Another more practical aspect which made mass prosecutions less appealing was the lack of time and financial and human resources. The enormous amount of trials that would have needed to be instigated "would have stretched an already hard-pressed judicial system beyond reasonable limits."[26]

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[22] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 39.

[23] *TRC Final Report*, Volume 5, 309. As will be discussed hereafter, however, hardly any such prosecutions took place.

[24] A. BORAINE, *A country unmasked*, Oxford, Oxford University Press, 2000, 7 and 119.

[25] *TRC Report*, Volume 1, Chapter 1, Chairpersons' Foreword, 5. Nevertheless, as VILLA-VICENCIO pointed out, it should be kept in mind that "the price paid for national stability (…) can have adverse implications for the long term stability of the emerging new democracy." C. VILLA-VICENCIO, "Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet", *Emory Law Journal* 2000, Vol.49(1), 213. This is discussed more in detail later in this thesis (see Chapter 4, Section 2).

[26] *TRC Report*, Volume 1, Chapter 1, Chairpersons' Foreword, 6.

The feature that is promoted the most when justifying the South African amnesty scheme is the condition that it could only be granted if there was full disclosure of the facts of the crimes. As mentioned, the South African amnesty is often described as an amnesty in exchange for truth. It was implemented in the broader framework of truth seeking the TRC strived to achieve. Revealing the truth about past atrocities was regarded as a central goal and considered highly valuable and important. It is true that in case of prosecutions, perpetrators can be convicted on the basis of evidence beyond reasonable doubt only. Given that they can undergo the proceedings relatively passively, since there is no need for them to confess, prosecutions might, moreover, not be able to actually reveal the truth about what happened and might not lead to any confession of guilt by the perpetrator, even when leading to a conviction. Therefore, it was argued that by creating the incentive of possibly being granted amnesty, perpetrators would be encouraged to provide full disclosure of their crimes, which would lead to a more complete picture of the past than prosecutions would be able to accomplish.

Although violations took place on both sides of the conflict and the atrocities committed by the apartheid regime and its opponents were treated equally,[27] this strategy of using a carrot and stick approach particularly aimed at forcing the white elite and apartheid officials still in power to come forward and release information about the apartheid system and human rights violations. Whereas various main incidents were well-known, it remained unclear to what extent, for what reasons and against whom these violations had taken place. In excess of this lacking information, it was not only deemed crucial to uncover the exact truth about the apartheid system and the violations that had taken place, but also to assess the broader mindset and attitudes of white South Africans.[28]

This goal of truth seeking would serve different objectives. It would prevent a recurrence of the violations, establish a culture of respect for human rights and create accountability for the future.[29] The process of truth seeking was also regarded as an indispensable means to finally reach the goal of reconciliation. It was stressed that "it is only on the basis of truth that true reconciliation can take place."[30]

[27] Given the contrasting underlying reasons for committing atrocities, however, this identical treatment was extremely controversial. J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 53.
[28] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 51.
[29] *TRC Report*, Volume 1, Chapter 1, Chairpersons' Foreword, 7.
[30] *TRC Report*, Volume 1, Chapter 1, Chairpersons' Foreword, 18.

4. Constitutionality

If the amnesty application was complete and successful and therefore amnesty was granted, the result thereof was that the perpetrator in question could not be held criminally nor civilly liable in respect of the act, omission or offence he was granted amnesty for, as stated in Section 20(7) of the TRC Act. Consequently, no prosecutions could be maintained against the perpetrator anymore and he could not be held civilly liable for any damages caused by the act for which amnesty was granted.[31] In the *Azapo* case,[32] however, the applicants sought to have Section 20(7) declared unconstitutional. According to them, the amnesty's consequences were not authorized by the Interim Constitution, since it would be inconsistent with Section 22 thereof, which states that "every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."[33] It was argued that the Amnesty Committee was neither 'a court of law' nor 'another independent and impartial forum', and that it did not have the power to 'settle justiciable disputes'. The Constitutional Court acknowledged that the effect of amnesty affects very fundamental rights and examined whether there was anything in the Interim Constitution itself that permitted or authorised a possible violation of Section 22. According to the Court, the epilogue of the Interim Constitution, which it considered as being a provision of the Constitution itself, had the same status as any other provision thereof and "authorised and contemplated an 'amnesty' in its most comprehensive and generous meaning."[34] Thus, the constitutionality of the amnesty provisions to the TRC Act was upheld. Although the Court stated that it was not concerned with "the wisdom of its choice of mechanisms but only with its constitutionality,"[35] which therefore is the only relevant standard, it recognised the difficult dilemmas this amnesty entails:

> "The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new."[36]

[31] *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa and others*, Constitutional Court, 27 July 1996, para 7.
[32] *Azanian Peoples Organisation (AZAPO) and others v. President of the Republic of South Africa and others*, Constitutional Court, 27 July 1996.
[33] Section 22 Interim Constitution.
[34] *Azapo* Case, para 50.
[35] *Azapo* Case, para 21.
[36] *Azapo* Case, para 21.

Therefore, rather than using complex and legal language or reasoning, the Court stressed the need for truth and reconciliation in South Africa.[37]

5. International compatibility

In addition to challenging the amnesty provisions' constitutionality, the applicants also invoked international law, which was, according to them, violated. More specifically, they referred to the four Geneva Conventions and their relevant Protocols and stated that they confer upon states a duty to prosecute those responsible for gross human rights violations. However, the Court doubted whether these instruments were at all applicable to the situation and eventually decided that there is no "breach of the obligations (…) in terms of the instruments of public international law."[38] With regard to its discussion on international law, the *Azapo* case has received considerable criticism. It is unfortunate that the Court did not examine the possible existence of a duty to prosecute in case of crimes against humanity or other possible duties under customary international law.[39]

The question whether or not a duty to prosecute existed for South Africa under international law is discussed separately in Chapter 2,[40] after an overview is given on the potential existence of a duty to prosecute under international law.

6. Criticism

Besides appreciation and admiration for its unique approach, the South African amnesty scheme has also faced considerable criticism. According to some commentators, the design was 'perpetrator-friendly' and victims were treated too poorly.[41] Also the conditions that had to be fulfilled in order to be qualified for being granted amnesty did not remain unchallenged. With regard to its central objective of revealing the truth, it is argued that what the Amnesty Committee demanded offenders to disclose was too narrow, legalistic and somewhat

[37] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 32.
[38] *Azapo* Case, para 32.
[39] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 34.
[40] See Chapter 2, Section 5.
[41] See for example the critical analysis of Jenkins: "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 27-65.

inconsistent.[42] Further, mention is made of difficulties concerning the Committee's mandate, resources and proceedings.[43]

The most important objections are related to the lack of sufficient prosecutions after the ending of the TRC. In its final report, the TRC recommended that

> "where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals (excluding privileged information such as that contained in amnesty applications). Consideration must be given to imposing a time limit on such prosecutions."[44]

Out of the 7116 amnesty applications the Amnesty Committee received, in only 1167 of these cases amnesty was granted. Files of 300 cases were handed over by the TRC for further investigation and prosecution to the public prosecutor. In addition, the National Prosecuting Authority (NPA) obtained information about other perpetrators.[45] However, only five cases, involving 11 perpetrators, have been prosecuted eventually and no sufficient explanation concerning this lack of prosecution was given by the South African authorities. The fact that the TRC's recommendations with regard to prosecuting perpetrators who did not apply for or were denied amnesty were not effectively implemented,[46] caused considerable disappointment inside South Africa as well as in the international community.

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[42] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 436.

[43] Apart from criticism on how it was determined whether a crime had a political objective, it was argued that the concept of 'human rights violations' was defined too narrowly. An extensive discussion on the critique of the TRC's work would, however, exceed the purpose of this thesis and is discussed elaborately elsewhere: A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, X, 347 p.; C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 27-65; M. MAMDANI, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)", *Diacritics* 2002, Vol.32(3), 33-59; J. SARKIN, "An Evaluation of the South African Amnesty Process" in A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa. Did the TRC Deliver?*, Philadelphia, University of Pennsylvania Press, 2008, 93-115; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, XIII, 441 p.

[44] *TRC Final Report*, Volume 5, 309.

[45] H. VAN DER MERWE, "Prosecutions, Pardons and Amnesty: the Trajectory of Transitional Accountability in South Africa" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical perspectives in transitional justice*, Antwerp, Intersentia, 2012, 446-447.

[46] The government had no obligation to implement the recommendations the TRC made in its Final Report. This is regarded as an important flaw and was taken into account by other truth commissions such as the Sierra Leonean example, where the actual implementation of the TRC's recommendations was made obligatory.

Thereby, it was argued that the intended carrot and stick approach largely failed.[47] This is intensified by the perception that this lack of prosecutions was due to political rather than technical considerations.[48] However, it was argued that "once the Amnesty Committee had reached the end of its mandate, prosecutions had to be instituted as the only credible alternative to amnesty".[49]

7. Conclusion

In this chapter, the amnesty scheme that South Africa designed was discussed more in detail. It was illustrated that the amnesty law essentially was the outcome of political negotiations, characterising the case of South Africa as a 'negotiated transition'. Next, it was explained why the South African amnesty scheme is considered innovative. Since amnesty could only be granted if the perpetrator individually applied for it and disclosed the full truth about the political crime he had committed, this was a conditional amnesty which broke the cycle of unconditional, blanket and self-amnesties granted in most Latin American countries in the past.

Moreover, it was demonstrated that the amnesty scheme was expected to serve several goals. Besides being considered a necessary tool to prevent a civil war and thereby create peace and stability, the amnesty was framed in the broader framework of the truth recovery process in South Africa. Amnesty was used as an incentive to encourage perpetrators to disclose the truth about what happened. That way, more light could be shed on the apartheid system and the human rights violations that had been committed. This goal of truth seeking

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[47] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 44.

[48] A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: Can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 472; H. VAN DER MERWE, "Prosecutions, Pardons and Amnesty: the Trajectory of Transitional Accountability in South Africa" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical perspectives in transitional justice*, Antwerp, Intersentia, 2012, 447. H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, 52.

[49] As a consequence, South Africa's post-TRC measures, among which a further Presidential pardon, cannot be considered acceptable. H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, 52. In this book, Lubbe focused on South Africa's transition after the end of the TRC and its Amnesty Committee's operations and critically analysed the various post-TRC initiatives that were taken, among which prosecutions and Presidential pardons. As regards the post-TRC prosecutions, a comprehensive analysis thereof can be found in: O. BUBENZER, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process*, Leiden, Martinus Nijhoff Publishers, 2009, 258 p.

was itself deemed necessary to facilitate other objectives, such as ensuring accountability and facilitating reconciliation.

Further, it was indicated how the South African Constitutional Court upheld the constitutionality as well as the international compatibility of the amnesty law. Lastly, some criticism on the amnesty scheme was discussed, of which the most fundamental critique concerns the lack of sufficient prosecutions after the TRC's operation, in contradiction to its recommendations.

CHAPTER 2. AMNESTY IN INTERNATIONAL LAW

Since the second half of the twentieth century, the nature of conflicts has changed. Whereas international conflicts have declined, there has been a rise of internal conflicts. In connection therewith, this shift is reflected by the changed role of amnesties, being invoked by governments or oppressing regimes with regard to atrocities committed during internal conflicts.[50] Although the granting of amnesty often used to be considered as an issue belonging to the sovereignty of states, there has been an extension of international humanitarian law and international criminal law and growing concerns of the international community, which causes amnesty to be regarded as falling within the ambit of international jurisdiction.[51]

Given that the granting of amnesty is nowhere explicitly prohibited in international law, it is necessary to examine whether there nevertheless exists an international duty to prosecute certain crimes and atrocities. However, even if such a duty to prosecute exists, it must be further analysed whether the granting of amnesty is per se incompatible therewith. Therefore, a possible duty to prosecute should be applied to the specific situation of transitional societies. Even though the particularities of these societies are no excuse not to comply with a possible duty to prosecute and thereby create wholesale impunity, it must be acknowledged that such societies face considerable constraints.[52] Consequently, it should be examined whether in such cases a duty to prosecute requires the new authorities in power to prosecute every single violation or spells out which and how many perpetrators should be prosecuted if a limited amount of prosecutions may suffice.

To systematically describe whether there exists an international duty to prosecute, a distinction is made between different areas of international law. Given their overlap, international conventional law and international human rights law are analysed jointly. Thereafter, international customary law is discussed. Also the position of the International Criminal Court concerning amnesty is, because of the many questions it raised on this issue, discussed separately. After this analysis of the status of international law concerning the granting of amnesty, it is examined in which way this has evolved over time. In the light of these findings, it is lastly reviewed whether the South African amnesty scheme can be considered compatible with South Africa's international obligations during that time.

[50] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 91-92.
[51] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 92 and 116.
[52] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2595-2596.

1. International conventional law and international human rights law

Several international treaties contain provisions requiring states to prosecute violations of these treaties in their national jurisdiction. Firstly, a duty to prosecute or extradite clearly exists under the Genocide Convention[53] and in case of 'grave breaches' of the Geneva Conventions and their Additional Protocol I.[54] Although this duty is absolute[55] and granting amnesty when these conventions are applicable would therefore be a breach of a treaty obligation,[56] these conventions are only applicable in limited situations. Firstly, the Genocide Convention is restricted to situations where there is an "intent to destroy (…) a national, ethnical, racial or religious group."[57] This definition comprises two limitations, namely (1) the act must be committed with a specific interest to 'destroy' the opposition, (2) which must constitute one of the mentioned groups. Since "political groups" are not referred to, acts against these groups are excluded from the definition.[58] Secondly, the Geneva Conventions and Additional Protocol I only create a duty to prosecute with regard to 'grave breaches' and, moreover, only if they are committed during international armed conflicts.[59] Finally, even if the Conventions are applicable, they are not considered as imposing a duty to prosecute all perpetrators or instances and are therefore not violated when selecting cases by focusing on those who are 'most responsible'.[60]

Common Article 3 to the Geneva Conventions and Additional Protocol II[61] covers non-international or internal conflicts.[62] Protocol II supplements and develops common Article 3

[53] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 1021.
[54] Geneva Conventions, 12 Augustus 1949: Article 49 Geneva I, Article 50 Geneva II, Article 129 Geneva III and Article 146 Geneva IV; Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 84.
[55] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 418; M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 516.
[56] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 515-516.
[57] Article 2 Genocide Convention.
[58] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 517.
[59] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 303; K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 175; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 418; M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 516.
[60] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 37; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 418.
[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

and contains one of the only references to amnesties in its Article 6(5), which states: "at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty (…)."[63] The intended meaning of this paragraph is controversial.[64] In its commentary to this Article, the International Committee of the Red Cross (ICRC) stated that "amnesty is a matter within the competence of the authorities."[65] It was further said that "the object of this sub-paragraph is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided."[66] However, this provision was later reinterpreted by the ICRC itself[67] and by other commentators. They state that the provision is limited to "combatant immunity", which traditionally means that "a combatant in an international conflict should not be punished for having been a participant in the conflict as long as he respected international humanitarian law."[68] Therefore, combatants who commit acts equivalent to grave breaches should be punished. The ICRC even argued that its interpretation has become part of customary law.[69] Other authors, however, emphasise the limited evidence of state practice on which this claim was based[70] and argue that interpreting Article 6(5) as being merely limited to combatant immunity is not supported by the Plenary Meeting Notes.[71] Therefore, it is said that common Article 3 does not create a duty to prosecute.

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[62] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 40; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 418.

[63] K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 176-177.

[64] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 101.

[65] ICRC Commentary to Article 6(5) of Protocol II, 4617.

[66] ICRC Commentary to Article 6(5) of Protocol II, 4618.

[67] This happened in a letter of 1997 by the Head of the Legal Division of the ICRC. By that time, already different developments had taken place in international humanitarian law, whereby its scope expanded.

[68] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 102.

[69] See its study of 2005: J.-M. HENCKAERTS, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross* 2005, Vol. 87(857), Rule 159; *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 40; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 418.

[70] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 304-305. It was said that the number of sources used for the ICRC study is relatively small and that research by different scholars contradicts the findings of this study: K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 418-419; *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 40-41.

[71] K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 177.

In addition to the aforementioned Conventions and Protocols, also the Convention Against Torture[72] and the Convention on Enforced Disappearances[73] contain a duty to prosecute or extradite perpetrators in case of violations of certain provisions, by stating that if not extraditing, State Parties to the Conventions should submit the case to the competent authorities for the purpose of prosecution. Moreover, this should be done in the same way as serious offences under the State Party's domestic law.[74]

Human rights treaties do not explicitly mention a duty to prosecute. These treaties only obligate states to 'ensure' the rights in the treaties. An examination of the case law of the human rights courts that implement and enforce these human rights conventions, shows regional differences.

The Inter-American Court, on the one hand, which has direct experience of dealing with amnesties, has rejected unconditional amnesties for serious crimes. However, it is important to mention that this Court did not yet have to decide on conditional amnesties or amnesties in combination with prosecutions.[75] In the *Velásquez Rodríguez* case, the Court held that the obligation under Article 1(1) of the American Convention on Human Rights[76] to ensure the free and full exercise of the rights contained in the Convention, implies that "the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[77] Nevertheless, the Court did not explicitly state that this duty to investigate and punish requires criminal prosecution of the perpetrators.[78] Its case law seems to indicate that this obligation can be fulfilled by means of imposing noncriminal sanctions.[79]

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[72] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 10 December 1984, 1465 UNTS 85.
[73] International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, G.A. Res. 61/177, U.N. Doc. A/RES/61/177.
[74] Article 7 of the Convention Against Torture and Article 11 of the Convention on Enforced Disappearances.
[75] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 44.
[76] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969.
[77] *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 166.
[78] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 97; L. MALLINDER, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 2007, Vol. 1, 216.
[79] L. MALLINDER, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 2007, Vol. 1, 216.

The European Court of Human Rights, on the other hand, has not directly dealt with amnesties. In case of serious violations of human rights, this Court has decided that states are obliged to investigate, but not necessarily prosecute. According to the Court, the right to an effective remedy, contained in Article 13 of the European Convention on Human Rights,[80] which one has in case of a violation of his rights under the Convention, entails "a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure."[81] It is said that in order to verify whether this right has been respected, one has to examine the quality of the investigation and no obligation to prosecute and punish perpetrators is hereby imposed.[82] Given these different approaches of the respective Courts, it is doubtful that a universal prohibition of amnesty law exists under international human rights law.[83]

It was argued that for those crimes for which conventions require prosecutions, this duty should not be interpreted in such a way as to impose an impossible burden on the newly formed state. In such case, this general obligation should be analysed from the viewpoint of its application to the concrete situation and in the light of its purpose to have a deterrent effect.[84] This does not necessarily require prosecution of each violation and perpetrator, but limited prosecutions and 'exemplary punishment' can suffice in this regard.[85]

2. Customary international law

Whether the granting of amnesty is prohibited under customary international law is particularly important for war crimes committed in non-international conflicts and crimes against humanity, since no international convention prohibits these crimes. Customary international law refers to rules followed by states out of a sense of legal obligation. This contains, on the one hand, the objective element of state practice and, on the other hand, the

[80] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.
[81] *Aksoy v. Turkey*, Judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, para 98.
[82] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 44.
[83] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 43-45; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 420.
[84] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2600.
[85] "A bounded program of exemplary punishment could have a significant deterrent effect, and thus achieve the aim justifying the general duty to punish atrocious crimes." D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2601.

subjective element of *opinio juris*, meaning that the state practice must be followed from a sense of legal obligation.[86] Sources where evidence of state practice and *opinio juris* can be found are, for example, case law of international tribunals and hybrid courts, soft law instruments, domestic legislation, state practice in negotiating peace agreements and the support or rejection of amnesty processes, amnesty provisions in international conventions, etc.[87]

With regard to case law of international tribunals and hybrid courts, the position on whether or not a prohibition on granting amnesty exists under customary international law for international crimes is considerably diverse.[88] Regarding state practice, it has already been mentioned that on this basis, the ICRC reinterpreted Article 6(5) of the Additional Protocol II, by stating that this provision, according to customary international law, should be read as excluding the possibility to grant amnesty to "persons suspected of, accused of or sentenced for war crimes."[89] However, it is argued that this interpretation is only based on a relatively small amount of state practice and can therefore not be considered as being based on sufficient evidence.[90] Research by different authors gathering data on state practice on the duty to prosecute seems to contradict the findings of the ICRC. State practice in enacting amnesties shows that states keep enacting amnesty laws, even for the most serious crimes,[91] and, moreover, that they support amnesties in other jurisdictions[92] and provide support for the implementation of amnesty processes.[93] Moreover, attempts to prohibit

[86] Restatement Third of Foreign Relations Law of the United States Section 102(2) (1987); Statute of the International Court of Justice, Article 38(1)(b), 59 Stat. 1055, 1060 (1945); *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 38; K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 172-173; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 419; M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 520.

[87] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 40; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 419.

[88] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 39.

[89] J.-M. HENCKAERTS, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross* 2005, Vol. 87(857), Rule 159.

[90] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 41; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 419.

[91] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 419.

[92] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 41-42.

[93] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 419.

amnesty laws in international conventions have failed and their legality is mostly upheld by national courts.[94]

All this has led many commentators to argue that it cannot be concluded that a general prohibition of amnesty exists under customary international law.[95] Moreover, even commentators interpreting a duty to prosecute certain crimes under customary law highly strictly acknowledge that such duty does not require a state to prosecute every violation for which such duty is considered to exist. If the criteria used to select perpetrators fulfil certain requirements, prosecuting those most responsible might suffice in order to comply therewith.[96]

3. The International Criminal Court and the Rome Statute

The International Criminal Court was established by the Rome Statute,[97] which was adopted on 17 July 1998 and entered into force on 1 July 2002. The establishment of a permanent international criminal court was suggested already earlier, but highly debated. It is framed in the international trend to 'fight impunity'[98] and is therefore aimed at facilitating a climate of accountability. In general, the establishment of this Court is widely welcomed and can be considered as being part of state practice and *opinio juris*, which is relevant with regard to

[94] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 43. J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1003; L. MALLINDER, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide,* Oxford, Hart, 2008, 244; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), C. TRUMBULL, "Giving amnesties a second chance", *Berkeley Journal of International Law* 2007, Vol. 25(2), 295.

[95] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 43.

[96] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2599.

[97] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90 (Rome Statute).

[98] Although the concept of 'impunity' is frequently used, it is not often concretely defined. DU BOIS-PEDAIN described it as "the pervasive failure of states to mobilise their law enforcement systems against human-rights violators, especially against those on the government's payroll." A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: Can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, footnote 3 on 460. In the UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, the concept of impunity was defined as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." Addendum to the *Report of the independent expert to update the Set of Principles to combat impunity*, by D. ORENTLICHER, 18 February 2005, UN Doc. E/CN.4/2005/102/Add.1.

determining customary international law. The ICC has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[99]

Although the issue of amnesty laws was discussed during the negotiations, it is nowhere explicitly mentioned in the Rome Statute.[100] Whether this means that the ICC has to respect a national amnesty law concerning crimes falling under its jurisdiction is discussed. On the one hand, it is argued that this is not the case, given the Court's aim to combat impunity and considering that states have a duty to prosecute perpetrators for crimes of genocide and serious violations of international humanitarian law.[101] On the other hand, however, it is claimed that the Rome Statute contains provisions which allow the recognition of an amnesty exception to the jurisdiction of the ICC.

This claim is firstly based on Article 16 of the Rome Statute. This Article states that the Security Council, by adopting a resolution under Chapter VII of the UN Charter,[102] can order the deferral of an investigation or prosecution by the Court. This implies that the situation should amount to a threat to the international peace and security under Article 39 of the UN Charter. However, it is hard to think of a situation in which refusing the recognition of amnesty would threaten international peace.[103] Amnesty laws are often the outcome of peace agreements transferring power, whereby even though a certain degree of tensions might still be present, it is not likely that the situation is severe enough to meet the threshold of Chapter VII.[104] Therefore, Article 16 is elsewhere interpreted to be "intended as a delaying mechanism only, to prevent the Court intervening in the resolution of an ongoing conflict by the Security Council. It would be an unwieldy provision to invoke to achieve permanent respect for an amnesty law."[105]

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[99] Article 5 Rome Statute. This jurisdiction is, however, complementary to that of the State Parties, which remain the favourable forum to deal with international crimes. Therefore, the ICC will only start investigations or prosecutions if the national competent authority is unwilling or unable to do so.

[100] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 106; H. GROPENGIEßER & J. MEIßNER, "Amnesties and the Rome Statute of the International Criminal Court", *International Criminal Law Review* 2005, Vol.5(2), 267; D. ROBINSON, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", *European Journal of International Law* 2003, Vol. 14(3), 483.

[101] D. MAJZUB, "Peace or justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law* 2002, Vol.3(2), 264.

[102] Charter of the United Nations, 24 October 1945, (UN Charter).

[103] J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1014.

[104] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 109.

[105] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 109.

Secondly, Article 53 of the Rome Statute is referred to, which allows the Prosecutor not to prosecute if "this would not serve the interests of justice."[106] This would give the Prosecutor a certain discretion, whereby he can decide not to prosecute in order to respect an amnesty law. It is, however, not fully clear what the exact scope of 'the interests of justice' entails.[107] It is claimed that if there is any amnesty exception to the jurisdiction of the ICC at all, it has to be found in Article 53. The term "'justice' as it appears in Article 53 does not seem to connote 'criminal justice' and would allow the Prosecutor to take non-punitive factors into account".[108] In case refusing to respect an amnesty law and requiring prosecutions would lead to renewed or continued atrocities, this seems to go against the interests of justice. However, this means that one has to speculate about possible future developments and is consequently contradictory to the idea of the deterrent effect of prosecutions.[109]

Thirdly, Article 17 of the Rome Statute requires the ICC to declare a case inadmissible where "the case has been 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." However, Subsection (2) of Article 17 might require a criminal prosecution, since 'bringing the perpetrator to justice', which is required in order for an investigation not to be genuine, is usually understood in a legal rather than a moral sense.[110] Furthermore, it is difficult to uphold the interpretation that amnesty will be covered if this results from the unwillingness of a state.[111] Although guidance is given in the Rome Statute with regard to the meaning of the concepts 'unwilling' and 'unable', these criteria imply an examination of the state's intention, which includes a subjective interpretation. Consequently, it is difficult to assess the ICC's interpretation thereof.[112]

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[106] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 524.

[107] It was argued that the Prosecutor can hereby take an "entirely political" decision. L. MALLINDER, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 2007, Vol. 1, 219.

[108] D. MAJZUB, "Peace or justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law* 2002, Vol.3(2), 271. See also: H. GROPENGIEßER & J. MEIßNER, "Amnesties and the Rome Statute of the International Criminal Court", *International Criminal Law Review* 2005, 296.

[109] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 110. In his article, MAJZUB suggested a framework for the Prosecutor's use when deciding whether or not to prosecute: D. MAJZUB, "Peace or justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law* 2002, Vol.3(2), 247-279.

[110] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 111; M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 524-525.

[111] J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1014.

[112] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 110-111.

The last argument formulated to support an amnesty exception to the ICC's jurisdiction is to rely on Article 20 of the Rome Statute, which codifies the *ne bis in idem* principle by saying that no person who has already been tried by a court for certain conduct can be tried again by the ICC with respect to the same conduct. It is suggested that confessions before a truth commission could be considered the equivalent of a judicial trial. However, the difficulties of this argument are indicated and it is pointed out that Article 20 explicitly mentions 'another court' and therefore a truth commission might not be considered as equivalent thereto.[113] Moreover, proceedings by a national court will not be sufficient to exclude prosecution by the ICC if those proceedings were either aimed to shield the perpetrator from criminal responsibility for crimes within the jurisdiction of the ICC or were not conducted independently or impartially and conducted in a manner inconsistent with an intent to bring the perpetrator to justice.[114] Finally, it is added the ICC itself might have regard to an amnesty.[115]

4. Evolution of international law over time

When examining how international law evolved over time, it becomes clear that it evolved in a different way than the literature, as will be discussed later, which causes tensions. With regard to international law there has been an expansion of instruments and institutions in all three distinct legal areas of international law. Therefore, international legal, diplomatic and economic pressure not to grant amnesty has increased. International case law and authoritative opinions rejecting amnesties for being in contradiction with international law have expanded.[116] "Major advances in international, regional and domestic efforts to combat impunity through criminal prosecution" have taken place.[117] Perhaps the most clear indication of this tendency is the creation of the ICC. The Preamble of the Rome Statute explicitly

[113] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 525. This argument was also formulated by GAVRON: J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 109. MAJZUB explicitly stated that the right of *ne bis in idem* only arises if a perpetrator is repeatedly criminally prosecuted: D. MAJZUB, "Peace or justice? Amnesties and the International Criminal Court", *Melbourne Journal of International Law* 2002, Vol.3(2), 270. For a more in-depth discussion on how truth commissions and the ICC can cooperate, see: D. ROCHE, "Truth Commission Amnesties and the International Criminal Court", *The British Journal of Criminology* 2005, Vol. 45(4), 565-581. This author clarified how the Prosecutor can deal with perpetrators who were granted amnesty by a truth commission.

[114] Article 20 Rome Statute.

[115] J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1014.

[116] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 26.

[117] *Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity*, by D. ORENTLICHER, 27 February 2004, UN Doc. E/CN.4/2004/88, para 24.

states: "*(…) 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 (…).*"[118] Consequently, "there is an evident legal trend undermining the legitimacy of national amnesties, and while they will no doubt continue to appear in practice, the Court as a legal body is likely to have a strong presumption against them."[119] These developments have led to a revision of the UN Principles to combat impunity.[120]

At first sight, international law thus appears to be moving in the direction of prohibiting the granting of amnesty for international crimes.[121] Nevertheless, as already discussed with regard to customary international law, an examination of state practice shows a lack of objection against amnesty laws or even support for them by states, courts and international bodies. Amnesty laws continue to be enacted and although the number of amnesty laws excluding amnesty for international crimes has increased, the same counts for amnesty laws including amnesty for those crimes.[122] Therefore, despite this increasing severity, international law still seems to leave a certain margin of flexibility and discretion for states to deal with amnesties.[123]

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[118] Preamble of the Rome Statute.
[119] J. GAVRON, "Amnesties in the light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly* 2002, Vol. 91, 117.
[120] UN Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, addendum to the *Report of the independent expert to update the Set of Principles to combat impunity*, by D. ORENTLICHER, 18 February 2005, UN Doc. E/CN.4/2005/102/Add.1. It was explained that "while these developments have made it necessary to update the Principles, the Principles themselves have played a singularly influential role in contributing to these advances." *Report of the independent expert to update the Set of Principles to combat impunity*, by D. ORENTLICHER, 18 February 2005, UN Doc. E/CN.4/2005/102, 2. Although the Principles are no legally binding instrument in themselves, they are considered as an expression of the relevant legal principles. *Report of the independent expert to update the Set of Principles to combat impunity*, by D. ORENTLICHER, 18 February 2005, UN Doc. E/CN.4/2005/102, para 11.
[121] J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1004.
[122] L. MALLINDER, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide,* Oxford, Hart, 2008, 151.
[123] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 27.

5. Compatibility of the South African amnesty scheme with international law

To examine whether or not South Africa was subject to a duty to prosecute under international law, it is important to put this amnesty scheme into its relevant timeframe.

The TRC was operational from 1995 until 1998,[124] at a time when only few international obligations existed. With regard to international conventional law, the Geneva Conventions are only applicable to international armed conflicts. Since the conflict in South Africa is considered to be an internal conflict,[125] the duty to prosecute which the Geneva Conventions contain, is not relevant in this case. However, for the purpose of Additional Protocol I, international armed conflicts also include armed conflicts in which peoples are fighting against racist regimes.[126] Although this Protocol therefore could have been applicable, it was only ratified by South Africa in 1995 and thus not binding at the time the acts for which amnesty could be obtained actually occurred. Given the internal nature of the conflict, also Additional Protocol II has to be taken into account. However, the threshold that has to be reached in order for this Protocol to be applicable requires a certain conflict intensity, since the armed conflict should be one "between [the state's] armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations."[127] It is argued that this level of intensity was not met in South Africa.[128] As already discussed, common Article 3 of the Geneva Conventions and Additional Protocol II does not seem to create a duty to prosecute. Further, the Genocide Convention and its duty to prosecute are not relevant for the South African case, since the apartheid practices are not classified as a crime of genocide.[129]

[124] It has already been mentioned that the activities of the Amnesty Committee continued after the publication of the TRC's final report.
[125] DU BOIS-PEDAIN stated that the opponents in the South African conflict were part of the opposition against apartheid and the conflict cannot be qualified as an international armed conflict, "despite the fact that members of the liberation movements trained in camps located in neighbouring states, and were sometimes attacked by South African military and police agents on the soil of these states." A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 322-323.
[126] Article 1(4) Protocol I.
[127] Article 1(1) Protocol II.
[128] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 325.
[129] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 325. See also the TRC Report which stated that "a finding of a crime against humanity does not necessarily or automatically involve a finding of genocide." *TRC Report* Volume 1, Appendix, 3.

The Convention Against Torture, which contains a duty to prosecute or extradite perpetrators of certain violations of the Convention, was only ratified by South Africa on 10 December 1998 and therefore not binding upon the country at that time. However, torture is prohibited by international law and, moreover, this prohibition has the status of *ius cogens*.[130] Therefore, despite the lack of ratification of the Convention Against Torture, South Africa remained bound by customary international law not to commit torture. Nevertheless, there does not clearly exist a prohibition of granting amnesty since there is no general duty to prosecute under customary international law, as already discussed. Up until now, South Africa is still not a State Party to the Apartheid Convention.[131] With regard to the ICC, the Rome Statute, which is signed and ratified[132] by South Africa, does not have any retroactive effect. Therefore, the ICC only has jurisdiction over crimes committed after its entry into force.

On the basis of this analysis of the compatibility of the South African amnesty scheme with international law, it can be concluded that from a strictly legal point of view, the amnesty provisions were compatible with the country's international obligations of that time.[133]

6. Conclusion

This chapter showed that the question whether or not the granting of amnesty is compatible with the present state of international law has provoked remarkable controversy. To systematically examine this question, a distinction was made between international conventional law and international human rights law, on the one hand, and international customary law, on the other hand. With regard to the first category, a consensus exists that only few conventions include a duty to prosecute. This is the case for the Genocide Convention and the Geneva Conventions and their Additional Protocol I in case of 'grave breaches', although these conventions are only applicable in limited situations. Whether common Article 3 of the Geneva Conventions and Additional Protocol II creates a duty to prosecute is debatable. Also the Convention Against Torture and the Convention on Enforced Disappearances contain a duty to prosecute or extradite perpetrators in case of violations of certain provisions. It is doubtful whether a universal prohibition exists under international human rights law, given that human rights treaties do not explicitly mention a duty to prosecute and case law of human rights courts shows regional differences. Lastly, it cannot

[130] The term 'ius cogens' refers to peremptory norms of international law, which are deemed so fundamental that they cannot be derogated from.
[131] International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, A/RES/3068(XXVIII).
[132] South Africa signed the Rome Statute on 17 July 1998 and ratified it on 27 November 2000.
[133] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 322-328.

be concluded that amnesty is prohibited under customary law, since state practice and *opinio iuris* in that regard are not clear-cut. The establishment of the International Criminal Court raised many questions concerning amnesty. Therefore, the position of the ICC on amnesty has gained much attention. Although there is no real consensus on this issue, different arguments were formulated to claim that there is an amnesty exception to the jurisdiction of the ICC.

The question of whether granting amnesty is compatible with the present state of international law is, as a consequence, not always clear-cut and will depend on the particular situation and respective international obligations at stake. Despite international law seemingly becoming more severe, no universal duty to prosecute seems to exist and a margin of flexibility remains. As explained in this chapter, even when violations have been committed for which a duty to prosecute exists, granting amnesty is not per se incompatible therewith. Transitional societies which often face enormous constraints in this regard, can comply with this duty by selecting perpetrators to be prosecuted by way of 'exemplary trials' on the basis of appropriate criteria. These criteria should ensure that prosecutions are aimed at those persons which are responsible for the most serious violations, with an essential focus on commanders.[134] That way "prosecutions by a transitional government that focused on those most responsible for designing and implementing a past system of rights violations or on the most notorious crimes would best comport with common standards of justice".[135]

Further, this chapter explained why the South African amnesty scheme can be considered compatible with the international law as stated at its time.

Notwithstanding the lack of clarity in international law, the Belfast Guidelines on Amnesty and Accountability proclaim that "the development of international law and practice is however influencing the shape and role of amnesties as today amnesties are rarely granted unconditionally to war criminals and human rights abusers. Instead, amnesties are now often conditioned on individual offenders engaging with processes to prevent further violence and deliver accountability, and are designed to complement selective prosecution strategies. In such contexts, amnesty can be used strategically to enhance the state's fulfilment with its

[134] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2598-2603.
[135] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2602-2603. Hereby, this author also identified some negative criteria which should not be used as a means for selecting defendants.

multiple legal obligations."[136] The advancements of amnesty schemes are discussed more in detail in the next chapter.

[136] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 27.

When studying the literature, fundamental differences can be uncovered in how authors, academics and experts in the field look at amnesty. Therefore, along with developments in international law, changes in attitudes towards the granting of amnesty can also be uncovered in the literature. Possibly surprising against the background of the aforementioned evolutions in international law, it appears that the literature has been evolving in the opposite direction. Moreover, it seems that these evolutions can be roughly classified in different periods of time. Therefore, the examination of the developments in the literature in this chapter is carried out chronologically. With regard to each time period, the main attitudes towards the granting of amnesty are described. By analysing the position of the literature before and after the experience of the South African amnesty scheme, both timeframes can be compared to uncover changes and to facilitate unravelling the possible influence of the South African experience.

1. The early days and the battle against impunity

In her famous article "Settling accounts: the duty to prosecute human rights violations of a prior regime", published in 1991, ORENTLICHER concluded that state parties to certain international treaties generally had a duty to prosecute and that wholesale impunity for atrocious crimes was incompatible with customary law according to which states had an obligation to 'ensure' rights.[137] This author was severe in requiring prosecutions and even argued that "the more harmful effects of failing to establish an effective deterrent to systematic violations of fundamental rights" outweigh that "a virtual certainty of punishment could deter some abusive regimes from voluntarily relinquishing power."[138] Military dissatisfaction cannot be invoked as a valid excuse not to prosecute and governments should take these innate risks into account. According to her, international law itself could, by requiring prosecution, be a useful tool for governments under pressure of groups seeking impunity and could at the same time prevent that those governments do not prosecute because this seems politically desirable.[139] Nevertheless, she recognised that post-transition trials can create political instability[140] and did not argue that governments should prosecute

[137] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2540.
[138] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2549.
[139] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2548.
[140] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2596.

until they collapse.[141] Instead of prosecuting every violation, exemplary trials in which those who were most responsible are prosecuted can suffice.[142]

It is important to frame this article in the period it was written in. During the 'early days', which is the concept ORENTLICHER uses to refer to the 1980's,[143] the debate was defined by the experience of Latin American transitions and amnesties. In many of those countries, illegitimate regimes only agreed on leaving power if the self-amnesty they passed was accepted or if they were granted blanket amnesty.[144] As ORENTLICHER later stated herself, she therefore "came to regard with suspicion amnesties covering atrocious crimes that were justified as measures of national reconciliation."[145] Because of the examples in Latin America, "there was ample reason to see 'reconciliation' as a watchword for impunity."[146] This context clearly indicates where the 'battle against impunity'[147] finds its roots.

Indeed, during this timeframe, a lack of prosecutions was considered as equivalent to impunity. This is often described as the 'peace vs justice' dichotomy,[148] according to which there can be no peace without justice. The concept of 'justice' is hereby interpreted narrowly and meant to refer to prosecutions, which are considered to be the only valid way to hold perpetrators accountable. Thus, only prosecutions lead to accountability, which is a necessary precondition for attaining justice. Whereas the concept of 'justice' was equivalent to 'accountability', which could be reached through prosecutions, 'impunity' was

[141] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2548.
[142] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2598-2603.
[143] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 11.
[144] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 11; K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 168; C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 30; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 415. In case of self-amnesty, the government in power itself, before surrendering, would grant amnesty for the atrocities and crimes it committed. Blanket amnesty implies that entire categories or groups of perpetrators are granted amnesty unconditionally.
[145] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 12.
[146] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 12.
[147] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 13.
[148] For a brief overview on the history of this peace vs justice model, see: R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 5-12.

consequently considered as a synonym for granting amnesty to perpetrators.[149] It was indicated that even though proponents of amnesty might argue that amnesty could be used as a tool to facilitate reconciliation and democratic reconstruction, practical experiences had shown that amnesty was only used for the 'wrong' reasons and could therefore be considered as varying types of impunity.[150] Given that the only examples of amnesty in practice were the aforementioned self- and blanket amnesties, it is hardly surprising that scholars viewed amnesty laws with mistrust, since these amnesties could indeed be considered equivalent to impunity and yet no amnesty scheme had shown an alternative way to deal with past atrocities.

In this period of time, the advantages of prosecutions, which remain relevant nowadays, were highly stressed. It was advocated that the important consequence of prosecutions is the deterrent effect of criminal punishment, whereby future abuses are prevented.[151] By breaking the chain of impunity, the rule of law is established, a culture of respect for human rights is created and the dignity of individuals can be restored. Prosecutions are an indication that no system is above the law, which can rebuild trust in the new democratic government and its institutions.[152] They are a sign of good faith, which is essential to prove the viability of the newly formed democracy.[153] This serves not only the moral objective of reconstructing a just order, but also the goal of strengthening the newly formed, mostly fragile democracy.[154] The main potential disadvantage of prosecutions that was acknowledged, is their possible destabilising effect. The threat or actual instigation of prosecutions might lead to a continuation or renewal of the conflict and bring fragile peace negotiations into danger.[155] Moreover, in case of lacking human and material resources, necessary political and economic developments might be jeopardised by pressing for mass prosecutions.[156]

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[149] Which is shown by the rather strict division made in an article by COHEN, written in the same period of time: S. COHEN, "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past", *Law & Social Inquiry*, 1995, Vol.20(1), 7-50. Moreover, the concepts of 'amnesty' and 'impunity' were explicitly used as synonyms in L. HUYSE, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry* 1995, Vol.20(1), 52, footnote 3.

[150] S. COHEN, "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past", *Law & Social Inquiry*, 1995, Vol.20(1), 28-29.

[151] L. BERAT & Y. SHAIN, "Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase", *Law & Social Inquiry* 1995, Vol.20(1), 187.

[152] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2542-2543.

[153] S. COHEN, "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past", *Law & Social Inquiry*, 1995, Vol.20(1), 23.

[154] L. HUYSE, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry* 1995, Vol.20(1), 55.

[155] D. F. ORENTLICHER, "Settling accounts: the duty to prosecute human rights violations of a prior regime", *Yale Law Journal* 1991, Vol.100(8), 2544-2545.

[156] L. HUYSE, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry* 1995, Vol.20(1), 63.

ORENTLICHER's article is the perfect example to demonstrate the main concerns of its time. However, when analysing the literature of the period after the experience of the South African amnesty scheme, there appears to be a shift towards more acceptance of (certain types of) amnesties.

2. Post-TRC: differentiation and rejection of a one-size-fits-all approach

In the late 1990's, amnesties were no longer merely an autonomous means to unconditionally grant immunity to governments and their agents as a whole. Instead, they became integrated in broader programs of transitional justice mechanisms and were especially used in combination with the establishment of truth (and reconciliation) commissions. Therefore, "the normative context for evaluating the justice of amnesties became deeply complex."[157]

In 1999-2000, SCHARF, DUGARD and GALLAGHER emphasised that amnesties vary widely. Whereas GALLAGHER made a clear distinction between three different categories of amnesty,[158] the first two authors only separated unconditional amnesties from other types of amnesties.[159] Therefore, already soon after the end of the South African experience, it became clear that a one-size-fits-all policy was not at all desirable.[160] Whereas it was argued that unconditional amnesties are no longer acceptable, the same cannot be said about conditional amnesties.

SCHARF stated that amnesty cannot be considered the equivalent to impunity: "it is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress."[161] With regard to this issue, he explicitly mentioned the amnesty scheme of South Africa and stated that this case "indicates that amnesty is often tied to

[157] M. PENSKY, "Amnesty on trial: impunity, accountability, and the norms of international law", *Ethics & Global Politics* 2008, Vol. 1, 11.
[158] This author made a distinction between (1) self-amnesties, granted by the government leaving power for acts committed by itself and its agents, (2) transitional amnesties, granted by the newly formed transitional government for acts committed by the previous regime and (3) post-conflict amnesties, granted by the government for acts committed during an internal conflict. K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 168-171.
[159] J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1001 and 1015; M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 526.
[160] K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 170; D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 18.
[161] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 512.

accountability mechanisms (…). While not the same as criminal prosecutions, these mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment and rehabilitation."[162] According to him, in many situations they may be better suited to achieve the aims of justice.[163] Generally, he claimed that the South African amnesty "demonstrates that the offer of amnesty may be a necessary bargaining chip to induce human rights violators to agree to peace and relinquish power."[164] Similarly, DUGARD argued that amnesty may be the best solution to reach peace or even justice. Especially a Truth and Reconciliation Commission as the South African one, can succeed therein.[165] The establishment of a truth commission implicitly shows, according to VILLA-VICENCIO, "the willingness to explore alternative ways of redressing political conflict."[166]

Nevertheless, the literature of this time period remained relatively cautious. It was stressed that different types of amnesty should be analysed in their own specific context in order to determine whether or not they are permissible. This implies that these authors confirmed that not all amnesties should be directly upheld. This is not only because national obligations and sources may vary according to the type of amnesty and country at stake,[167] but also because depending on the case, certain conditions ought to be fulfilled, such as support of the population and being embedded in a wider strive to achieve accountability.[168] Despite the premature experiences with advanced amnesty schemes and their consequences and literature thereon, it was therefore indisputable that unconditional or self-amnesty, such as the Latin American examples cannot be regarded as permissible forms of amnesty.

3. Redefining concepts and supporting amnesty

These aforementioned more moderate and nuanced viewpoints have been further developed during the following years. Again, it was said that amnesties may reduce violence and lead to reconciliation, but above merely defining arguments in favour of amnesties, the literature went a step further.

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[162] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 512.
[163] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 512.
[164] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 508-509.
[165] J. DUGARD, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", *Leiden Journal of International Law* 1999, Vol.12(4), 1001.
[166] C. VILLA-VICENCIO, "Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet", *Emory Law Journal* 2000, Vol.49(1), 213.
[167] This is illustrated in Chapter 2.
[168] K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 170 and 186.

JENKINS, who explicitly examined the South African amnesty scheme, critically reflected on this experience in order to identify which lessons international legal policy can learn from this case.[169] By reflecting on the success and failures of the system, the author implicitly showed not to reject amnesty if granted under certain conditions.[170] She argued that despite the identified shortcomings, the process is suitable for replication, taking into account recommendations for minimising the risks.[171] Also DU BOIS-PEDAIN specifically focused on the South African experience.[172] According to this author, the South African conditional amnesty can secure different important objectives.[173] Further, it demonstrated to be an effective accountability mechanism and a successful way to deal with the aftermath of civil conflict. It is thus a true instrument of transitional justice.[174] More important and innovative was the author's claim that conditional amnesty can best be considered as "a new 'justice script' for a society in transition."[175] Because its construction as "an exceptional 'rite de passage' into the new, post-conflict society", the risk of undermining the rule of law is controlled. Furthermore, the author made the nuance that amnesty is not 'deserved' but 'earned' by perpetrators because of their participation in the truth and reconciliation process.[176] This would avoid impunity, which should be interpreted more flexible and weaker.[177] Similarly, MALLINDER claimed that the concept of justice should be defined more broadly. Depending on the circumstances, this broader conception of justice can be promoted by amnesty.[178] The author emphasised it should not be overlooked that there exist different forms of justice, with varying legitimacy. Whereas Western societies focus on retribution, many African societies prefer restorative working methods. The latter often result in alternative forms of punishment, which

[169] See: C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1).
[170] During our conversation, JENKINS suggested that amnesties should not be simply dismissed right away in every situation. Interview with JENKINS, Leuven, 16 March 2015.
[171] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 57.
[172] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 420 p.
[173] These objectives comprise, among others, the attraction of a considerable amount of perpetrators, thereby creating extensive information about the past atrocities as well as satisfaction and a possibility of confrontations for the victims. A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 300.
[174] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 300.
[175] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 337-338.
[176] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 338.
[177] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 334.
[178] L. MALLINDER, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 2007, Vol.1(2), 218.

make it possible to grant amnesty in a context of societal forgiveness and reconciliation.[179] Also truth commissions can, according to the author, be considered as an alternative to formal justice when meeting certain requirements.[180]

Probably the best 'evidence' of evolving viewpoints, is the fact that ORENTLICHER herself in 2007 reviewed her rather strict opinion with regard to the granting of amnesty. She explicitly stated that her "views on transitional justice have evolved with the broadening and deepening of global experience."[181] She explained to now have a "deeper appreciation for the multifaceted nature of transitional justice and the special contribution that non-judicial measures, when effective, can make to a broader process of political and social transition. (…) the work of highly respected truth commissions can facilitate a broader and more complex understanding of the machinery of mass atrocity than the circumscribed verdict of a criminal proceeding can do."[182] She even disputed the insistence on prosecutions when, because of cultural differences, reconciliation and forgiveness are a better way to secure the end of conflicts.[183]

Consequently, it seems that during the post-TRC period, the concept of amnesty has become broader, whereby it was recognised that different variations require different approaches. As SCHABAS explained, "amnesty has become very much of a dirty word for activists and many scholars in the field of international human rights and international humanitarian law."[184] During this time period, however, the concept has moved away from this purely negative connotation. These evolutions seem to be due to the results shown in practice, which also provoked a tendency to reconsider the concepts of 'justice', 'accountability' and 'impunity' in a more flexible and broad way. Based on these practical examples, the literature seems to have become more advanced, concrete and elaborate when identifying requirements an amnesty should fulfil in order to be permissible and successful. Being embedded in a broader strategy of transitional justice mechanisms is

[179] L. MALLINDER, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 2007, Vol.1(2), 220-221.
[180] L. MALLINDER, "Can Amnesties and International Justice be Reconciled?", *International Journal of Transitional Justice* 2007, Vol.1(2), 224-226. MALLINDER hereby identified different forms the relationship between truth commissions and amnesties can take. See also the already mentioned author VILLA-VICENCIO, footnote 166.
[181] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 16.
[182] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 16.
[183] D. F. ORENTLICHER, "'Settling accounts' revisited: reconciling global norms with local agency", *International Journal of Transitional Justice* 2007, Vol. 1(1), 20.
[184] W. A. SCHABAS, "Amnesty, the Sierra Leone Truth and Reconciliation Commission, and the Special Court for Sierra Leone", *Journal of International Law & Policy* 2004, Vol.11(1), 165.

thereby a continuously returning demand, whereby truth commissions represent an important factor.[185]

4. Recent years: amnesty as a transitional justice mechanism

As indicated, the abovementioned developments show that many authors not only started recognising the advantages of amnesty and the purposes it can serve, but also tried to think of criteria, requirements and characteristics amnesty schemes should respect in order to be acceptable. This indicates that in the future amnesty can be considered permissible when taking into account the lessons learned from past experiences.

In recent years, the arguments in favour of amnesty became more explicit and strong. Not only was it articulated that the conditional amnesty process has shown another and fairer way than the blanket model, a particular amnesty is nowadays considered a feasible alternative to criminal prosecutions.[186] Full disclosure of the facts turns a conditional amnesty, which is not a softer version of prosecution, into a tool for accountability instead of impunity and involves a shift away from the standard justice script.[187] That way, "rather than mere instruments of impunity, amnesties should instead be seen as important institutions in the governance of mercy, the reassertion of state sovereignty and (…) the return of law to a previously lawless domain."[188] MCEVOY and MALLINDER even reversed the argument of impunity by saying that "where prosecutions are by definition selective and where punishments can rarely be truly proportionate, a lawful amnesty which requires the performance of certain obligations (…) may in fact be preferable to de facto impunity where the vast bulk of perpetrators are untouched by any legal process."[189] Especially with regard to the South African amnesty scheme, it was said that this example was "lauded for its

[185] For a clear and brief overview of what truth commissions are, why they are (not) established and what their (dis)advantages are, see: United States Institute of Peace, *Transitional Justice: Information Handbook*, Washington, USIP, 2008. For an overview of different types of truth commissions, established in various African countries, see: C. M. FOMBAD, "Transitional Justice in Africa: The Experience with Truth Commissions", available at http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions.htm.

[186] A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 460.

[187] A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 464 and 481.

[188] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 410.

[189] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 422.

apparent ability to ensure accountability while circumventing traditional forms of punitive justice."[190]

These statements demonstrate that the traditional 'peace vs justice' dichotomy was increasingly subject to critique. As explicitly articulated by FREEMAN, "the debate is not, as some suggest, between peace and justice or even between impunity and justice. It is between competing conceptions of justice."[191] Aside from the argument that amnesty can lead to accountability instead of impunity, MALLINDER claimed that whereas amnesties are commonly regarded as a denial of justice, they can be designed in such a way to promote restorative justice.[192] Even in the case of South Africa, whereby amnesty was the outcome of political negotiations, restorative justice elements can be integrated in the amnesty scheme.[193] Although the importance of prosecutions was still recognised, their deterrent effect was contested[194] and their extent was relativized by stressing that a limited amount of trials or convictions only does not necessarily result in de facto impunity.[195]

Prosecutions were considered as only one of the many mechanisms transitional justice entails, which "are becoming increasingly multi-faceted".[196] Amnesties as well as prosecutions are only one tool among many to possibly implement. It was already indicated

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[190] H. VAN DER MERWE, "Prosecutions, Pardons and Amnesty: the Trajectory of Transitional Accountability in South Africa" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical perspectives in transitional justice*, Antwerp, Intersentia, 2012, 443.

[191] M. FREEMAN, *Necessary evils: amnesties and the search for justice,* New York, Cambridge University Press, 2009, 109.

[192] L. MALLINDER, "Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice" in D. PHILPOTT & J.J. LLEWELLYN, *Restorative Justice, Reconciliation and Peacebuilding,* 2012, 15 and 22. The author identified restorative justice principles such as inclusive stakeholder participation, truth recovery, enforcement and repairing harm. In another article, the same author argued that "it is possible to design amnesties which, rather than enacting impunity, may instead provide at least some of the requirements of truth recovery, restoration, as well as legal, democratic and institutional accountability". L. MALLINDER & K. MCEVOY, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies", *Contemporary Social Science: The Journal of the Academy of Social Science* 2001, 28.

[193] L. MALLINDER, "Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice" in D. PHILPOTT & J.J. LLEWELLYN, *Restorative Justice, Reconciliation and Peacebuilding,* 2012, 21-22. See also: R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 206.

[194] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 422-427.

[195] Given the nature and extent of the atrocities committed and the enormous amount of perpetrators, it should not surprise that the number of trials is comparatively low. Nevertheless, this is not necessarily problematic if high-ranking officials and those most responsible are focused on. A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: Can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 472.

[196] H. VAN DER MERWE, "Prosecutions, Pardons and Amnesty: the Trajectory of Transitional Accountability in South Africa" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical perspectives in transitional justice*, Antwerp, Intersentia, 2012, 456.

that regarding these different transitional justice mechanisms, it seems that the establishment of a truth commission was often considered desirable, if not necessary.[197] In general, it was argued that "transitional justice mechanisms work best if they are combined in a comprehensive strategy"[198] and thus no exclusive approach should be conducted, whereby a certain mechanism is chosen at the expense of the other mechanisms.[199] More importantly, recent studies on the impact of transitional justice processes on improving human rights and achieving democracy contradicted the idea of amnesty being inherently harmful for peace or the promotion of human rights. They empirically confirmed the arguments, which were formulated already earlier in the literature, that a combination of adopting amnesties together with other transitional justice mechanisms may even improve human rights protection. Indeed, their empirical research indicated that "the most successful transitional justice projects for achieving stronger democracies and human rights records will include trials and amnesty. Adding truth commissions into the mix of mechanisms has proved equally successful."[200] Also elsewhere a quantitative study concluded that "countries that utilized a hybrid of restorative and retributive justice were more likely to have a higher peace sustainability than countries which only utilized one mechanism."[201]

Nevertheless, as JEFFERY highlighted, it is important to take into account the fairly limited amount of empirical research carried out so far.[202] Although significant, it is too early to draw conclusions from this preliminary research, thereby overgeneralising these findings. Moreover, the findings of OLSEN, PAYNE and REITER's study concerning the consequences of

[197] The other transitional mechanisms are vetting or lustration, whereby government institutions are reformed, reparations and compensation, reconciliation and disarmament, demobilisation and reintegration (DDR).
[198] United States Institute of Peace, *Transitional Justice: Information Handbook*, Washington, USIP, 2008, 1.
[199] Complementary measure facilitate a successful transition: H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, 51.
[200] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 154. The authors also formulated reasons to explain why the combination of these approaches has a positive outcome. Furthermore, they stressed the importance of distinguishing different contexts, thereby making a division between regime collapses and negotiated transitions. Also in LIE, BINNINGSBO & GATES's study, it was found that non-retributive forms of post-conflict justice, such as truth commissions, "have a prolonging effect on the duration of peace in post-conflict democratic societies." T. G. LIE, H.M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, 17.
[201] N. RICCI, "Eroding the barrier between 'peace' and 'justice': effects of transitional justice mechanisms on post-conflict stability", *CEMPROC Working Paper Series* 2013, 17. Also this author sought to formulate explanations for his findings, whereby he argued that besides the importance of taking the social and cultural situation into account, the international community can be highly influential. Again, truth-telling seems so be a particularly crucial factor.
[202] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 207.

amnesty for peace seem to be in contradiction with another empirical study about the effect of post-conflict justice on the duration of peace, which indicated that amnesty mostly raises the risk of peace failure significantly.[203] In response to these inconsistencies, JEFFERY advocated further research on the role and impact of amnesties as regards peace negotiations as well as longer-term peace.[204]

5. Conclusion

With regard to attitudes towards the granting of amnesty in the literature, this chapter demonstrated that important evolutions have taken place in this field. In the early days, the limited experiences with advanced amnesty schemes created the perception that amnesty would inevitably lead to impunity. The severe dichotomy between peace and justice and the climate of the battle against impunity caused many authors and experts to reject amnesties and strongly advocate prosecutions.

The South African amnesty scheme is the prototype of a conditional amnesty, which was, compared to its predecessors, innovative in different ways. The increasing experience with varying advanced amnesty schemes brought several authors to reconsider their arguments in the light of these new realities. This led to an ongoing tendency to not simply reject nor accept or defend amnesty. Carefully, the literature moved away from the traditional strict extremes and reconsidered its interpretations of different concepts such as justice, impunity and accountability. A broader understanding of these concepts led to more nuanced opinions on amnesty and its consequences and (dis)advantages.

More recently, we can see many experts creatively thinking about necessary conditions, which make amnesties a legitimate tool for societies in transition. Amnesty, under certain circumstances and subject to certain requirements, was considered an autonomous transitional justice mechanism,[205] which is, especially when combined with other such mechanisms, able to fulfil the needs and expectations of societies in transition. The best example of this tendency may be the recent publication of 'The Belfast Guidelines on

[203] T. G. LIE, H. M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, 17.

[204] JEFFERY explained that amnesties "persist because of their perceived utility for ending violence, ensuring the stability of new democracy regimes and rendering the truth. Although some evidence suggests that each of these perceptions does in fact meet with reality, where each is concerned a caveat applies." R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 208-209.

[205] For example, amnesty was explicitly discussed as a transitional justice mechanism in T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 35.

Amnesty and Accountability'. These Guidelines were created by a group of experts and "aim to assist those seeking to make or evaluate decisions on amnesties and accountability in the midst or wake of conflict or repression."[206] In my opinion, they can be considered as the externalisation and result of the ongoing developments, which were described in this section.

Nevertheless, the insufficient amount of empirical research on varying consequences and implications of transitional amnesties causes many claims to be based on assumptions only.[207] Moreover, it is necessary to keep in mind that despite the increasing experience with amnesty schemes in practice and the fact that the evolutions in the literature at first sight seem to go in the same direction, discussions certainly remain present. This is not surprising, however, since this debate is highly complex, interdisciplinary and of crucial importance for societies in transition. The continuation of debate and research on these issues should therefore only be encouraged.

[206] *The Belfast Guidelines on Amnesty and Accountability*, Transitional Justice Institute, University of Ulster, 2013, 25.
[207] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 209.

CHAPTER 4. THE IMPACT AND FUTURE OF TRANSITIONAL AMNESTIES

In this chapter, the impact and future of transitional amnesties is discussed. To firstly illustrate the possible impact a transitional amnesty can bring about, the South African amnesty scheme is focused on. Hereby, different cautions are formulated regarding the assessment of the impact the South African amnesty scheme might have had. Attention is drawn to difficulties regarding the attempt to draw causal links between this case and the developments in international law and literature. Further, it is discussed whether this experience should be considered as a successful example to draw lessons from. In the second section of this chapter, the possible future of transitional amnesties is examined by researching their acceptability on the basis of evaluating different criteria they are expected to contribute to. To concretise this otherwise abstract evaluation, the South African case is utilised to exemplify several complexities.

1. The impact of the South African amnesty scheme

After having discussed the position of international law on amnesty and the attitudes thereon in the literature as well as developments in both areas, it would be interesting to examine the influence of the specific amnesty scheme designed in South Africa and uncover whether the identified evolutions might have been shaped by this experience. However, for different reasons, drawing a causal link between the South African case and the developments in international law and literature is neither feasible nor desirable, which is clarified more in detail in this chapter. Furthermore, one easily becomes eager to draw lessons from one case in order to apply them to other situations. Even though these efforts might be certainly well-intentioned, it is illustrated in this chapter why it is highly important to be cautious and refrain from unwillingly or unknowingly imposing a one-size-fits-all approach.

a. Difficulty of drawing causal links

In order to grasp the possible influence of the South African experience on both international law and literature and uncover in which way the developments in both areas might have been affected by the South African amnesty scheme, it was researched if and how preparatory works of international conventions refer to the South African case. The literature was further categorised chronologically, whereby a clear division was made before and after the South African amnesty scheme. However, establishing a causal link between South Africa's amnesty scheme and the evolutions in both areas is highly difficult and problematic.

With regard to international law, references to the South African amnesty scheme during preparatory works are hardly detectable. With regard to the literature, the classification that was made in this thesis served rather didactic purposes and aimed to give a rough overview of the main evolutions, concerns and innovations which characterise each phase. It would be artificial, however, not to look beyond the distinctions that were made and to ascribe all evolutions uncovered after the South African experience to this case only. As already explained, the classification only indicated main tendencies. It would be unfair to generalise the developments in the literature and thereby neglect the opinions and viewpoints that go against the leading or newly formulated beliefs, which make the debate specifically complex and multifaceted. Therefore, the distinction applied above, should be nuanced.

Already before South Africa designed its remarkable amnesty scheme, a debate on the permissibility of the granting of amnesty was going on. Although the leading voice of that time was clearly that of the 'purists', who claimed that a duty to prosecute is absolute and does not allow for exceptions in any circumstances and of which ORENTLICHER's article is the most well-known expression, there were also 'pragmatists', such as NINO, who made the nuance that each case has to be evaluated according to its own specific factual situation.[208] Even though it has been highlighted that in the time after the South African amnesty scheme the pragmatists seemed to gain more adherence and attitudes on amnesty became largely more positive, accepting and even promoting, it should not be overlooked that there remained important criticism and caution. Suggesting that after the South African case the literature was in favour of granting amnesty, would therefore be unquestionably inappropriate.

Consequently, one does not only have to keep in mind these nuances concerning the literature's position on amnesty in order not to overgeneralise the uncovered tendencies. Moreover, they should be taken into account when attempting to uncover the impact of the South African amnesty scheme on these tendencies. The developments are more gradual and subtle than indicated above and innovations already started before and continued after the phase they were classified in. The South African case was only one example amongst many and has to be seen in the wider context of increasing experiences with amnesties, truth commissions and new attempts to innovatively make a smooth transition. According to SARKIN, South Africa did not change the opinions on amnesty.[209]

[208] C. S. NINO, *Radical Evil on Trial*, New Haven, Yale University Press, 1996, xii, 220 p. During our conversation, this caveat was stressed by SARKIN. Interview with SARKIN, Leuven, 18 March 2015.
[209] Interview with SARKIN, Leuven, 18 March 2015.

Although a more elaborate comparative study of different amnesty schemes might show more insights in South Africa's influence, such an exercise would exceed the limited scope of this Master's thesis. Even though it was initially considered to include the case of Sierra Leone in order to uncover how different the position on amnesty in international law and literature had become, being able to make a substantial claim in this regard would have required a more expansive comparative study, including more than only one other amnesty scheme. Moreover, it is necessary to take into account that different opinions on both amnesties might be due to the different circumstances of both cases instead of the merely evolving viewpoints of the international community.[210]

b. An experience to draw lessons from?

The fact that establishing links between the South African amnesty scheme and the developments in international law and literature is problematic does not mean, however, that we cannot claim that it has been influential nor that we cannot draw any lessons from this case. Concerning the first aspect, it has already been set out in which way this amnesty scheme was innovative compared to its predecessors. It was the first time that the granting of amnesty was linked to disclosing the truth. According to SARKIN, this is what makes the difference between an acceptable and an unacceptable amnesty.[211] Apart from its innovative aspects, SARKIN also pointed out that the South African TRC was the first truth commission that grabbed such remarkable international attention and visibility. Also elsewhere, it was mentioned that it "most effectively captured public attention throughout the world and provided the model for succeeding truth commissions."[212]

However, with regard to the observation that South Africa served as a model for other truth commissions[213] and, moreover, for 'succeeding' truth commissions, one should be careful. Firstly, it is extremely difficult to assess the success of the TRC. Thereby, it is not only important to refer to elaborate discussions on whether or not the TRC achieved its

[210] For example, because of the ongoing violence in Sierra Leone, the situation was considered to be more urgent and an amnesty seemed more necessary in order to end the violence. Therefore, the amnesty provision could count on the national support of many Sierra Leoneans. It is also argued that because of Sierra Leone's dependence on foreign resources, the international community was remarkably influential. K. GALLAGHER, "No justice, no peace: the legalities and realities of amnesty in Sierra Leone", *Thomas Jefferson Law Review* 2000, Vol.23(1), 160 and 165.
[211] Interview with SARKIN, Leuven, 18 March 2015.
[212] A.R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: Did the TRC Deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 8.
[213] Since the South African case inspired many other countries, JENKINS referred to it as an 'iconic experience'. Note made at the International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015.

objectives,[214] but also a distinction between a largely internal and external view should be brought to attention. At first sight, during and shortly after the operation of the TRC, the literature seemed to be largely positive and approving. However, in the long-term, the literature appeared to become more critical and disappointed. This could be due not only to the appearance of long-term effects and the impact of the process or to the fact that academics started swimming against the tide,[215] but also the distinction between internal and external views comes into play here. According to SARKIN, the external view on the South African transition process has always been more rosy and superficial. The internal view, on the contrary, stressed the lack of highlighting the difficulties of day to day life. South African people, according to SARKIN, had a much greater negative attitude towards what the TRC achieved and was likely to achieve. Their attitudes were much more cynical.[216] Also elsewhere, it was acknowledged that "many South African analysts and foreign scholars working in collaboration with South Africans do not echo the unqualified accolades for the TRC expressed by outside observers."[217] This is a possible explanation for the disappointment of external researches, whose expectations might have been too high.

Regardless whether or not the TRC has been 'successful', it clearly served as an example for other societies in transition. When drawing lessons from a certain situation in order to apply them to a different context, one should be cautious. Nevertheless, even though these lessons might not be transferrable from one situation to another,[218] they can still be certainly

[214] See for example: A.R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: Did the TRC Deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 241-279, where it was discussed whether or not the South African TRC succeeded in establishing truth, reconciliation and justice. Difficulties of defining those conceptions and their precise content were pointed out, as well as the uncertainty about what exactly the TRC was expected to deliver with regard to each of these objectives.

[215] As suggested by JENKINS; interview, Leuven, 16 March 2015.

[216] International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015; Interview with SARKIN, Leuven, 18 March 2015; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 6-7.

[217] A.R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: Did the TRC Deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 13. Also JENKINS mentions this difference in perception: C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 31.

[218] JENKINS warned for 'post-conflict justice junkies', who go hopping from one conflict situation to another, which connotes the idea that experiences are transferable. She emphasised that an experience in one country is not automatically relevant and transferable to another country which may have a completely different political and economic history and culture. International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015; C. JENKINS, "Transitional justice: lessons from South Africa?" in JENKINS, C. & DU PLESSIS, M. (eds.), *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 38.

useful.[219] It is formulated that "there is usually a strong emphasis on the special circumstances which obtained in South Africa, and it is argued that the South African model cannot be imposed on other societies. There is merit in this argument, but it can be taken too far. There may well be countries in transition which could, with profit, learn from the South African approach."[220] Also elsewhere it is stressed that "future societies in transition can learn from the South African experience by regarding its achievements as positive contributions and its shortcomings as negative contributions. (…) This reduces the likelihood of repeating avoidable errors – errors that transitional societies can hardly afford to make."[221]

Which lessons we should draw from the South African case in concrete terms exceeds the focus of this Master's thesis and is already discussed elaborately elsewhere. It suffices to mention that besides comments on the TRC and the South African transition more generally,[222] also attempts have been made to learn specifically from the amnesty scheme. For example, with regard to the South African carrot and stick approach, it is said that for some perpetrators the risks of applying for amnesty were too high compared to the risks of not applying for amnesty.[223] Further, it is proposed that Amnesty Committees should not be composed of lawyers only and that treating victims with respect is highly essential.[224] Nevertheless, as formulated by JENKINS, "criticism of the amnesty process has been linked to other factors outside the control of the Amnesty Committee".[225]

Indeed, when assessing the impact, permissibility and success of an amnesty scheme, it should be taken into account that this is only one aspect among many which is part of the broader 'transition package'. Although both JENKINS and SARKIN pleaded for avoiding a 'toolkit approach', whereby countries can pick and choose the tools they want to apply in

[219] SARKIN stressed that comparative research in this regard is very useful. Interview with SARKIN, Leuven, 18 March 2015.
[220] A. BORAINE, *A country unmasked*, Oxford, Oxford University Press, 2000, 279.
[221] H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, 204.
[222] For example, it is recommended that truth commissions' mandates should be more narrowly and clearly defined and that they should focus on macro-truth findings. The requirement of achieving both truth and reconciliation was questioned, as well as the appropriateness of truth commissions promoting forgiveness. A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 288-300.
[223] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 50.
[224] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 51.
[225] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 44. The author mentioned the lack of sufficient reparations by the government and the failure to ensure prosecutions as recommended in the TRC's Final Report.

order to make their transition,[226] this term indicates the range of possibilities and combinations thereof which societies in transition can design. The fact that a transition is deemed not successful or criticised for some of its aspects should be separated from questions regarding the success and criticism on the amnesty scheme in particular. For example, the failure of the government to pay sufficient reparations for victims in South Africa should be disconnected from the amnesty scheme.[227] However, even though this separation might be necessary in order not to confuse the acceptability of the amnesty itself with that of the transition in general, isolating the amnesty from the designed framework as a whole might be problematic as well. This separation would be highly artificial and, as is the case in South Africa, whether or not an amnesty is acceptable is often determined depending on the broader framework it fits in.[228] As already mentioned, the establishment of truth commissions and combining various transitional justice mechanisms in which an amnesty is embedded can turn an amnesty, which might not have been acceptable otherwise, into a valid tool. This indicates the complexity of debates in which the permissibility of amnesties is discussed and shows, moreover, that these questions not only raise legal issues but are highly interrelated to other research domains. Undoubtedly, the issue calls for an interdisciplinary approach.

2. Assessing the acceptability of transitional amnesties

As emerges from the research so far conducted in this thesis, the acceptability of granting transitional amnesties remains disputed. To shed more light on the potential advantages the granting of amnesty might entail, an assessment framework is created in this chapter. Different criteria are therefore selected, which represent different goals that amnesty can, or at least is claimed to be potentially able to, achieve and which are generally considered as highly precious values by newly formed states. Thus, for each criterion it is examined whether or not it might be successfully realised by amnesty. Some of these criteria are explicitly pointed out as being a purpose of the South African amnesty scheme. This amnesty scheme was proposed as being a means to achieve peace, uncover truth and reach

[226] International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015.

[227] For this reason, reparations are not considered a criterion on the basis of which amnesty should be valued in order to be acceptable. Consequently, it is not included in the assessment framework created in the second section of this chapter.

[228] This argument exactly counts for the example of reparations. Whereas it was argued that they should be separated from the granting of amnesty and the latter's acceptability should not be assessed on the basis thereof, it is at the same time important to stress that both are nevertheless interlinked. The fact that amnesties bar criminal and civil liability entails that the victims' right to claim compensation from the prosecutor principally lapses. Therefore, in combination with a lack of sufficient reparations, amnesty might be more problematic.

reconciliation.[229] These three goals are therefore the first criteria to include in our analysis. Additionally, it is interesting to examine the controversial question whether amnesty can lead to accountability and justice. Each of these criteria is evaluated in order to be able to make a more solid claim as regards the acceptability of granting amnesty.

While executing this assessment, the South African amnesty scheme is used as a practical example to better illustrate different arguments and concerns. Thus, it is aimed to make a broader claim on the acceptability of amnesties beyond but based on this experience. Therefore, for each criterion the particularities of the South African case are discussed to exemplify criticism and complications which might apply more generally to other cases as well.

However, as is explained more elaborately hereafter, judging whether or not amnesty can lead to peace, truth, reconciliation and accountability and justice, is a highly problematic task. To facilitate this attempt, a comparison is made with the situation in which no amnesty would be granted but prosecutions would be instigated instead. That way, for each of these criteria it is examined whether amnesty is more likely to achieve this objective than prosecutions would be able to. If research shows that this question has to be answered in the affirmative, the contribution of amnesty to that criterion is valued as positive. On the contrary, if some criteria are more likely to be achieved by prosecutions than by amnesty, they are valued negatively as not enhancing the acceptability of granting amnesty. Since analysing whether amnesty might succeed in achieving the criteria included in the assessment framework is a question requiring rather empirical and sociological research, which is not feasible to conduct for this thesis, already existing studies and research will be used. Some of this research has already been briefly mentioned in Chapter 3, where the literature's attitudes on amnesty and the development thereof were discussed.

As can be seen, the making of reparations to victims is not a criterion selected to include in the assessment framework. The question of whether amnesty might be acceptable is thus not evaluated on the basis of whether sufficient reparations have been made to the victims. The reasons therefore are diverse. In this thesis, reparations are not considered a purpose amnesty is ought to fulfil directly. As argued earlier, appraising the possible achievements of amnesty should be separated from other aspects for which a transition is criticised. The example was given that the failure of the South African government to pay sufficient

[229] *TRC Report*, Volume 1, 5, 18 and 120.

reparations[230] should be disconnected from criticism on the amnesty scheme.[231] For the purposes of this thesis, reparations are considered a separate transitional justice mechanism, aside from the other mechanisms that can be used, such as prosecutions, truth commissions, vetting programmes, etc. It is deemed important not to ascribe the failure of reaching this goal, which is considered a distinct tool, to the operation of another mechanism, namely the amnesty scheme.[232]

However, the fact that the acceptability of amnesty is not evaluated depending on whether sufficient reparations have been made, does not mean that this is not a highly important goal societies in transition should aim to achieve. Above all, it is certainly acknowledged that in practise it is highly problematic and artificial to fully disconnect this goal from the granting of amnesty. As already explained, amnesty should be seen in the wider context and framework it operates in and it is precisely the combination between different mechanisms which might affect the respective tools' acceptability and success. The absence or failure of one mechanism might render an otherwise acceptable mechanism inappropriate. Especially for the example of reparations, this argument should be stressed. Since amnesties bar civil and criminal liability, the victim's right to claim compensation from the prosecutor principally lapses.[233] Consequently, both are interlinked and amnesty might seem more or less problematic depending on whether sufficient reparations have been made. Although it is therefore interesting to discuss the issue of reparations, not per se as a criterion in the assessment framework, but as another important mechanism, elaborating further on this matter exceeds the scope of this thesis. Moreover, it is partly covered in the evaluation of the justice criterion, since it is regarded an aspect of restorative justice and, more precisely, social and economic justice.

Thus, in what follows next, it is examined for each selected criterion whether amnesty is a way to contribute to this objective in the same way as or better than prosecutions, which therefore makes amnesty an acceptable instrument to adopt in transitions.

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[230] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008,11-12, 135-136 and 285-286; C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 44; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 100-104.

[231] See Chapter 4, Section 1.

[232] It is true that whereas the mechanism of reparations is not discussed here, the TRC gains considerable attention, although truth commissions are also considered a separate transitional justice mechanism. Nevertheless, since in the case of South Africa the TRC was competent for considering the granting of amnesty, it was therefore fully embedded in its operation which makes a discussion thereon unavoidable. As regards reparations, however, the TRC was only capable to make recommendations in this regard. (See Chapter 1, Section 1 and footnote 267).

[233] As explained earlier, see footnote 31.

a. Peace

With regard to the first criterion, it was already indicated in Chapter 1[234] that amnesty is commonly argued to be a useful tool during peace negotiations. Forcing prosecutions is often regarded as dangerous for the newly formed fragile democracy, since the threat of prosecutions would discourage the old oppressing government and its agents from cooperating.[235] Amnesty laws are therefore often justified by the argument that they are a necessary compromise in order to end the ongoing civil war or prevent the renewal of violent conflict.[236] To uncover the impact of amnesty on peace, also empirical research has been undertaken in recent years. In their study, OLSEN, PAYNE and REITER made a distinction between two different contexts transitions take place in. In the case where the old regime collapses, empirical evidence proved that it is more likely that the new democracy will instigate trials and prosecute perpetrators. In the case of a negotiated transition, however, the authors acknowledged that trials might be considered too risky for the fragile democracy and therefore amnesty will be the most plausible choice.[237]

For the case of South Africa, BORAINE strongly emphasised this claim and stated that "we really had no choice but to look for another way of coming to terms with the past."[238] According to him, the amnesty provision was necessary to achieve peaceful elections. Otherwise, "there would have been no democratic constitution and the country would have deteriorated into a state of siege with many more deaths and further destruction of property."[239] Even Human Rights Watch, which strongly disapproved the Latin American

[234] See Chapter 1, Section 3.
[235] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 368-369.
[236] Chapter 1, Section 3. H. M. BINNINGSBO, J. ELSTER & S. GATES, "Civil War and Transitional Justice,1946-2003: A Dataset", Paper presented at the 'Transitional Justice and Civil War Settlements' workshop in Bogotá, Colombia 18-19 October 2005, available at https://www.prio.org/utility/Download.ashx?x=85, 15; T. G. LIE, H.M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, 1-2.
[237] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 155-158.
[238] A. BORAINE, *A country unmasked*, Oxford, Oxford University Press, 2000, 7.
[239] A. BORAINE, *A country unmasked*, Oxford, Oxford University Press, 2000, 7. Similarly, SCHARF argued that the South African amnesty "demonstrates that the offer of amnesty may be a necessary bargaining chip to induce human rights violators to agree to peace and relinquish power." M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 508-509. Also DAVID VENTER stated, during an interview conducted with him, that "it was clear then that when the ANC came to power, if some form of resolution was not found, a very large number of security operatives would be criminally prosecuted. This would have been horribly destabilising, frankly could have led to the military destabilising the entire negotiation process, which they had the power to do." Interview with VENTER, Leuven, 19 June 2014.

amnesties, acknowledged that "prosecutions would have antagonised any hope of a peaceful transition in South Africa."[240] In the already mentioned *Azapo* case, in which the constitutionality of the legislation implementing the amnesty provision was contested, the Constitutional Court stated that:

> "For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a "democratic society based on freedom and equality".[241] If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation."[242]

However, even though this argument of peacefully creating a new democracy is echoed repeatedly and broadly acknowledged as being a convincing argument in favour of amnesty provisions, this claim has to be investigated carefully. In her 2007 article, JENKINS sought to investigate the actual political necessity of the South African amnesty provision. She therefore conducted interviews with key ANC negotiators. These interviews showed that different negotiators had different perspectives and reasons for agreeing with the amnesty provision,[243] which are more complex than appears from the Constitutional Court's statement in the *Azapo* case.[244] Moreover, the negotiators did not seem to have agreed out of fear for causing a 'bloodbath'.[245] On the basis of her research, JENKINS even offered the idea that "the amnesty was actually conceded primarily for political advantage rather than political necessity".[246] Despite her important critical assessment of this issue and her acknowledgment of the complex motivations underlying the amnesty agreement, the author

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[240] Statement of REED BRODY of Human Rights Watch, as quoted by JENKINS in C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 31.
[241] Sections 33(1)(a)(ii) and 35(1) of the 1993 Interim Constitution.
[242] *Azapo* Case, para 19.
[243] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 36.
[244] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 34.
[245] In his foreword to the TRC Report, Chairperson Archbishop Desmond Tutu emphasised that "had the miracle of the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa." *TRC Report*, Volume 1, Chapter 1, Chairpersons' Foreword, 5.
[246] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 36.

believed that the South African amnesty can be considered as an amnesty for peace, necessary to achieve the transition.[247]

More in general, the difficulty of assessing the actual necessity of amnesties was also recognised in the study of OLSEN, PAYNE and REITER. In their research, the authors referred to the lack of information about the threat of 'spoilers' in negotiated transitions.[248] This causes that "vitally important assumptions remain untested simply because of a lack of information. (…) we know very little about spoilers and potential spoilers, yet these groups are believed to have a profound influence on transitional justice decisions."[249] Further, it was stressed that even though amnesties are often implemented when no other method works and are therefore regarded as an acceptable means of last resort,[250] the requirements of such amnesties are increasingly demanding, which remarkably limits the degree to which they are considered legitimate.[251]

In addition to this caution on the argument that amnesty is a necessary means to achieve peace, a distinction should be made between short-term and long-term peace. Necessary though agreeing on amnesty might seem for a society in order not to collapse, "the price for national stability, which may include amnesty for perpetrators, can have adverse implications for the long term stability of the emerging new democracy."[252] As already mentioned and acknowledged in the study of OLSEN, PAYNE and REITER, in negotiated transitions, prosecuting perpetrators or even combining amnesties with trials might seem too dangerous. Nevertheless, this does not necessarily mean that those mechanisms cannot be used subsequently. While the new democracy remains vulnerable, amnesties can be granted to ensure stability, whereas trials can be instigated after the new state has had more time to strengthen its judicial and democratic institutions and has gained more stability and power.[253]

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[247] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 37. However, she emphasised that the South African case demonstrates politicians' reluctance to inform the public on their motives for agreeing on amnesty, while offering a 'no choice' justification instead.

[248] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 158.

[249] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 160.

[250] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 103 and 105.

[251] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 110 and 133.

[252] C. VILLA-VICENCIO, "Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet", *Emory Law Journal* 2000, Vol.49(1), 213.

[253] T. OLSEN, L. PAYNE & A. REITER, "The justice balance: when transitional justice improves human rights and democracy", *Human Rights Quarterly* 2010, Vol.32(4), 999. Consequently, the seemingly

Empirical evidence proved that combining different transitional justice mechanisms and thereby complementing trials with amnesty leads to more successful transitions resulting in a stronger democracy and enhanced human rights protection. The right balance of combining both approaches has a positive impact.[254] Thus, "sequenced combinations, with trials following amnesties, provide the means by which countries can pursue balanced justice even where legacies of authoritarian violence prevail."[255] "Delayed justice offers new democracies the chance to balance accountability with a practical need for amnesty: security."[256] In another empirical study, the threats of amnesty for long-term or sustainable peace were proclaimed even stronger. There, it was argued that "amnesty tends to be de-stabilizing and generally associated with shorter peace duration".[257] Although the evidence was stronger for democracies than for non-democratic or autocratic societies, support was nevertheless found for the proposition that amnesties reduce post-conflict peace instead of prolonging it in most post-conflict situations.[258] Thus, it was claimed that in most settings, amnesties increase the risk of peace failure.[259]

Despite the expansion of empirical research in this area, the exact impact of amnesties on both short-term peace, as a necessary means during peace negotiations, and long-term or sustainable peace remains unclear. With regard to short-term peace, it was already pointed out that arguments are "based more on conjecture and assumption than on empirical evidence".[260] The same concern was affirmed concerning long-term peace. Consequently, the need for further empirical research on these important questions was highly stressed.[261]

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impossibility to instigate prosecutions prior to or simultaneous with amnesties can be overcome, while ensuring that, although later, they take place nevertheless.

[254] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 154-155. The combination between amnesty providing stability and prosecutions enhancing accountability and the possible establishment of a truth commission is crucial and the balance between these combined mechanisms is the key to success. T. OLSEN, L. PAYNE & A. REITER, "The justice balance: when transitional justice improves human rights and democracy", *Human Rights Quarterly* 2010, Vol.32(4), 997.

[255] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 158.

[256] T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 158.

[257] T. G. LIE, H.M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, abstract.

[258] T. G. LIE, H.M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, 16.

[259] T. G. LIE, H.M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, 17.

[260] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 209.

[261] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 208-210; T. G. LIE, H.M. BINNINGSBO & S. GATES, "Post-conflict justice and sustainable peace", World Bank Policy Research Working Paper 4191, April 2007, 2; T. OLSEN, L. PAYNE & A. REITER, *Transitional justice in balance: comparing processes, weighing efficacy,* Washington, United States Institute of Peace Press, 2010, 160-161.

b. Truth

As pointed out above, South Africa was the first country to demonstrate the possibility of linking the granting of amnesty to truth finding. One of the conditions that perpetrators individually applying for amnesty had to fulfil, was the disclosure of the whole truth about the crime for which they were seeking amnesty. This element of truth finding was an essential objective of as well as justification for the granting of amnesty and the establishment of the TRC. By using the possibility of being granted amnesty as a trigger or incentive, it was hoped that perpetrators would come forward and reveal the truth about certain events. As formulated in the TRC Final Report,

> "The amnesty process was also a key to the achievement of another objective, namely eliciting as much truth as possible about past atrocities. The primary sources of information were the perpetrators themselves who, without the option of applying for amnesty, would probably not have told their side of the story."[262]

Similarly, in the *Azapo* case, it was stated that

> "truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire."[263]

However, it was also acknowledged in the TRC Final Report that

> "(…) those who applied for amnesty did not always make full disclosure; perpetrators recounted versions of events that were sometimes different. The inability to reach a clear version of truth in respect of particular incidents led to confusion and anger on the part of victims' families and members of the public."[264]

Nevertheless,

> "(…) as many commentators noted, trials would probably have contributed far less than did the amnesty process towards revealing the truth about what had happened to many victims and their loved ones."[265]

Indeed, as regards this objective of truth finding, it was argued that prosecutions might not be a more successful means to achieve this goal. In case of being prosecuted, perpetrators do not need to tell the truth about what happened nor confess their involvement in the crimes and they can be convicted on the basis of evidence beyond reasonable doubt only.

[262] *TRC Final Report*, Volume 1, 120.
[263] *Azapo* Case, para 17.
[264] *TRC Final Report*, Volume 1, 121.
[265] *TRC Final Report*, Volume 1, 121.

Therefore, it was argued repeatedly that it is this condition of truth telling that makes amnesty permissible.[266]

However, it needs to be examined whether this aim of truth finding, which was said to be serving as a means to achieve other goals as is discussed later, can be achieved by way of granting amnesty. Here, we focus in particular on the South African amnesty scheme, where the question of whether the amnesty led to truth recovery is fairly controversial and the TRC has gained remarkably criticism concerning this issue. More generally applicable conclusions can be deducted from the identified concrete shortcomings and benefits.

The TRC's Human Rights Committee was competent for public hearings in case of gross human rights violations, in which victims could testify in order to recover the truth about those events. The Amnesty Committee, on the other hand, was also competent for hearings, namely the amnesty hearings, on the basis of which it would decide whether or not to grant amnesty, whereby disclosure of the truth was an essential factor. Therefore, an assessment of whether the South African amnesty scheme was able to uncover truth cannot be disconnected from the TRC's activities, in which it was embedded. Whereas specific emphasis lies on the amnesty (hearing)'s contribution to truth finding, the notion of truth thus also needs to be discussed in the framework of the broader activities of the TRC.[267]

With regard to the requirement of 'full disclosure', it was not entirely clear what this condition exactly entailed, which led to difficulties of interpretation.[268] Essentially, the Amnesty Committee was criticised for having interpreted this concept too narrowly, requiring less disclosure from the perpetrators than actually was intended.[269] Further, for various reasons, it was claimed that amnesty was often granted in cases where full disclosure of the truth was lacking.[270] In some cases, the requirement was applied differently to different perpetrators, causing problematic dissimilarities.[271] Another inconsistency is that in some cases, full disclosure was considered to be obtained if no direct evidence could be found contradicting

[266] Interview with SARKIN, Leuven, 18 March 2015.
[267] See footnote 232.
[268] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 250.
[269] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 53.
[270] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 53.
[271] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 251-252.

the perpetrator's testimony.[272] Despite this criticism, it was argued that "the Amnesty Committee was concerned about full disclosure, even if it did not always succeed in extracting it".[273]

In general, two different levels of truth can be distinguished. On the one hand, 'macro-truth' refers to the 'big picture',[274] including information on "contexts, causes, explanations for, and patterns of human rights violations along with the determination of responsibility for them".[275] On the other hand, 'micro-truth' entails information about particular events and individuals.[276] Thus, whereas macro-truth strives to accomplish an overview of the structural framework in which violations took place and how and why this was caused, micro-truth focuses on revealing the truth about particular crimes towards individual victims, identifying the precise circumstances and responsible persons.

The TRC was responsible for investigating both levels of truth[277] and distinguished between four notions of truth in its Final Report: factual, forensic or objective truth, personal or narrative truth, social or dialogical truth and, lastly, healing and restorative truth.[278] This is an indication of the epistemological difficulties that arise when talking about 'truth',[279] which does not make it easier to assess whether truth has been uncovered. With regard to the three last types of truth, it was pointed out that other truth commissions regarded them as secondary goals rather than actual notions of truth, so that only the first type of truth can be considered as impartial and objective truth. Critics highlighted that the South African TRC valued these subjective notions of truth as more important than the first, 'scientific' type of truth. However, the central place that 'narratives' gained during the TRC process was found to be

[272] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 252. Thus, "the procedures of the TRC's Amnesty Committee (…) have been criticised for taking a narrow, legalistic, and somewhat inconsistent approach towards what offenders were required to disclose". K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 436.

[273] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 57.

[274] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 272.

[275] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 241.

[276] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 241; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 272.

[277] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 241.

[278] For a more detailed clarification on the content and scope of these different types of truth, see: *TRC Final Report*, Volume 1, 110-114; A. BORAINE, *A country unmasked*, Oxford, Oxford University Press, 2000, 288-291.

[279] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 259.

problematic, leading to a victim-centred truth[280] and stressing "versions or perspectives of the truth and not absolute truth".[281] In addition, the TRC's pursuit of objective truth was mainly focused on obtaining micro-level truth instead of macro-truth, as defined above.[282] This focus had the important consequence that information about particular events was revealed at the expense of creating an overall picture of the structural framework of the apartheid regime. By failing "to link the structural dynamics of the apartheid system to the abuses of the apartheid era",[283] the reasons why crimes were committed and which role race played herein were insufficiently uncovered.[284] The TRC's focus was, moreover, primarily concentrated on gross human rights violations.[285] Combined with the Commission's narrow conceptualisation, neglecting the abuses' structural context, the apartheid system's most problematic characteristics were overlooked.[286] Another consequence of this individualisation of truth and responsibility was the fact that the leadership remained outside the process. This was, however, also due to the lack or even active refusal of cooperation of political party leaders.[287]

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[280] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 242-243. These authors suggested that "storytelling is a problematic route to the discovery of truth", since narratives depart from the victim's perspectives and are always affected by personal meanings and experiences and vanishing memories. This contributed to the perception of the Amnesty Committee being perpetrator-friendly: C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 53.

[281] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 259.

[282] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 243; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 272. This critique was not only expressed with regard to the Human Rights Committee, but is also applicable to the Amnesty Committee. A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 251. However, not everyone seems to fully support the argument that no macro-truth was obtained: "[The TRC Final Report] represents an exhaustive and authoritative macro-record of a regime – the apartheid state – responsible for human rights abuse on a grand scale. (…) In addition to that 'big picture', the Final Report also uncovered and recorded mirco-level truths about many of the crimes (…)."J. DANIEL, "The Truth and Reconciliation Commission Process: A Retrospective" in C. JENKINS & M. DU PLESSIS, *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 79.

[283] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 249.

[284] This lack of effort on the side of the TRC and its different negative consequences were regretted. A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 249-250.

[285] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 275.

[286] Hereby, reference was made to "the racial discrimination, imposition of economic inequalities, social dislocations and limitations of life opportunities for blacks, which cumulatively were more destructive than the incidents of killings and torture the TRC sought to document." A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 276.

[287] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 275-277. Again, this critique is also applicable to the amnesty process, in which

Furthermore, it was argued that the amnesty hearings provided limited 'new' information.[288] This would be due to the narrow approach of the TRC and the lack of participation of key political leaders. In addition, many perpetrators did not apply for amnesty, considering the threat of being prosecuted in case of not doing so not sufficiently serious. Moreover, many perpetrators believed their crimes would probably not even be investigated.[289] However, this argument concerning an insufficient revelation of 'new' truth, was disputed elsewhere. It was emphasised that many amnesty applications concerned matters for which no victims had testified yet, creating "only a limited overlap between victim statements and amnesty applications."[290] Consequently, "much new information about the circumstances that led to human rights violations, emerged, especially during the amnesty process."[291]

These various shortcomings the TRC's truth finding process was criticised for are for a large part said to be due to the various obstacles it faced. Among these were mentioned the lack of support by white people for the TRC, the destruction of records and data by the apartheid government in order to wipe out evidence, the short length of the TRC's time mandate and its limited resources, the limited investment in its Investigations Unit leading to an insufficient amount of staff members of which too few researches, etc.[292]

Although this analysis of the South African amnesty scheme and its TRC seems to present an overly negative image of their capacity to uncover truth, these critiques should be moderated. Even though we might have to acknowledge that the truth uncovered by the TRC is only a partial truth, JENKINS emphasised that compared to other countries, the South African amnesty process, in relation to truth, "unquestionable was better".[293] "Turning at least some of this denial into confession, and at least some of the suspicion into knowledge, was a

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political leaders barely participated. A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 250-251.

[288] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 276 and 293.

[289] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 373.

[290] *TRC Final Report*, Volume 7, Foreword, 3.

[291] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 260.

[292] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 245-248; C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 54-55; K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 436; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 260 and 274.

[293] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 45. JENKINS pointed to various important revelations made during the TRC amnesty process.

real achievement."[294] Also SARKIN stated that "despite the many criticisms of its work, the TRC has helped to uncover at least some truth about what occurred in South Africa."[295] Especially in comparison with prosecutions, the amnesty process would have led to a higher quantity and quality of information than would have been obtained otherwise.[296] It was claimed even stronger, that "it is widely accepted that the process obtained more truth than would have been possible without the offer of amnesty."[297] The visibility of the TRC also plays an important role here. This time public hearings did not take place behind doors. On the contrary, public confessions were broadly covered by the media. Not only did this have an important political impact, but it also hampered denial, thereby fulfilling a significant public education function.[298]

Thus, as regards the question of whether amnesties lead to truth finding, various complications have been explained. Difficulties concerning the understanding of the concept 'truth', which is the same for all cases more broadly, as well as the TRC's approach thereto, its interpretation of its mandate and other technicalities and obstacles the TRC faced were pointed out. Against this background, it seems essential to realise that in general "even in contexts of optimal implementation, the truth uncovered will almost inevitably be incomplete and partial. Thus if we are willing to accept an imperfect rendering of the truth, then we can say that in some contexts amnesties hold the potential to facilitate truth telling."[299]

c. Reconciliation

After periods of violence and conflict, the newly formed state mostly has the ambition to reconcile its divided society. Often, important ethnic, racial, political or religious cleavages split the country significantly. Another goal countries in transition therefore aim to achieve is that of reconciliation.

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[294] C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 46.
[295] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 371.
[296] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 250-251.
[297] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 436.
[298] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 242; C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 46.
[299] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 207.

As mentioned previously, the pursuit of truth in South Africa did not only constitute an important ambition of its own, but was moreover considered to serve as a means to reach other objectives as well. One of these objectives was exactly achieving reconciliation. The entire process of truth seeking was regarded as an indispensable means to finally reach the goal of reconciliation. This made the TRC "the first truth commission mandated to balance truth finding with reconciliation."[300]

The difficulties concerning the question whether or not truth has been uncovered in South Africa were already discussed. With respect to this issue of reaching reconciliation by way of truth recovery, it was suggested that "*sufficient* truth about the past must emerge in order to achieve reconciliation, closure for victims and nation building."[301] However, it is highly complicated to assess whether the level of truth that has been uncovered can be considered sufficient for this purpose. In the TRC Final Report, these difficulties were acknowledged, but the essential role of truth was nevertheless stressed:

> "We should accept that truth has emerged even though it has initially alienated people from one another. The truth can be, and often is, divisive. However, it is only on the basis of truth that true reconciliation can take place."[302]

Accordingly, reconciliation was attempted to be reached via truth finding. Whereas the latter was an objective which was aimed to be achieved directly through the amnesty process, reconciliation was a goal to be reached fairly indirectly, by way of this amnesty process and the broader activities of the TRC. Notwithstanding reconciliation being an indirect consequence of the amnesty process, both were highly interlinked. As stated in the *Azapo* case,

> "the families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue."[303]

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[300] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008,12.
[301] J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 371, own emphasis.
[302] *TRC Final Report*, Volume 1, 18.
[303] *Azapo* Case, para 17.

Consequently, the linkage of amnesty to truth finding in South Africa was seen as an attempt to re-establish 'moral balance'[304] and truth finding was recognized as a factor "contributing to the healing of victims and society".[305]

The question whether the TRC succeeded in bringing about reconciliation in South Africa is exceptionally complex. This is mainly due to the general uncertainty about what exactly this notion of reconciliation entails.[306] Reconciliation can be framed at different levels and between different actors in society.[307] More in particular, notwithstanding reconciliation being a main objective of the TRC, this concept was not further defined and its meaning was therefore unclear. It was said that the TRC has attempted to address interpersonal, community, political, racial and national reconciliation. Nevertheless, this ambiguity created controversy within the Commission about the interpretation of its mandate and about the relevance of each layer of reconciliation within this framework.[308]

With regard to interpersonal reconciliation, it was argued that during public hearings in particular, the Commission focused on this type of reconciliation, especially by stressing the direct relation between the victim and the perpetrator.[309] That way, attention was mainly directed at particular events, pushing the understanding of violence as a political product of the apartheid system more to the background.[310] This criticism is comparable to the TRC's focus on micro-level truth, hampering a broader understanding and public acknowledgement of the structural violence and leaving political leadership out of sight. Elsewhere, however,

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[304] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 13.

[305] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 435.

[306] In the TRC's Final Report, the difficulty of its task to strive for reconciliation was acknowledged and misconceptions about the content of this notion were referred to: "The trouble is that there are erroneous notions of what reconciliation is all about." *TRC Final Report*, Volume 1, 17.

[307] D. BLOOMFIELD, T. BARNES & L. HUYSE, *Reconciliation After Violent Conflict: A Handbook*, Stockholm IDEA, 2005, 12 and 22-23.

[308] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 255; J. DANIEL, "The Truth and Reconciliation Commission Process: A Retrospective" in C. JENKINS & M. DU PLESSIS, *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 80. In its Final Report, the TRC highlighted "the vital importance of the multi-layered healing of human relationships in post-apartheid South Africa: relationships of individuals with themselves; relationships between victims; relationships between survivors and perpetrators; relationships within families, between neighbours and within and between communities; relationships within different institutions, between different generations, between racial and ethnic groups, between workers and management and, above all, between the beneficiaries of apartheid and those who have been disadvantaged by it." *TRC Final Report*, Volume 5, 350-351.

[309] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 255 and 277.

[310] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 276.

the opposite was claimed and attention was drawn to the general political pressure on reconciliation in South Africa and an important consequence this has brought about. Victims were expected "to give priority to his or her obligations as a *citizen* rather than a *violated person* in the creation of a new and different kind of society".[311] This claim suggests that (too) much emphasis was put on national unity and reconciliation at the expense of reconciliation on the individual level. This critique that national reconciliation was deemed essential, seems to be confirmed by the statement that "in a clash between the requisites of truth and those of reconciliation, what the Archbishop regarded as 'the national interest of reconciliation' would prevail."[312]

In order to assess whether the TRC's activities led to racial reconciliation, empirical research and surveys have been conducted.[313] The amount of this type of research is, however, very limited and the long-term impact of the TRC on this level of reconciliation is hardly detectable. Nevertheless, it was argued that even if it would be found that the TRC did not (sufficiently) succeed in bringing about racial reconciliation, one can wonder whether this could be expected from the Commission in the first place. The racial conflict in South Africa had been going on for centuries and had an impressive scope and consequences. Deep societal, racial and economic divisions cannot be expected to be solved right away, especially when taking into account the TRC's limited life span and resources.[314]

Principally, not only with regard to this level of racial reconciliation, but the issue of reconciliation more in general, one can wonder if this is an objective which a truth commission should be expected to achieve. It was suggested that "truth commissions, no matter how well-intentioned their leaders, are not appropriate vehicles for promoting

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[311] C. VILLA-VICENCIO, "Getting on with life: a move towards reconciliation" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 201.

[312] J. DANIEL, "The Truth and Reconciliation Commission Process: A Retrospective" in C. JENKINS & M. DU PLESSIS, *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 80.

[313] J. L. GIBSON, "Overcoming Apartheid: Can Truth Reconcile a Divided Nation?", *Annals of the American Academy of Political and Social Science* 2006, Vol. 603, 82-110; G. THEISSEN, "Common Past, Divided Truth: The Truth and Reconciliation Commission in South African Public Opinion", paper presented at the Workshop on "Legal Institutions and Collective Memories", International Institute for the Sociology of Law, Oñati, Spain, 22-24 September 1999, available at http://userpage.fu-berlin.de/theissen/pdf/IISL-Paper.PDF; "Reflecting on Reconciliation: Lessons From the Past, Prospects for the Future", *Reconciliation Barometer Survey: 2014 Report*, Institute for Justice and Reconciliation, 2014, available at http://ijr.org.za/publications/pdfs/IJR%20SA%20Reconciliation%20Barometer%20Report%202014.pdf.

[314] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 263.

reconciliation and forgiveness, especially in a society with deep structural divisions."[315] One should realise that reconciliation, on whatever layer and of whatever kind, can hardly be expected to emerge when people do not feel any positive change in their daily lives and actual living conditions.

For the case of South Africa, the TRC seemed to have been aware of this struggle and underlined in its report that

> "people were victimised in different ways and a range of gross human rights violations was committed. The result demands extensive healing and social and physical reconstruction at every level of society. Sometimes these different needs themselves compete with one another, leading to fresh conflicts. This makes reconciliation a complex, long-term process with many dimensions."[316]

Consequently, it was explained that "reconciliation within the context of a country like South Africa is not based simply on confession of guilt and the asking of forgiveness. Acts such as these, painful as they may be for some, are but the first steps on the road to reconciliation."[317] In addition to these steps, a real transformation has to take place, entailing structural reformation and reparation.[318] Nevertheless, truth commissions can at least attempt to lay the basic foundations on which further efforts can be built and truth recovery plays a key role herein. After all, it was emphasised that this transformation, which is the way to reach true reconciliation, cannot but be based on truth.[319]

As is illustrated more extensively hereafter, the recognition of reconciliation as being a highly complex though essential feature of successful transitional societies is an indication of a restorative justice approach.

d. Accountability and justice

As already explained when discussing the (evolution of) attitudes on amnesty in the literature, the transitional justice discourse in the 1980's was defined by the battle against

[315] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 277.
[316] *TRC Final Report*, Volume 5, 350.
[317] W. ESTERHUYSE, "Truth as a trigger for transformation: from apartheid injustice to transformational justice" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 154.
[318] W. ESTERHUYSE, "Truth as a trigger for transformation: from apartheid injustice to transformational justice" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 153-154.
[319] W. ESTERHUYSE, "Truth as a trigger for transformation: from apartheid injustice to transformational justice" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 153-154.

impunity and dominated by the peace vs justice dichotomy. The concept of justice was interpreted highly narrowly, referring to a strict notion of retributive justice which could only be reached if accountability was achieved, the only way leading thereto being criminal prosecutions. Consequently, no prosecutions meant no accountability and therefore no justice, causing amnesty to be considered synonym a to impunity.[320] Given the interconnectivity of these concepts of 'accountability' and 'justice', they are discussed together here.

In the case of South Africa, the particular approach of this country's amnesty scheme and the wider functioning of its TRC seem to have broadened the perceptions of these notions. In the TRC's Final Report, the goal of truth seeking was said to be a means to achieve other objectives apart from reconciliation. It would prevent a recurrence of the violations, establish a culture of respect for human rights and create accountability for the future.[321] This claim seems to be affirmed in the literature, where it was said that the South African amnesty scheme "indicates that amnesty is often tied to accountability mechanisms (…). While not the same as criminal prosecutions, these mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment and rehabilitation."[322] That way, full disclosure turns a conditional amnesty, which is not a softer version of prosecution, into a tool for accountability instead of impunity.[323] This innovative design of amnesties, only granted conditionally, "gave way to new understandings of amnesties as mechanisms designed to render truth, prompt memory, and even facilitate accountability."[324] Conditions such as full disclosure of the truth, public hearings and individual application, were mentioned as "ways of ensuring accountability with respect to an amnesty beneficiary".[325] This has fundamentally changed the way in which amnesties were perceived.[326]

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[320] Which is shown by the rather strict division made in an article by COHEN, written in the same time period: S. COHEN, "State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past", *Law & Social Inquiry*, 1995, Vol.20(1), 7-50. Moreover, the concepts of 'amnesty' and 'impunity' were explicitly used as synonyms in L. HUYSE, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry* 1995, Vol.20(1), 52, footnote 3.

[321] *TRC Final Report*, Volume 1, 7.

[322] M.P. SCHARF, "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal* 1999, Vol.32(3), 512.

[323] A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 464 and 481.

[324] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 77 and 99.

[325] M. FREEMAN, *Necessary evils: amnesties and the search for justice,* New York, Cambridge University Press, 2009, 164. All these conditions were part of the South African amnesty requirements. Other possible conditions which can help to ensure accountability were mentioned as well. M. FREEMAN, *Necessary evils: amnesties and the search for justice,* New York, Cambridge University Press, 2009, 164-172.

[326] R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 77.

This perception of amnesties being a way to reach an alternative form of accountability also brought about the necessity to reconsider the narrow conception of justice, strictly referring to retributive or criminal justice in this context. Conditional amnesties were considered as "a new 'justice script' for a society in transition,"[327] requiring a shift away from the traditional justice script.[328] On the basis of the South African experience, it was claimed that "the current discourse on transitional justice suffers from tunnel vision and that the concept of 'justice' in transitional justice needs to be expanded."[329] Repeatedly, it was explained that in this framework of different understandings of justice, amnesties can be implemented in such a way as to promote restorative justice.[330] In its Final Report, the TRC expressed its restorative justice approach explicitly:[331]

> "We have been concerned, too, that many consider only one aspect of justice. Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice – a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation."[332]
>
> "Thus, the tensions and links between amnesty, truth and justice, and the relationship between the Commission and the criminal justice system in South Africa were meant to help prepare the way for the Commission's contribution to the restoration of civil and human dignity."[333]

In general, this perception of amnesties being embedded in restorative justice processes seems to be lauded. It was believed that "the locating of amnesties within the restorative

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[327] A. DU BOIS-PEDAIN, *Transitional amnesties in South Africa*, Cambridge, Cambridge University Press, 2007, 337-338.

[328] A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 464 and 481.

[329] C. JENKINS, "Transitional justice: lessons from South Africa?" in JENKINS, C. & DU PLESSIS, M. (eds.), *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 3.

[330] L. MALLINDER, "Amnesties in the Pursuit of Reconciliation, Peacebuilding and Restorative Justice" in D. PHILPOTT & J.J. LLEWELLYN, *Restorative Justice, Reconciliation and Peacebuilding,* 2012, 15 and 22; L. MALLINDER & K. MCEVOY, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies", *Contemporary Social Science: The Journal of the Academy of Social Science* 2001, 28. See also: R. JEFFERY, *Amnesties, accountability, and human rights*, Philadelphia, University of Pennsylvania Press, 2014, 99, 206 and 77: "Amnesties instituted to render the truth were conceived not as opponents of justice per se, but as instruments of a more holistic, restorative form of justice."; J. SARKIN, *Carrots and Sticks: The TRC and the South African Amnesty Process,* Antwerp, Intersentia, 2004, 250.

[331] For an examination of the extent to which the TRC's operations can be considered as a form of restorative justice, see: S. PARMENTIER, "The South African Truth and Reconciliation Commission. Towards Restorative Justice in the Field of Human Rights" in E. FATTAH & S. PARMENTIER (eds.), *Victim policies and criminal justice on the road to restorative justice: a collection of essays in honour of Tony Peters*, Leuven, Leuven University Press, 2001, 401-428.

[332] *TRC Final Report*, Volume 1, 9.

[333] *TRC Final Report*, Volume 1, 126.

justice framework (…) offers the possibility that rather than denying justice, amnesties can in fact be used to facilitate and enhance compliance with the rule of law, strengthen justice norms as well as assist with broader processes of social and communal 'dealing with the past'."[334] Further, this linkage of amnesty to restorative justice was viewed as a possible solution for shortcomings of the retributive justice approach, as enabling the essential aim of reintegrating perpetrators back into society and as increasingly achieving goals such as truth recovery and reconciliation.[335]

Again, the question whether amnesty processes are able to achieve justice is difficult to assess, once more because of the multi-layered content of the justice concept. As regards South Africa in particular, some authors expressed doubts on whether restorative justice is a meaningful alternative to the retributive form of justice. Along with philosophical and ethical difficulties, they pointed out practical limitations this approach entails.[336] One of the key difficulties they referred to involves the restriction of truth commissions' power to only make recommendations concerning reparations instead of being capable to actually implement them. This issue of reparations brings us to another important form of justice, namely social and economic justice. This term is generally used to indicate structural equality and distributive justice.[337] Although this concept can be partly comprised in the restorative justice concept, socio-economic justice has an even broader outreach. An empirical study distinguished between four types of justice to measure whether justice has been reached in South Africa and the amnesty process was fair, namely procedural justice, retributive justice, restorative justice and distributive justice.[338]

Consequently, when asking whether justice has been achieved in South Africa or whether amnesties in general can be used to achieve justice, the answer will be depending on what exactly one has in mind when talking about 'justice'. However, some authors criticised the use of these different notions of justice and doubted the usefulness and additional value of putting an adjective in front of the noun 'justice'. This creates uncertainty about what is meant

[334] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 427-428.
[335] K. MCEVOY & L. MALLINDER, "Amnesties in transition: punishment, restoration, and the governance of mercy", *Journal of Law And Society* 2012, Vol.39(3), 429.
[336] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 297.
[337] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 272.
[338] J. L. GIBSON, "Truth, Justice and Reconciliation: Judging the Fairness of Amnesty in South Africa", *American Journal of Political Science* 2002, Vol. 46(3), 540–556.

by justice when talking about transitional justice.[339] It was advocated that the conception of transitional justice should be expanded, in order to include "the wide range of 'justice' issues with which many societies in transition must deal if they are to make real and lasting progress away from conflict and repression".[340]

In concrete terms, it was said that "for South Africa, the question is whether the amount of accountability provided is sufficient to satisfy the demands of justice so that social energies and resources can be devoted to building a truly non-racial democracy. For the rest of the world, and in particular for the international human rights community, the question is whether the amount of accountability provided will be strong enough to act as a deterrent against future human rights violations (…)".[341]

e. Conclusion

In this section, the acceptability of granting amnesties was examined by looking into several possible benefits amnesties can attain. By creating an assessment framework consisting of different criteria which are considered as valuable aims that are deemed important to be reached in the newly formed democracy, it was researched whether amnesties can achieve these aims or whether they are at least more likely to do so than prosecutions. The criteria of peace, truth recovery and reconciliation were explicitly mentioned as goals to be reached in the South African amnesty scheme. In addition, the criteria of accountability and justice were included, being a general and overarching aim. For each of these criteria, the South African case was used as an example to practically illustrate whether amnesty was an appropriate means to reach these goals or, when taking into account the pitfalls faced by South Africa, whether they can be designed in such a way to succeed herein.

For each criterion, it was encountered that not only because of the specific circumstances of the South African case, but also generally applicable complications, the question of whether amnesties are capable of fulfilling the expectations thereon is hard to answer. All criteria included in the framework suffer from terminological ambiguities, causing that different

[339] Note made by JENKINS at the International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015.
[340] C. JENKINS, "Transitional justice: lessons from South Africa?" in JENKINS, C. & DU PLESSIS, M. (eds.), *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 37. This author argued that for example in the context of poorer countries, justice should include something about social justice and not merely focus on prosecuting perpetrators. Note made at the International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015.
[341] R. SLYE, "Justice and amnesty" in C. VILLA-VICENCIO & W. VERWOERD, *Looking back, reaching forward: reflections on the Truth and Reconciliation Commission of South Africa*, London, Zed Books, 2000, 183.

authors might have different opinions on whether or not they have been achieved. People often have a different layer of a certain concept in mind in their discussions. The limited amount of empirical research carried out in this field makes this matter even harder to determine.

Notwithstanding these obstacles, it can be argued that prosecutions are not necessarily better suited to achieve these aims. The threat of prosecutions is likely to cause a continuation of the conflict or destabilisation of the newly formed government, there is no guarantee that more truth will be uncovered by way of trials and the possibility of reaching reconciliation when perpetrators and victims are confronted in this way is fairly small. Retributive or criminal justice, which can be reached via prosecutions, was considered a narrow conception of justice and not able to cover the broad range of interests at stake. Moreover, the fact that the vast bulk of perpetrators will often never be put to trial amounts to de facto amnesty. Nevertheless, it has become clear that contrary to a conditional amnesty, an unconditional, blanket amnesty cannot be upheld anymore.

Essentially, it should be stressed that in most cases a lot is expected from the newly formed democracy. Transitional justice mechanisms are supposed to successfully achieve the various goals for which they are designed. However, one should keep in mind that for each situation a different approach is needed and that the challenges new democracies face after periods of violence and conflict are immense. Transitional justice consists of different sub-categories and "defining transitional justice too broadly would make it a meaningless concept, but defining it too narrowly holds the danger of ignoring the complex impact of social conflict and the many factors affecting the reconstruction of human relations and identity."[342] It was emphasised that it is essential not to place unrealistic expectations on single transitional justice mechanisms.[343]

Not only with regard to the goals that are to be achieved, but also the time within which this is expected to be completed, it was argued that one should not put too much pressure on the new democracy. It cannot be demanded that long periods of mass atrocities are resolved in a short period of time. Especially for the case of South Africa, it was argued that this experience "suggests we may need to rethink our ideas about the length of transitions, seeing them not as a moment, but as a more extended period of fragility and uncertainty than

[342] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 300.
[343] A. R. CHAPMAN & H. VAN DER MERWE, *Truth and Reconciliation in South Africa: did the TRC deliver?,* Philadelphia, University of Pennsylvania Press, 2008, 300.

we would perhaps wish, requiring sustained effort and attention over a much longer period that the international community has typically been willing to provide."[344]

3. Conclusion

In this chapter, firstly the impact of the South African amnesty scheme was discussed. It was explained that the exact influence of the South African experience on international law is hard to assess, given the lack of explicit references to this case. Also with regard to the literature, it was explained that the distinctions made in this thesis to categorise the tendencies in the literature mainly served didactic purposes and are fairly artificial. Although developments can certainty be identified, the literature evolved more gradual and the extent to which this might have been influenced by the South African case is hard to determine. Furthermore, it was discussed whether the South African amnesty scheme can be considered as a successful example to draw lessons from. However, it was explained that the success of this case is highly disputed. Cautions regarding drawing lessons from one case and transfer them to another situation were formulated, but also the usefulness of learning from past experiences was highlighted.

The question on the impact of the South African amnesty scheme was thus mainly discussed from an international perspective, focusing on its possible influence on international law and literature as well as transitions in other countries. Its possible influence on current events in South Africa today, and thus its national impact, was not mentioned. However, one can wonder whether the fact that the South African society is extremely violent[345] might be related somehow to the fact that amnesty was granted after the apartheid era. Nevertheless, linking the criminality in South Africa to its past is highly dangerous, since the current violence might be caused by various factors.[346, 347] Moreover, arguments were illustrated in this thesis claiming that amnesty is no equivalent to impunity and can ensure accountability

[344] C. JENKINS, "Transitional justice: lessons from South Africa?" in JENKINS, C. & DU PLESSIS, M. (eds.), *Law, Nation-building & Transformation: the South African experience in perspective*, Antwerp, Intersentia, 2014, 38. Also Lubbe explained that "the process of transformation, reconciliation, development and reconstruction of South African society had not been finalised when the TRC and the Amnesty Committee reached the end of their mandates. (…) the entire process is delicate and requires a long-term commitment." H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, 204.

[345] Note made by SARKIN at the International seminar: Two Decades of Transitional Justice in Southern Africa: lessons learnt and future orientations, KU Leuven, 16 March 2015.

[346] According to SARKIN, the current violence does not mean that the South African transition has failed. He alluded to the problem that human rights and politics are highly interlinked in South Africa. He pointed to a lack of human rights education and efforts in the psychological sphere.

[347] For example, a factor which might be identified as fuelling violence is the high degree of poverty. Above all, recently migration has led to serious xenophobia.

in an alternative way.[348] Above all, the fact that in the long run, during the so-called post-TRC period, the South African amnesty scheme was increasingly criticised cannot be disconnected from the successive measures that were taken after the end of the TRC's operation.[349] Not only the lack of sufficient prosecutions of those who were denied amnesty, but especially the granting of additional pardons was seriously disapproved. It was argued that, contrary to the initial amnesty, they "seem to have little to do with reconciliation goals or sacrifices for democracy."[350] They are considered "a worrying sign that the social memory of the link drawn between conditional amnesty and supposedly superior conceptions of justice can be used to undermine support for criminal justice institutions carrying out their appointed tasks."[351] It was claimed that these initiatives undermine the rule of law in South Africa and the society's faith in the judicial system. Consequently, "in South Africa, justice remains a negotiated term".[352] Elaborating further on these issues would, however, exceed the scope of this thesis.[353]

In the second Section of this chapter, the acceptability of granting amnesty was researched. To objectify this analysis, an assessment framework was created consisting of various criteria selected because of their identification as important goals a newly formed democracy should seek to achieve. It appeared that for the South African case as well as amnesty schemes more in general, various elements complicate rendering a clear-cut answer to this question. It was argued that this does not mean, however, that prosecutions are per se better

[348] JENKINS explicitly stated not to have found significant proof that the amnesty scheme caused lasting damage to the South African society. C. JENKINS, "'They have built a legal system without punishment': reflections on the use of amnesty in the South African transition", *Transformation: Critical Perspectives on Southern Africa* 2007, Vol.64(1), 59.

[349] On this topic, see: H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, XV, 236 p.

[350] H. VAN DER MERWE, "Prosecutions, Pardons and Amnesty: the Trajectory of Transitional Accountability in South Africa" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical perspectives in transitional justice*, Antwerp, Intersentia, 2012, 453.

[351] A. DU BOIS-PEDAIN, "Post-conflict accountability and the demands of justice: Can conditional amnesties take the place of criminal prosecutions?" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical Perspectives in Transitional Justice*, Antwerp, Intersentia, 2012, 483. In particular, this author referred to the disagreement on whether Jacob Zuma had to be put on trial when he was charged for taking bribes. It was suggested that arguments against prosecution were related to the fact that these charges concerned the execution of political office and to the amnesty's wide scope covering a broad range of offences.

[352] H. VAN DER MERWE, "Prosecutions, Pardons and Amnesty: the Trajectory of Transitional Accountability in South Africa" in N. PALMER, P. CLARK & D. GRANVILLE (eds.), *Critical perspectives in transitional justice*, Antwerp, Intersentia, 2012, 453.

[353] More information on these issues can be found in: O. BUBENZER, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes after the Truth and Reconciliation Commission's Amnesty Process*, Leiden, Martinus Nijhoff Publishers, 2009, 258 p and H. J. LUBBE, *Successive and additional measures to the TRC amnesty scheme in South Africa: prosecutions and presidential pardons*, Antwerp, Intersentia, 2012, XV, 236 p.

suited to reach these goals. Lastly, it was said that often (too) much is expected from transitional societies in (too) little time.

GENERAL CONCLUSION

This Master's thesis dealt with the subject of transitional amnesties. More specifically, the position of international law and literature on the granting of amnesties was discussed as well as the different evolutions and developments in both areas. The specific amnesty scheme of South Africa was used as a practical example to illustrate important features of amnesty schemes and to uncover whether such cases might have influenced the developments in international law and literature.

In order to conduct this research, the South African amnesty scheme was explained in the first Chapter. After having briefly sketched its political origin, the innovative aspects of this amnesty scheme were illustrated, whereby the essential conditionality of this amnesty was emphasised. Only after individual applications by perpetrators who told the whole truth about the crimes they committed with a political objective, the Amnesty Committee of the TRC could decide to grant amnesty. In addition to the linkage of amnesty to truth, victim participation was key and public hearings facilitated the open and public character of the process. Further, the different objectives of and justifications for the South African amnesty scheme as well an examination of its constitutionality and international compatibility were included. Lastly, some criticism on this case was discussed.

In Chapter 2, the position of international law on the granting of amnesty was examined in detail. Since international law does not explicitly prohibit amnesty laws, it was examined whether there exists an international duty to prosecute and, if so, whether granting amnesty is incompatible therewith. Hence, a distinction was made between international conventional law and human rights law, customary law and the position of the ICC. Since only few conventions comprise a duty to prosecute, it is questionable whether human rights law generally prohibits amnesties and this is not the case for customary law, there does not seem to exist a universal duty to prosecute. Moreover, in cases where a duty to prosecute does exist, transitional societies are not necessarily required to prosecute each violation and perpetrator in order to comply therewith. With regard to the ICC's position on amnesty, there is no consensus on this issue. Therefore, even though international law has evolved and became more severe in this regard, there remains a certain margin of flexibility. Lastly, it was explained why the South African amnesty scheme is generally considered compatible with the state of international law at its time.

The attitudes towards amnesty in the literature were analysed in Chapter 3. In order to illustrate the different evolutions that have taken place in this field, the literature was roughly

classified in categories and discussed chronologically, whereby the main concerns and tendencies of each category were emphasised. Whereas initially, given the experience of amnesties being limited to unconditional amnesties and the strict peace vs justice dichotomy, the literature declined amnesties and promoted prosecutions, the development of different amnesty schemes seemed to have influenced this debate. Amnesties were no longer rejected right away, but the literature remained nevertheless cautious with regard to defending amnesty schemes. After rethinking leading concepts in this field, the literature investigated the conditions necessary to turn amnesties into a valid transitional justice mechanism. However, a lack of empirical research on the impact of amnesties left many questions unanswered.

Chapter 4 discussed the impact as well as future of transitional amnesties. Section 1 comprised several warnings concerning attempts to draw links between the South African amnesty scheme and the developments in both international law and literature on the one hand, and considering this case as a successful experience to draw lessons from on the other hand. Firstly, it was explained that even though the discussions on international law and literature in which the South African case was framed might seem to suggest that they were at least influenced by this experience, it is hard to prove its exact impact. Further, mention was made of difficulties concerning the evaluation of the success of the South African amnesty scheme and, moreover, concerning learning lessons from this case in order to apply them to a different situation. Although learning from past experiences is useful and encouraged, it is essential to take each situation's own particularities into account.

Lastly, in Section 2 of this chapter, the acceptability of amnesties was researched. On the basis of an assessment framework consisting of different criteria being important goals a democracy seeks to achieve after transition, it was examined whether amnesties are capable of contributing to achieving these aims. Hereby, the goals of peace, truth recovery, reconciliation and accountability and justice were focused on. Generally, for all criteria it was showed that the question of whether they can be reached via amnesties is hampered by conceptual difficulties and insufficient empirical research. Nevertheless, it was argued that prosecutions might not be a means better suited to achieve these aims.

This Master's thesis indicates that within this theme, many important questions remain unanswered, causing remarkable uncertainty. The fact that controversy remains present is, however, not surprising given the complexity of this debate, its interdisciplinary characteristics and its crucial importance for societies in transition. The continuance of debate and (empirical) research on these issues can therefore only be encouraged.

Nevertheless, reducing this uncertainty, for example by explicitly regulating the granting of amnesty in international law or by a judgement of the ICC, might not create a better situation than this uncertainty neither. Whereas some societies might need more guidance and clarity on what they are allowed to do in periods of transitions, this uncertainty at the same time leaves an important and useful margin of flexibility, giving transitional societies the possibility to design a scheme that suits their needs and capabilities in the most appropriate way.[354] As formulated by JENKINS, this creates a climate of 'constructive uncertainty',[355] which is not necessarily harmful.

[354] Interview with SARKIN, Leuven, 18 March 2015.
[355] Interview with JENKINS, Leuven, 16 March 2015.

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