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The Concept of Amnesty in the Crossfire between International Criminal Law and Transitional Justice



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Transnational Criminal Justice and Crime Prevention

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Declaration

I declare that *The Concept of Amnesty in the Crossfire between International Criminal Law and Crime Prevention* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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October 2009

Signed:.....



Contents

	Page
<i>“The Concept of Amnesty in the Crossfire between International Criminal Law and Transitional Justice”</i>	
I. Introduction	2
II. The Definition of Amnesty, its Variations and Historical Development	4
1) Distinction between Amnesty and Impunity	4
2) Distinction between Amnesty and Pardon, Oblivion, Respectively	5
3) Amnesty from Criminal and/or Civil Liability	6
4) Variations of Amnesty	7
5) Historical Development	7
a) Arena of Internal Conflicts	7
b) Arena of International Conflicts	8
c) The Scheme of Combating Impunity	9
III. International (Criminal) Law Provisions Referring to Amnesty Directly and the Duty to Prosecute	10
1) Duty to Prosecute Arising from Criminal Law Treaties	13
2) Duty to Prosecute Arising from Human Rights Treaties / the “Right to a Remedy”, Respectively	14
3) Duty to Prosecute Arising from Customary International Law or General Principles of Law	17
4) Preliminary Result	18

IV. Derogability of the Duty to Prosecute and General Pros and Cons of Amnesty	20
1) Arguments contra Amnesty	21
2) Arguments pro Amnesty	24
a) Legal Arguments	25
b) Political Arguments	28
aa) Reconciliation	29
bb) Peace	29
c) Practical Experience Arguments	31
d) Preliminary Result	32
V. Which Kind of Amnesty is Acceptable?	33
1) Blanket, General and Self Protecting Amnesties	33
2) Conditional Amnesties	34
VI. Amnesty and the International Criminal Court	38
VII. Selective Prosecution Approach as a Proposal	42
VIII. Conclusion	45
List of References	i-ix
List of Abbreviations	xi

“It is the part of him who grants peace not of him who sues for it, to lay down the conditions”

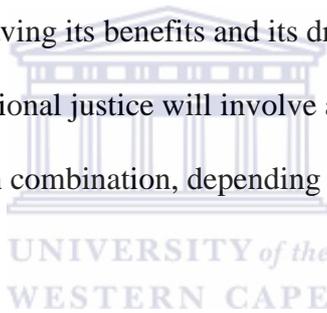
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“The Concept of Amnesty in the Crossfire between International Criminal Law and Transitional Justice”

I. Introduction

Transitional justice is distinct from “ordinary justice” because of the fact that it has to deal with large-scale and especially serious abuses committed or tolerated by a normally authoritarian regime within the framework of a military or at least violent socio-political conflict.¹ Political transition may be accompanied by amnesties, prosecution in national courts, and prosecution in international tribunals or a combination of these, each having its benefits and its drawbacks and no doubt the future understanding of transitional justice will involve an appreciation of the need for all of these, sometimes in combination, depending on the particular context.²



This question of how to deal with the past in transitional phases moves somewhere between the study of international (criminal) law and the relatively new study of transitional justice. The latter involves political, historical and societal considerations. The extent of severity of past violations, the prior history of democratic rule of the country, the number of victims, the extent of complicity by the citizenry, cultural and historical traditions, the stability of the new government, the media and the economy provide a unique context in each case. This multidisciplinary nature of the topic is what makes it so difficult, yet so interesting, to deal with at the same time.

¹ Kai Ambos, *The Legal Framework of Transitional Justice: Study Prepared for the International Conference ‘Building a Future on Peace and Justice’ Nuremberg, 25-27 June 2007*, Nuremberg 2007, 7.

² Andreas O’Shea, *Amnesty for Crime in International Law and Practice*, Leiden: Koninklijke Brill NV, 2004, 96.

Amnesty is a mechanism that is increasingly employed in transitional justice as an alternative means to punishment in a world that increasingly demands the punishment of individuals who commit international crimes.³

That is exactly the field of tension that this research paper will deal with.

The concept of amnesty belongs to the grey area of international (criminal) law and the international law applicable to amnesties has been characterised by a lack of coherence and clarity⁴ due to the fact that the legal, political, and moral choices involved are only to some degree shaped by the requirements of the international community, which makes the issue of impunity so complex, evoking impassioned debate⁵.

Starting with the concept of amnesty itself, its different variations, basic ideas and historical development, this study describes its relationship to international (criminal) law where amnesty at first sight appears to be an incongruous element.

On the other hand, there is a need for amnesty from the point of view of the study of transitional justice where amnesty is an accepted tool being used by states in phases of transition and dealing with past atrocities. For this reason, I would like to place amnesty within the framework of punishment and international law by establishing guidelines for acceptable amnesties.

Next, the discussion will turn to the relation of amnesties to the International Criminal Court and, finally, I will propose the “selective prosecution approach” which, in my opinion, is the best choice of actions in transitional phases.

³ Ibid., 33.

⁴ Ibid., 1.

⁵ Naomi Roth-Arriaza, *Impunity and Human Rights in International Law and Practice*, New York, Oxford: Oxford University Press, 1995, 5.

II. The Definition of Amnesty, its Variations and Historical Development

The word “amnesty” has its origin in the Ancient Greek word “*amnestia*” meaning oblivion.⁶ An Act of oblivion, on the other hand, can be defined as a general overlooking or pardon of past offences by the ruling authority⁷. The sole perception – understood literally and connected to crimes and the concept of liability – connotes a negative aftertaste and automatically prick one’s ears, keeping in mind that “oblivion” comes close to “losing sight of something” or “forgetting”.

When it comes to attempts to define “amnesty” one cannot say that there is a standard definition of the term but rather various proposals. So amnesty could, for instance, be defined as “immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context⁸”.

This definition separates amnesty from other related terms and gets to the point of summing up the most important aspects related to the concept. Specifically, the most important aspects are the facts that the immunity is in law, that one distinguishes immunity from its criminal law and civil law consequences and that the conduct in respect of which immunity from prosecution has been granted, is placed in a political context.

1) Distinction between Amnesty and Impunity

The immunity is in law because of having the force of law⁹ and that is what distinguishes the concept of amnesty from that of impunity, which is a broader notion that incorporates amnesty and does not necessarily depend on legal authori-

⁶ O’Shea (2004), 5.

⁷ The Oxford English Dictionary, 2nd ed.

⁸ O’Shea (2004), 1, 2.

⁹ *Ibid.*, 2.

ty¹⁰. In other words, the concept of impunity lacks the attribute “immunity in law”.

2) Distinction between Amnesty and Pardon, Oblivion, Respectively

In the case of amnesty, we are concerned with offences committed in a political context¹¹. This is an important aspect in the definition because it distinguishes amnesty from pardon.¹² In fact, these two legal concepts share the same consequences in law. Both of the devices result in a person obtaining immunity under both the criminal and civil law. Both may take their effect at any stage of the legal proceedings and, finally, both do not affect the legality of the conduct, but merely the release of the accused from trial, or a guilty person from the legal consequences of his admittedly illegal act. Both concepts also share the same religious element of forgiveness. Yet, the two concepts are not the same, and one can separate them according to their different purposes and origins. Amnesty is primarily aimed at promoting peace or reconciliation. Pardon, in turn, is a mechanism at the discretionary use of a head of state to sidestep the court. It is based on the absolute power of a head of state and it serves some undefined public purpose, and it usually involves obtaining something useful from the beneficiary of the pardon, or preventing or correcting a mistake in the conviction of an innocent person.¹³ Therefore, while pardon originates in the absolute power of sovereigns, amnesty, on the other hand, has its origins in attempts to promote peace between two or more warring parties, and to ensure lasting victory over conquered territory.¹⁴

¹⁰ Ibid., 2.

¹¹ Ibid., 73, 74.

¹² Ibid., 2.

¹³ Ibid., 2.

¹⁴ Ibid., 3.

Moreover, although there is surely an area of overlap between the concepts of amnesty and pardon, a clear differentiator is the fact that the term “amnesty” belongs more to international law¹⁵ while “pardon” and “reprieve” are clearly institutions of national law,¹⁶ normally made by the head of state in sensitive cases with a strong public appeal. Revisiting the aspect of “the political context” once again, amnesty and oblivion might be practically synonymous, except that an amnesty is understood to be a specific form of oblivion in the context of war¹⁷. Consequently, pardon is granted to individuals on the basis of individualised considerations, whereas amnesty is granted to groups on the basis of public policy concerns. Finally, it is to mention that pardon generally does not vitiate guilt for the underlying offence, whereas amnesty operates as an extinction of the offence itself.¹⁸

3) Amnesty from Criminal and/or Civil Liability

Most amnesties operate solely within the criminal justice arena, but an amnesty (law) may indemnify an individual not only against criminal prosecution and punishment and eliminate his criminal responsibility, but also against civil actions.¹⁹

In simple terms, the consequences of an amnesty from criminal liability have a wider societal reach (concerning for instance the society or the state as an entity), while those of an amnesty from civil liability affect the non-indemnified individual more directly and are more perceptible for him. This paper will deal primarily and in main with the former but it also will focus on selected points of the latter.

¹⁵ Noted by the US Court of Claims in *Knote v US*, 10 Ct.Cl. 407.

¹⁶ O’Shea (2004), 3.

¹⁷ O’Shea (2004), 8.

¹⁸ Roth-Arriaza (1995), 22.

¹⁹ O’Shea (2004), 73.

4) Variations of Amnesty

Amnesties manifest themselves in theory and practice in different variations. For example, there are self (-protecting) amnesties, conditional amnesties (interplay of an amnesty with conditions or even other mechanisms), blanket amnesties (covering all offences²⁰) or general amnesties (covering all perpetrators), the latter two also being combined under the term “across-the-board exemptions”.

National amnesties, such as amnesties favouring ordinary criminals, amnesties granted on the occasion of certain festivities, or so-called corrective amnesties used to reverse an injustice, are not the subject of this study as they are neither connected to international criminal law nor to transitional justice.

5) Historical Development

a) Arena of Internal Conflicts

In the past amnesties were granted in civil wars as an incentive to quell rebellions or riots²¹. Famous examples of civil insurrection are the American war of independence and the American Civil War.

Amnesty is still used to quell or discourage rebellion in the context of civil wars²².

Its use in civil strife has received wide recognition, and there are a number of examples of its use in practice in post-war internal conflicts.²³ One could even find evidence of a revival of amnesty clauses – rejuvenating the philosophy of reconciliation - after internal conflicts in the peace agreements for Burundi and Sierra

²⁰ Ibid., 41.

²¹ Ibid., 6.

²² Ibid., 22.

²³ Albania, Algeria, Angola, Argentina, Burundi, Bhutan, Bolivia, Brazil, Bulgaria, Cambodia, Chad, Chile, Columbia, Croatia, Cyprus, Ecuador, El Salvador, Ghana, Haiti, Jordan, Mauritania, Mauritius, Nepal, Oman, Poland, Romania, Russia, Sierra Leone, South Africa, Spain, Sri Lanka, Syria, Serbia and Zaire (now the Democratic Republic of Congo). – Ibid., 22.

Leone.²⁴ where, in the Sierra Leonean case, the government stated that without an offer of amnesty and pardon, the Lomé Peace Agreement would not have come into existence²⁵.

b) Arena of International Conflicts

In international conflicts the strategy of granting amnesty thrived as a means of maintaining peace between former warring states and became a strong feature of peace settlements.²⁶ The extent to which it was used is evidenced by the fact that when parties concluded a peace treaty, amnesty was scheduled in the first article of the peace agreement. And even where it was not expressly mentioned, it was assumed tacitly²⁷, the Peace of Westphalia of 1648 being a well-known example²⁸.

The European experience of the seventeenth to nineteenth centuries demonstrates that amnesty was most likely to be adopted for two reasons: when there was no clear victor²⁹, and where the negotiating parties were firmly and genuinely determined to establish a lasting peace.³⁰ In line with this historical application of amnesties, even today the need for amnesty arises in the context of international conflicts, as has been seen and, indeed is most evident when, on the one hand, there is no clear victor who is able to assume command of the state power and, on the other hand, where the prevailing situation requires a mechanism which primarily would be able to ensure a lasting easing of tension.

²⁴ Ibid., 22, 23.

²⁵ Ambos (2007), 9.

²⁶ O'Shea (2004), 7.

²⁷ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1764, V. II, para. 989.

²⁸ O'Shea (2004), 8.

²⁹ Ibid., 16.

³⁰ Ibid., 15.

c) The Scheme of Combating Impunity

The model of combating impunity, the ideological antithesis of the concept of amnesty, emerges in the Treaty of Versailles of 1919 which contained provisions for the prosecution of the German Kaiser³¹, thus starting the trend to prosecute and punish invariably those responsible for what subsequently became known as international crimes. The Treaty of Sevres of 1920 continued this tradition, envisaging the prosecution of Turks for the massacre of Armenians. But this was still premature and this project was terminated by the Treaty of Lausanne of 1923, which provided for a general amnesty and is a notable example of amnesty being granted for the worst excesses of inhumanity.³²

By virtue of the Kellogg-Briand Pact of 1928 the prohibition on the use of force found its place in international law and with the adoption of the UN Charter (especially Article 2 (4)) it became an established international law norm. The adoption of the UN Charter resulted in the perception that the need for amnesty provisions in peace treaties had gradually subsided.³³ The prohibition on the use of force, if taken seriously, necessarily led to the establishment of precautionary measures in cases where the norm was breached. This, in turn, paved the way for the concept of impunity first and foremost, and away from that of amnesty. Consequently, amnesty as a means of reconciliation with the enemy did not form a major component of the ending of the Second World War, but the victors rather deliberately sought the international prosecution of those who had waged the war of aggression.³⁴

³¹ Ibid., 15.

³² Ibid., 15.

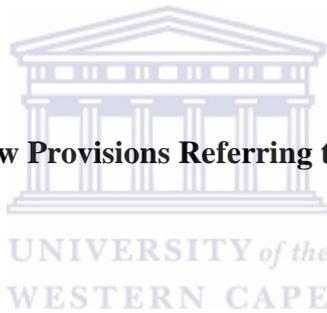
³³ Ibid., 15.

³⁴ Ibid., 16.

Even though it might appear that the concept of amnesty lost significance or became less important, this is not so. On the one hand, we note that, in contrast to the treatment of the enemy, the Allies of both the major wars ensured complete amnesty for those who acted in support of the war effort against the enemy.³⁵

And, on the other hand, it was in fact this development of the growing tension between the idea of impunity and the concept of amnesty which actually led to the problem of accommodating the concept of amnesty within the context of international (criminal) law and its regime. This is to say, it is due to this historical development that we now have to face the question of how to find a place for the concept of amnesty within international (criminal) law.

III. International (Criminal) Law Provisions Referring to Amnesty Directly and the Duty to Prosecute



There are no direct references to the question of amnesty in international instruments, Article 6 (5) of the 1977 Additional Protocol II to the four Geneva Conventions of 1949³⁶ being an exemption, but even this provision, as far as it concerns amnesty, is merely advisory.³⁷ It does not have the meaning and scope occasionally attributed to it, namely, to oblige the authorities in power to endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, but it only states that a “combatant impunity” should be granted to “normal soldiers”. It does not address the issue of criminal responsibility deriving

³⁵ Ibid., 16.

³⁶ Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977, entry into force: 7 December 1978.

³⁷ Roth-Arriaza (1995), 58.

from the perpetration of war crimes.³⁸ And as neither the norms of criminal law treaties nor the general human rights conventions requiring prosecution prohibit by their terms amnesty laws³⁹, it is more the challenge to piece together the explicit and emerging outlines of international rules as they apply and limit the use of the concept of amnesty⁴⁰ as well as to test it against the sources of international law.⁴¹

The consideration of piracy and slave trading was so dangerous and devastating that any state which caught such offenders was authorised to try and punish them. This dates back to the origins of international law, and it has led to the establishment of universal jurisdiction of states over perpetrators of such crimes.⁴² Universal jurisdiction, however, is not mandatory, but permissive, meaning only that every country is allowed to prosecute criminals regardless of where the conduct in question took place, who the victims were, or whether any other link with the prosecuting state can be found, and therefore only providing the authority to prosecute and punish⁴³. As such, the concept of universal jurisdiction does not automatically bar the adoption of amnesty laws but it is more that a genuine duty of states to prosecute, as opposed to the granting of amnesty, that is required. A duty to prosecute arises also in the principle *aut dedere aut judicare*, meaning that that the state where the crime was committed either has to prosecute the perpetrator itself or to extradite him. The purpose here is to ensure that those who commit

³⁸ According to a letter written to interested scholars by an official of the International Committee of the Red Cross; Christian Tomuschat, "The Duty to Prosecute International Crimes Committed by Individuals" in: Hans Joachim Cremer; Thomas Giegerich; Dagmar Richter; Andreas Zimmermann (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Steinberger*, (2002), 348; Naomi Roth-Arriaza and Lauren Gibson, "The Developing Jurisprudence on Amnesty", *Human Rights Quarterly*, (1998) 20, 865.

³⁹ Roth-Arriaza (1995), 57.

⁴⁰ *Ibid.*, 57.

⁴¹ O'Shea (2004), 33.

⁴² Roth-Arriaza (1995), 25.

⁴³ Gerhard Werle, *Principles of International Criminal Law*, The Hague: TMC Asser Press, 2005, paras. 171, 183.

crimes under international law or perpetrate gross human rights violations are not granted safe havens anywhere in the world.⁴⁴ This principle goes beyond universal jurisdiction by making prosecution mandatory and is, in this way, similar to a genuine duty to prosecute.

Five different types of provisions provide support for a state's obligation to investigate gross human rights violations and to take action against those responsible, aside from providing redress to victims: First, there are a series of treaties specifying the obligation of states to prosecute and punish perpetrators of acts defined as crimes under international law. Second, authoritative interpretations of broad human rights treaties hold that state parties fail to ensure and respect the substantive rights protecting individuals' physical integrity if they do not prosecute and punish perpetrators of gross human rights violations. Third, the so-called "right to a remedy" provides a strong basis for inferring a duty to prosecute⁴⁵. And fourth and fifth, there is customary international law as well as general principles of law leading to the said obligation.

A distinction is drawn between a duty to prosecute, obliging, primarily, the state of commission, and, secondarily, third states. As to the duty of the state of commission in regard to the concept of amnesty, the question arises to what extent the duty exists and whether it is derogable or not. Concerning third states, the question is more whether an amnesty adopted by the state of commission would bar the third states' jurisdiction.

⁴⁴ Roth-Arriaza (1995), 25.

⁴⁵ *Ibid.*, 24.

1) Duty to Prosecute Arising from Criminal Law Treaties

The oldest obligation for states to prosecute certain crimes arises from the 1949 Geneva Conventions⁴⁶. Protocol I to the Conventions⁴⁷ states that “in order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, these persons should be submitted for the purpose of prosecution in accordance with international law, subject to guarantees of a fair trial”.⁴⁸ Moreover, in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948⁴⁹ and the Convention on the Suppression and Punishment of the Crime of Apartheid of 1973⁵⁰, the contracting parties confirm that genocide and apartheid are crimes under international law, which they undertake to prevent as well as to bring to trial those persons found within their jurisdiction accused of, or responsible for, the crime of genocide, apartheid, respectively.⁵¹ Additionally, the Convention against Torture of 1984⁵², as well as the Inter-American Convention on Forced Disappearance of Persons of 1994⁵³ require prosecution or extradition (*aut dedere aut judicare*) of suspected offenders of the crimes of concern.⁵⁴ And finally, a series of treaties on slavery and slavelike practices, including forced labour, as well as international agreements to outlaw and punish hijacking, aircraft sabotage, the taking of hostages, and terrorism all in-

⁴⁶ “grave breaches” under these Conventions include willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body and health, unlawful deportation or transfer or unlawful confinement.

⁴⁷ Protocol Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977.

⁴⁸ Roth-Arriaza (1995), 25.

⁴⁹ Article I, II, IV and V of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, entry into force: 12 January 1951.

⁵⁰ International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted on 30 November 1973, entry into force: 18 July 1976.

⁵¹ Roth-Arriaza (1995), 25, 26.

⁵² United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted on 10 December 1984, entry into force: 26 June 1987.

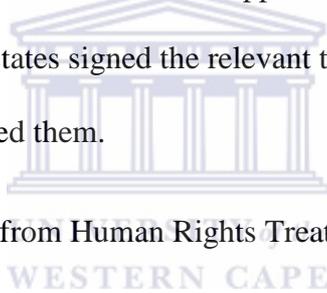
⁵³ Inter-American Convention on Forced Disappearances of Persons, adopted on 9 June 1994, entry into force: 28 March 1996.

⁵⁴ Roth-Arriaza (1995), 26, 27.

clude provisions which also require extradition or prosecution of those implicated.⁵⁵ All these crimes both inherently threaten human life and create a threat to international peace, commerce, and stability, and the conventions prohibiting them represent the movement from permissive universal jurisdiction to mandatory action against the modern-day successors to the pirates of old.⁵⁶

The most recent development is the adoption of the Statute of the International Criminal Court⁵⁷, stating in its Preamble⁵⁸ that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes, namely, genocide, crimes against humanity and war crimes⁵⁹.

Nonetheless, it is important to bear in mind that the applicability of criminal law treaties is limited because not all states signed the relevant treaties, nor have all states ratified them, or domesticated them.



2) Duty to Prosecute Arising from Human Rights Treaties / the “Right to a Remedy”, Respectively

After the shocking crimes committed immediately before and during World War II states finally began to accept limits on their virtually absolute sovereignty regarding the human rights of those residing within their jurisdiction.⁶⁰ Since then, comprehensive multilateral human rights instruments have been established⁶¹. The authoritative bodies interpreting these treaties and monitoring their enforcement

⁵⁵ Ibid., 25.

⁵⁶ Ibid., 26.

⁵⁷ The Rome Statute of the International Criminal Court, adopted on 17 July 1998, entry into force: 1 July 2002.

⁵⁸ Para. 4 to 6 of the Preamble.

⁵⁹ Articles 6, 7, and 8 ICC Statute.

⁶⁰ Roth-Arriaza (1995), 24.

⁶¹ For example, the International Covenant on Civil and Political Rights adopted on 16 December 1966, entry into force: 23 March 1976; the American Convention on Human Rights, adopted on 22 November 1969, entry into force: 18 July 1978; the European Convention on Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entry into force: 3 September 1953.

have required states to investigate, prosecute, and compensate victims in cases of torture, summary execution, and disappearances.⁶² It began in 1988 with the *Velazquez-Rodriguez*⁶³ case in which the Inter American Court of Human Rights decided that a state has a legal duty to prevent human rights violations, investigate evidence of such violations, identify those responsible, impose suitable penalties and ensure proper restitution to the victims.⁶⁴

The question arises whether it is one thing to declare that general human rights must be protected, if need be, by criminal law, but quite another thing to posit that in each and every case where a violation has occurred the perpetrator must be punished.⁶⁵ However, the jurisprudential development shows clearly that since the competent international tribunals (the European Court of Human Rights⁶⁶ / the UN Human Rights Committee⁶⁷) have also embraced the view that in instances of grave attacks against life, physical integrity and freedom of the victims, the duty to protect and ensure human rights entails a duty to punish the responsible perpetrators, this proposition seems by now to have acquired sufficiently broad foundations to stand as a rule of applicable positive law⁶⁸.

It certainly would be exaggerated to say that any human rights violation must necessarily entail criminal prosecution in order to undo the injury suffered by the victim. And what needs to be said here is that the principle of proportionality must be respected in this regard.⁶⁹ Nevertheless, the jurisprudence of the above-mentioned

⁶² Roth-Arriaza (1995), 28.

⁶³ *Velazquez Rodriguez*, Inter-American Court of Human Rights, judgment of 29 July 1988, Series C No. 4.

⁶⁴ Werle (2005), para. 181; see also, for example: *Barrios Altos vs. Peru Case* (14 March 2001) Judgment, Series C No. 75 (Inter-American Court of Human Rights); *Almonacid-Arellano et al v. Chile*, (26 September 2006) Judgment Series C No. 154 (Inter-American Court of Human Rights).

⁶⁵ Tomuschat (2002), 320; Ambos (2007), 16.

⁶⁶ Tomuschat (2002), 320.

⁶⁷ *Ibid.*, 322, 323.

⁶⁸ *Ibid.*, 325.

⁶⁹ *Ibid.*, 321.

human rights courts now seems to be firmly settled,⁷⁰ and a duty to prosecute also follows from the duty of states to guarantee human rights and ensure effective legal protection⁷¹.

All the comprehensive human rights treaties include in some form the “right to a remedy” for violations⁷², meaning that there is an obligation to “ensure” rights⁷³. Here again the question arises whether such a “remedy” can *only* be provided by the means of criminal law. The Inter-American Commission on Human Rights has long interpreted the “right to a remedy” language in the American Convention to include the obligation to investigate and prosecute, calling repeatedly for investigation of the facts and punishment of the responsible individuals in cases of torture or disappearances. The European Court of Human Rights has also interpreted the “right to remedy” language of the European Convention in the same way⁷⁴. In the *Klass*⁷⁵ case, for example, the Court found that Article 13 of the Convention requires the state to ensure that there is a remedy before a national authority in order both to have the petitioner’s claim of a violation of the Convention decided and, if appropriate, to ensure that he obtains redress. Additionally, in the case *X and Y v the Netherlands*⁷⁶ the Court held that only criminal law provisions could achieve effective deterrence and would normally regulate such matters. The Court held that, for serious criminal law violations, at least the possibility of prosecution

⁷⁰ Ibid., 323.

⁷¹ Angelika Schlunck, *Amnesty versus Accountability*, Berlin: Berlin Verlag Arno Spitz GmbH, 2000, 39.

⁷² Article 8 of the Universal Declaration of Human Rights (adopted and proclaimed on 10 December 1948); Article 2 (3) of the International Covenant on Civil and Political Rights; Article 25 of the American Convention on Human Rights.

⁷³ Roth-Arriaza (1995), 32.

⁷⁴ Ibid., 34.

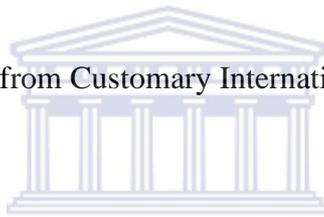
⁷⁵ *Klass and others v. Germany* (application no. 5029/71) Judgment of 6 September 1978 (ECHR).

⁷⁶ *X and Y v. the Netherlands* (application no. 8978/80) Judgment of 26 March 1985 (ECHR).

may be a requirement under the European Convention when civil remedies may be insufficient.⁷⁷

As mentioned in the context of criminal law treaties, it is important to keep in mind that not all countries are parties to one or more of the human rights instruments described here, and that these treaty-based obligations do not apply to them. In particular, governments that systematically violate human rights may be disinclined to adhere to human rights treaty regimes. However, these countries are still bound to respect the obligation to investigate and prosecute human rights violators if the obligation has attained the status of a customary law norm or a general principle of law.⁷⁸

3) Duty to Prosecute Arising from Customary International Law or General Principles of Law



Although obligations to investigate, prosecute, and to provide redress are relatively clear under treaty law, their customary law status turns out to be more ambiguous. A number of sources, like the treaty provisions mentioned above, taken together, diplomatic practice or the customary law surrounding crimes against humanity, if combined, suggest an emerging obligation under customary law.⁷⁹ Nonetheless, the failure of many states to act even against notorious human rights violators, or the granting of amnesties absolving violators from responsibility, makes it more difficult to define the fine line between the flouting of an established norm and the non-existence of sufficient evidence, based on internal practice, of the existence of the norm itself.⁸⁰ Nevertheless, the clearest place where a

⁷⁷ Roth-Arriaza (1995), 34.

⁷⁸ *Ibid.*, 38.

⁷⁹ *Ibid.*, 40.

⁸⁰ *Ibid.*, 40.

treaty obligation may have transmuted into customary law are the *aut dedere aut judicare* provisions common to treaties that criminalise human rights violations like torture and forced disappearances. The list of treaties requiring either prosecution or extradition is as long as the crimes they deal with, and these include humanitarian law, genocide, apartheid, slavery, prostitution, piracy, hijacking, drug trafficking, and terrorism.⁸¹ Yet, the most important point in this context is that under customary international law it is recognised today that the state in which a crime under international law (genocide, crimes against humanity and war crimes) is committed has a duty to prosecute that crime.⁸²

Given the fact that major legal systems all contain the idea that criminal conduct, even when (or especially when) perpetrated by state agents or officials, should be punished by the state,⁸³ one could say that a duty to prosecute international crimes or gross violations of human rights also results from these general principles of law recognized by civilized nations as a supplementary source of international law.

4) Preliminary Result

In sum, a duty to prosecute crimes under international law arises from several criminal law treaties, human rights treaties, customary international law, and even the general principles of law. Overall, the trends with respect to international criminal law show a movement from permissive to mandatory jurisdiction and from the idea of an international tribunal to reliance on national legal systems to prosecute offenders⁸⁴, just as is perfectly illustrated by the establishment of the

⁸¹ Ibid., 41.

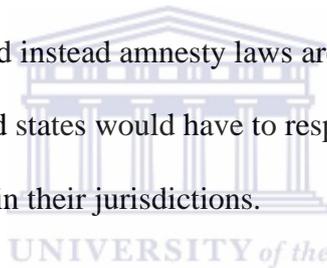
⁸² Schlunck (2000), 27.

⁸³ Roth-Arriaza (1995), 48.

⁸⁴ Ibid., 25, 28.

International Criminal Court. The logic underlying international crimes is that they affect the interests of the international community as a whole⁸⁵. And this would seem to deny individual states the power to grant amnesties on their own initiative, without any co-ordination with the other states or international institutions.⁸⁶

As regards the distinction between the duty to prosecute of the state of commission, on the one hand, and third states, on the other, it follows that if the former has a duty to prosecute it loses the power to grant an amnesty, and if it does do so, then the possibilities of third states to prosecute the perpetrators within their jurisdiction is not barred. In turn, in cases where there is no duty to prosecute on the part of the state of commission and instead amnesty laws are adopted or an “admissible” amnesty is granted, third states would have to respect the amnesty, too, and refrain from prosecution within their jurisdictions.



Against the background of this established duty of states to prosecute international crimes, on the one hand, and the growing practice of states of adopting amnesty laws, on the other, it appears questionable and problematic how to integrate the concept of amnesty into international criminal law generally.

⁸⁵ Kai-Michael König, *Die Völkerrechtliche Legitimation der Strafgewalt Internationaler Strafjustiz*, Baden-Baden: Nomos, 2003, 26; M. Cherif Bassiouni, “The Philosophy and Policy of International Criminal Justice” in: Lal Chand Vohrah and Antonio Cassese (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese (International Law Series, V.5)*, (2003), 65 et seq.

⁸⁶ Tomuschat (2002), 344.

IV. Derogability of the Duty to Prosecute and General Pros and Cons of Amnesty

It is certain that a national amnesty cannot be condemned as being unlawful where international law refrains from setting forth a duty of criminal prosecution.⁸⁷

However, as shown above, when it comes to international crimes and gross violations of human rights the duty of states to prosecute is nearly all-encompassing.

In order to establish whether amnesties can be in line with international (criminal) law, the question to answer is whether the duty to prosecute, to the extent that it exists, applies rigorously under all possible circumstances, with no exception, or whether it leaves some leeway for states to exercise political discretion according to requirements of political expediency⁸⁸. Put differently, the question arises whether the duty to prosecute is (non-) derogable⁸⁹.

This question becomes all the more acute when a country has emerged from the yoke of dictatorship and a fresh equilibrium needs to be found within a new and democratic context to come to grips with the past.⁹⁰ And considering the fact that in many countries, where the transition to the rule of law and democracy was not the outcome of a victory of revolutionary forces, but rather the result of a compromise between the opponents⁹¹, there was always a temptation for the groups still in power, as well as their challengers, to protect themselves from any danger

⁸⁷ Ibid., 344.

⁸⁸ Ibid., 343.

⁸⁹ Roth-Arriaza (1995), 62.

⁹⁰ Tomuschat (2002), 343.

⁹¹ For example: Argentina, Chile, and El Salvador in South America and the Republic of South Africa on the African Continent.

of one day suffering criminal sanctions by adopting amnesty laws as the most convenient instrument for that purpose.⁹²

On the one hand, disappearances, arbitrary killings, torture and “ethnic cleansing” all call for a resolute response from the new leadership⁹³, but on the other hand, there may also be interests which indeed can be pursued best by granting an amnesty to perpetrators of such crimes.

It is exactly these phases of transition which are the subject of the study of transitional justice, which can be defined as the body of law that guides us through the question of how new governments deal with a new developing democracy and post human rights violations or how they reconstruct the social and moral fibre of a society whilst dealing with the legacies of the past⁹⁴.

1) Arguments contra Amnesty

Granting amnesty to perpetrators of international crimes or gross violations of human rights matches a converse of the state’s obligation to prosecute.⁹⁵ In clearing the way to impunity the adoption of amnesties threatens peace and democracy⁹⁶, since, regardless of whether the country concerned finds itself in a transitional process or not, the first and most important step to be taken by a government is necessarily the establishment and promotion of the rule of law⁹⁷, including the state’s obligations arising from international criminal law. Otherwise, the potentially counter-productive nature of amnesty, deriving from the negative effects

⁹² Tomuschat (2002), 343.

⁹³ Ibid., 315.

⁹⁴ Naomi Roth-Arriaza, “The New Landscape of Transitional Justice” in Naomi Roth-Arriaza and Javier Mariez-currena (eds.), *Transitional Justice in Twenty-First Century*, (2006), 13.

⁹⁵ The so-called *rule of law argument*: if the law provides for a duty to prosecute then the rule of law entails a prohibition of amnesty. Ambos (2007), 17.

⁹⁶ O’Shea (2004), 83.

⁹⁷ Roth-Arriaza (1995), 4.

of impunity, comes into effect and the non-enforcement of criminal law leads to the immolation of its authority as well as its power to deter future crimes.⁹⁸ This perceived authority of the law must not be sacrificed in favour of such abstract interests like peace and stability,⁹⁹ and this especially holding for international criminal law being not as settled as national criminal law, but still emerging and in a developing process claiming invariable validity and trying to establish and maintain its authority globally by ensuring that it cannot be ousted domestically¹⁰⁰.

Respect for the law generally is likely to be compromised where it might widely be known that certain crimes, no matter how heinous, can be perpetuated with relative impunity.¹⁰¹ Regarding international crimes, which affect the interests of the international community as a whole, another logical line of reasoning argues against the concept of amnesty. Does not the perpetration of such crimes require punishment, if not for other reasons but only to ensure the protection of this international community's interests within a state's own borders and to avoid encouraging future atrocities in other unstable areas of the world¹⁰² and establishing a "negative" precedent to the peoples of other countries?

Moreover, amnesty is often ill-reputed as simply reflecting the weakness of the machinery entrusted with upholding the rule of law, on the one hand, and the pre-

⁹⁸ David Crocker, "Punishment, Reconciliation, and Democratic Deliberation", *Buffalo Criminal Law Review*, (2008) 5, 536 et seq; Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and The International Criminal Court", *European Journal of International Law*, (2003) 14, 489; Laura M. Olson, "Provoking the Dragon on the Patio. Matters of Transitional Justice: Penal Repression vs. Amnesties", *International Review of the Red Cross*, (2006) 88, 291; Diane F. Orentlicher, "Settling Accounts: Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal*, (1990-1991) 100, 2542.

⁹⁹ Orentlicher (1990-1991), 2542.

¹⁰⁰ O'Shea (2004), 84.

¹⁰¹ Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford: Stanford University Press, 1968, 287.

¹⁰² O'Shea (2004), 85 et seq.

ponderant role of the military, on the other (“*auctoritas, non veritas facit legem*”).¹⁰³

Proponents of investigation argue that a society which moves forward without confronting its past is condemned to repeat it and that only investigations and prosecutions draw a clear line between past and future, allowing the beginning of a healing process for the victims and especially their families to put past to rest.¹⁰⁴ They argue that a culture of impunity will continue unless the cycle is broken.¹⁰⁵ Furthermore, they contend that prosecutions represent an efficient way of ascertaining the truth through the legal process, ensuring that fact finding will be thorough and reasonably impartial. In addition, punishment, at least stigmatising the guilty, will also serve to deter potential lawbreakers.¹⁰⁶

Psychologists have long noted the traumatic effects of victimization.¹⁰⁷ They point out that prosecutions can channel the desire for private vengeance while “restoring citizens to full membership in society by suppressing the differences between those who had control over other persons’ lives and those whose existence was at their mercy”¹⁰⁸.

Perhaps the strongest argument against the concept of amnesty is that general deterrence requires the certainty of punishment¹⁰⁹ and in the absence of deterrence

¹⁰³ Tomuschat (2002), 347: citing the Guatemalan case; O’Shea (2004), 84.

¹⁰⁴ Roth-Arriaza (1995), 7, 8.

¹⁰⁵ *Ibid.*, 8.

¹⁰⁶ Roth-Arriaza (1995), 8.

¹⁰⁷ Lynne Henderson, “The Wrongs of Victims Rights”, *Stanford Law Review*, (1985) 37, 956.

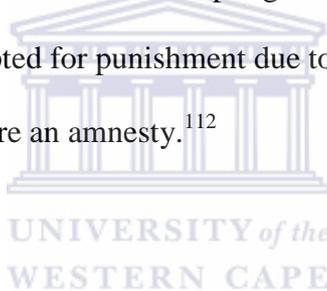
¹⁰⁸ Wesley Cragg, *The Practice of Punishment: Towards a Theory of Restorative Justice*, London: Routledge, 1992, 67 et seq.

¹⁰⁹ Roth-Arriaza (1995), 22.

and reformation, punishing the perpetrators of atrocities diminishes the need for reprisals or vengeance from the other parties to the conflict.¹¹⁰

All these arguments result in the conclusion that prosecution and punishment of international crimes or gross violations of human rights promote best peace through a respect for the authority of the law¹¹¹, placing a ban on the concept of amnesty entirely.

An example for the application of such a “strict prosecution” approach can be found in the case of Rwanda, where a substantial part of the population was party to the most horrific of all crimes, that of genocide, against a million of its citizens, and although considerations in the direction of adopting amnesty laws could have been made, the government yet opted for punishment due to the country’s history of impunity which could not endure an amnesty.¹¹²



2) Arguments pro Amnesty

There are also good reasons and arguments not to prosecute and punish but to install amnesties instead. They are usually linked close to some kind of transitional phases of states. The arguments here are that states should be able to exempt themselves from the obligations to prosecute and should be able to justify amnesty as a permissible derogation from existing international commitments. These arguments can be grouped into “legal”, “political” and “practical experience” arguments.

¹¹⁰ O’Shea (2004), 81.

¹¹¹ *Ibid.*, 84.

¹¹² *Ibid.*, 37.

a) Legal Arguments

Within the international legal context, the International Covenant on Civil and Political Rights¹¹³ and both the European¹¹⁴ and American¹¹⁵ conventions on human rights all contain provisions permitting derogation from some human rights obligations under conditions of a so-called “public emergency”. Fragile incoming governments facing a hostile military or continued ethnic or factional strife, for example, could plausibly argue for applicability of this “public emergency” escape clause.¹¹⁶ The European Court of Human Rights once defined the term of “public emergency” as a situation where the danger must be actual or imminent, its effects involving the whole nation, and threatening the continuance of the organized life of the community¹¹⁷ and held that “the crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate”¹¹⁸. Furthermore, international criminal law treaties contain their own derogability provisions, for instance, the Convention Against Torture, which makes the prohibition on torture non-derogable under any circumstances but not so the obligation to investigate and prosecute.¹¹⁹

Although these “public emergency” exceptions are limited and certain basic rights, including the right to life and those judicial guarantees essential for the protection of non-derogable rights¹²⁰ are non-derogable themselves, they show

¹¹³ Article 4 (1).

¹¹⁴ Article 15.

¹¹⁵ Article 27 (1).

¹¹⁶ Roth-Arriaza (1995), 62.

¹¹⁷ *Ibid.*, 62.

¹¹⁸ “*The Greek case*”, 1969 Y.B. European Convention on Human Rights, 511 (European Commission on Human Rights) (resolution), para. 153.

¹¹⁹ Roth-Arriaza (1995), 63.

¹²⁰ Article 27 (2) of the American Convention on Human Rights.

that a duty to prosecute arising from human rights treaties in principle and in the end can be porous. Of course, amnesty is not allowed for violations of non-derogable rights, but concerning violations of derogable rights there is some leeway left.

The same applies to the duty to prosecute within the scope of customary international law where the customary “doctrine of necessity” is in effect and can provide a defence to avoid obligations of customary law.¹²¹ Here again, a state must be threatened by a grave and imminent danger and its sole means of safeguarding an essential interest must be to adopt conduct not in conformity with international requirements while the state itself must not have contributed to creating the condition of necessity.¹²²

Consequently, international law does not forbid the concept of amnesty categorically as long as a “very special and extreme” situation arises of which the existence to show is a very heavy burden.

Moreover, noticeable¹²³ state practice shows that in transitional phases states do use amnesties for the purpose of forgetting about the past and starting anew, and they do so with strong societal support and tolerance of the international community and international law. Amnesties have been most prominent in the African and Latin-American regions, maybe because of the fact that these two regions have suffered a greater share of the world’s civil strife and dictatorships and have also been the showcases for modern transitions to peace and democracy.¹²⁴

¹²¹ Roth-Arriaza (1995), 63.

¹²² International Law Commission, draft Articles on State Responsibility (1980) 2 Yearbook of the International Law Commission 26, 33, U.N. Doc. A/CN.4/SER.A/1980/Add.1.

¹²³ O’Shea (2004), 72.

¹²⁴ *Ibid.*, 35; the transitions in most of the Central and East European countries were characterized by political trials and lustration laws.

O’Shea also states that amnesties, as a price for peace in societies in transition, will not go away.¹²⁵ In the context of state practice concerning amnesties, it is important to note that state practice itself plays a role within customary international law, providing one of two aspects which compose this source of law and even though there might be no *opinio iuris* concerning the acceptance of amnesties, at least a state practice on this matter can be found. Therefore, the amnesty state practice gives rise to considerations that amnesties might be permitted as exceptional measures and, consequently, on the question under which circumstances this should be the case.

Another argument in favour of amnesties can be drawn from the attempt to rank the “legal aims” of peace, which amnesties try to achieve, and justice. Would it be possible to establish a hierarchy of these two ideals? On the one hand, one needs justice to achieve peace, but, on the other hand, even justice needs to be pursued within the context of its associated goal of lasting peace.¹²⁶ Accordingly, as the pursuit of justice entails the prolongation of hostilities, whereas the pursuit of peace requires resigning oneself to some injustices¹²⁷, it must be possible to use amnesties with the purpose to establish and maintain peace and sacrifice justice to some extent in extreme cases.

It is interesting that even the United Nations have taken part in peace negotiations with an amnesty on the table (for instance, in El Salvador, Guatemala, Haiti or Sierra Leone), thus giving amnesties some kind of international legitimacy.¹²⁸

¹²⁵ *Ibid.*, viii.

¹²⁶ *Ibid.*, 25.

¹²⁷ E. Jean Manas, “The Impossible Trade-Off: Peace versus Justice” in: Richard H. Ullman (ed.), *The World and Yugoslavia’s Wars*, (1996), 43.

¹²⁸ Ambos (2007), 41.

b) Political Arguments

It is essential to understand the multi-dimensional framework within which choices to prosecute or amnesty operate¹²⁹, and the proposition that law is never made in a vacuum but is always part of a larger political, moral, and social dynamic,¹³⁰ as well as a factual context,¹³¹ especially holds true when it comes to the idea of transitional justice, which in itself requires a contextual inquiry¹³². Therefore, dealing with a criminal past is a challenge requiring differentiated solutions which, in addition to legal considerations, also demand a good political judgment within a large margin of discretion.¹³³ Political considerations in the end are the most important for a civil society as it is certain that if life and limb are not safe, such a society falls apart¹³⁴.

Putting it in simple terms, it can be said that there are two basic arguments justifying amnesties, the first being the attempt to achieve reconciliation, and the second being the preservation of lasting peace.¹³⁵

These various justifications have been employed individually and in conjunction with each other, intertwining into one coherent objective of effecting lasting peaceful coexistence of human kind. With regard to amnesties, the underlying assumption is that in a particular context, they might be a more appropriate means of achieving this goal than punishment.¹³⁶

¹²⁹ O'Shea (2004), 94.

¹³⁰ Roth-Arriaza (1995), 4.

¹³¹ O'Shea (2004), 82.

¹³² *Ibid.*, 96.

¹³³ Tomuschat (2002), 315.

¹³⁴ *Ibid.*, 317.

¹³⁵ O'Shea (2004), 86.

¹³⁶ *Ibid.*, 23.

aa) Reconciliation

Reconciliation can be understood as a process of making friends again or re-instituting alliances after estrangement, as a gesture of atonement for past wrongs as well as a catalyst for lasting peace.¹³⁷ Amnesty, however, has a different, more modest reconciliatory function. It aims not so much at to create friendly relations, but more to do away with enmity resulting from previous hostilities. Governments that grant amnesty to rebels or agree to amnesty in peace treaties usually have no desire to form alliances with former foes, but merely wish to diminish or extinguish the hostility that feeds the desire for war.¹³⁸ Balancing the possibilities, either to prosecute or to grant amnesty, it may be thought that far-reaching amnesties may serve as the most suitable and effective tool for achieving such a reconciliation¹³⁹. Opponents of official investigations have argued that such investigations may do more harm than good¹⁴⁰, because by dwelling on the past, they argue, a deeply divided society will be unable to overcome its divisions and move forward and old hatreds and vengeance will be dredged up and replayed *ad infinitum*, yet the overriding need is to let bygones be bygones and move forward in a spirit of conciliation.¹⁴¹

bb) Peace

Even where amnesty was not politically an absolute necessity, it has been used to ensure lasting peace, this being the main underlying rationale of amnesty clauses in peace treaties.¹⁴² It has long been recognised that lasting peace can only be

¹³⁷ *Ibid.*, 26.

¹³⁸ *Ibid.*, 26.

¹³⁹ Tomuschat (2002), 343.

¹⁴⁰ Ambos (2007), 8.

¹⁴¹ Roth-Arriaza (1995), 8.

¹⁴² O'Shea (2004), 24.

achieved by quelling the need for vengeance and that wars, ended by compromise and forgiveness, may be said to foster peace more effectively than those followed by recounting scores and revenge.¹⁴³ In facilitating transition, it is often expedient to obtain the co-operation of the key figures in the predecessor regime, and amnesty provides an incentive to such role players to co-operate with each other.¹⁴⁴

If perpetrators of international crimes were the only ones to sign a peace treaty, should they really be prevented from doing so by the threat of being prosecuted as soon as caught?¹⁴⁵ Granting amnesty to these perpetrators has two decisive advantages to the new government. Along with the fact that the combating parties can be brought around one table, the party which grants amnesty has the advantage to lay down the conditions for the next steps. In other words, the ball then is in the new government's court. If those conditions involve crushing the dignity of the vanquished by strict prosecution the peace will not last¹⁴⁶, but with amnesty a fresh start under the leadership of the new government is possible. This constellation arguing pro the concept of amnesty appeared so advantageous to the author that this work is prefaced with an introductory statement illustrating this point.

As, in most cases, the individual concerned would in any event be unlikely to re-offend against international norms after the relevant political situation forming the background to the crimes had subsided, it follows that it is this political situation which is to clear first and foremost to prevent future atrocities¹⁴⁷ and there is not necessarily a need for prosecutions of all perpetrators to achieve this goal.

¹⁴³ *Ibid.*, 25.

¹⁴⁴ *Ibid.*, 23, 24.

¹⁴⁵ Thomas F. Schneider, in his speech on „Germany as a State Party to the Rome Statute“ on 30 June 2009 in Berlin, at the Summer School of the LLM Programme “Transnational Criminal Justice and Crime Prevention”.

¹⁴⁶ O’Shea (2004), 25.

¹⁴⁷ *Ibid.*, 81.

Eventually, considering amnesty as a necessary evil to ensure transition to democracy¹⁴⁸, establishing peace by the means of granting an amnesty is all a matter of give and take.

c) Practical Experience Arguments

What speaks for the concept of amnesty in very simple way is the fact that sometimes, after conflicts involving masses of victims and perpetrators, it might be practically impossible to bring all the latter to justice.

The reason for that might be, for example, the limited resources that are available to a state, especially when the state is going through transition or change in government. These limited resources would have to be carefully managed to meet various needs. They might not be adequate to fund protracted and expensive trials, the outcome of which might not even result in a conviction or the establishing the truth. The Magnus Malan trial in South Africa is a case in point.¹⁴⁹ The case of Rwanda after the genocide can serve as another example in this context and one could ask whether the decision of the government to try all alleged persons and now being stuck with full courts with a mass of never-ending cases – only because the country's history of impunity could not endure an amnesty¹⁵⁰ – was right.

Furthermore, evidence may be destroyed or stale¹⁵¹, the witnesses reluctant and especially in most cases of transition from totalitarian or authoritarian regimes, the judiciary was very much part of the old system, implementing the repressive poli-

¹⁴⁸ Susan Opatow, "Psychology of Impunity and Injustice: Implications for Social Reconstruction" in: M. Cherif Bassiouni and Dean C. Alexander (eds.), *Post-Conflict Justice*, (2002), 210; O'Shea (2004), 24.

¹⁴⁹ O'Shea (2004), 100.

¹⁵⁰ *Ibid.*, 37.

¹⁵¹ Roth-Arriaza (1995), 9.

cies and wrapping them in the mantle of the rule of law,¹⁵² thus preserving the old order.¹⁵³

Would it in not be wiser in such cases to allow an amnesty as a formal and defined measure of exception and a realistic solution, rather than to establish a state of factual “quite” impunity?

d) Preliminary Result

As Tomuschat notes perfectly, one must recall that human rights and international criminal responsibility were invented to protect people who are threatened within a domestic context but not to constrain a national community which succeeds on its own initiative to repair the injuries of the past in the own way of self-determination.¹⁵⁴

Respecting all these arguments in favour of amnesty, it is to agree with those who are of the view that amnesties, if they have been responsibly granted by a people wishing to make a fresh start after having lived through a period of national cataclysm, should also be respected by the international law and the international community.¹⁵⁵ Thus, in special situations amnesties combined with other ways and means of confronting the past should be admissible to restore domestic peace and make national reconciliation possible.¹⁵⁶

¹⁵² Neil Kritz, “The Dilemmas of Transitional Justice” in: Neil Kritz (ed.) *Transitional Justice: How Emerging Democracies Recon with Former Regimes*, (1995) 1, xxv et seq.

¹⁵³ O’Shea (2004), 32.

¹⁵⁴ Tomuschat (2002), 347.

¹⁵⁵ John Dugard, “Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?”, *Leiden Journal of International Law*, (1999) 12, 1009.

¹⁵⁶ Werle (2005), para. 190.

V. Which Kind of Amnesty is Acceptable?

Ultimately, let us move to the considerations on which amnesties are acceptable and under which circumstances. While the duty to prosecute would almost logically lead to a prohibition of amnesties the broad concept of justice applicable in transitional justice calls for a more sophisticated approach.¹⁵⁷

First, one has to distinguish between the so-called “strict approach” and the “flexible approach”¹⁵⁸ characterising the bifurcated approach under which blanket amnesties are generally unacceptable and conditional amnesties acceptable in principle.

1) Blanket, General and Self Protecting Amnesties

As regards only blanket, general and self-protecting amnesties, these are generally unacceptable (strict approach). International law unequivocally prohibits this kind of amnesties¹⁵⁹, and the vast body of legal literature overwhelmingly confirms this position¹⁶⁰.

The problem is that their primary goal is to conceal completely past crimes by prohibiting any investigation¹⁶¹, and this goal backs up none of the positive aims of the concept of amnesty, namely, peace or reconciliation.

The sovereignty argument of the French *Conseil Constitutionnelle*¹⁶², that the effective exercise of sovereignty entails the right to take a sovereign decision on am-

¹⁵⁷ Ambos (2007), 1.

¹⁵⁸ *Ibid.*, 2.

¹⁵⁹ *Ibid.*, 39.

¹⁶⁰ M. Cherif Bassiouni, *International Criminal Law*, Ardsley: Transnational Publishers, 1999, 10 et seq., 22; Christina Möller, *Völkerstrafrecht und IStGH – Kriminologische, Straftheoretische und Rechtspolitische Aspekte*, Münster: Lit Verlag, 2003, 614 et seq., 619. Richard Goldstone and Nicole Fritz, “In the Interests of Justice and Independent Referral: The ICC Prosecutor’s Unprecedented Powers”, *Leiden Journal of International Law*, (2000) 13, 663.

¹⁶¹ Ambos (2007), 2.

nesty, cannot be convincing, since it does not respect international obligations of the state and the international nature of crimes under international law.

Blanket, general and self-protecting amnesties lead to the defenselessness of victims and perpetuate impunity; they preclude the identification of the perpetrators by obstructing the investigation and access to justice; they prevent the victims and their relatives from knowing the truth and receiving the appropriate reparation¹⁶³; they are inconsistent with general principles of law forbidding self-judging¹⁶⁴; and therefore, besides the positive effect that they permit a military regime to abandon its grip over the state, they are to be regarded with a high degree of mistrust.¹⁶⁵

Examples of such unacceptable amnesties can be found in Chile (1978), El Salvador (1993), Peru (1995) and Sierra Leone (1999), where the Special Court for Sierra Leone in the famous case *Kallon and Kamara* has considered the amnesty as without effect since it is, *inter alia*, “contrary to the direction in which customary international law is developing and (...) to the obligations in certain treaties and conventions the purpose of which is to protect humanity”¹⁶⁶.

2) Conditional Amnesties

On the other hand, conditional amnesties are, in principle, acceptable (flexible approach), since they do not automatically exempt perpetrators from punishment but make the exemption conditional on certain acts or concessions by the benefiting persons.¹⁶⁷ They incorporate the idea that an amnesty alone does not satisfy

¹⁶² *Décision 98-408*, 22 January 1999, Journal officiel de la République Française du 24 Janvier 1999, 1317, at 1320.

¹⁶³ *Barrios Altos vs. Peru Case* (14 March 2001) Judgment, C Series No. 75 (IACHR) para. 48.

¹⁶⁴ Roth-Arriaza (1995), 58.

¹⁶⁵ Tomuschat (2002), 345.

¹⁶⁶ *Prosecutor v. Kallon and Kamara* (13 March 2004) App. Decision, SCSL-2004-15AR72(E) and CSCSL-2004 – 16 AR72(E) (SCSL) para. 84 and para. 71, 73, 88.

¹⁶⁷ *Ambos* (2007), 2.

the demands of true reconciliation and therefore must be accompanied by alternative mechanisms allowing for the full and public establishment of the truth and the acknowledgement of those responsible for their criminal acts.¹⁶⁸ This leads to the crucial matter of what conditions should be postulated when it comes to acceptable conditional amnesties.

The first and minimum condition is the armed group's unreserved promise to lay down their arms, thus facilitating the end of hostilities.¹⁶⁹ In addition, restitution, reparation/compensation for and rehabilitation of the victims, as well as non-repetition assurances are required. Lustration laws are other important transitional justice tools. In special cases other traditional justice mechanisms, for example, "Gacaca" courts in Rwanda can be applied. Most probably, a combined application of all the transitional justice tools is appropriate, given the fact that the measures are complementary, each playing a distinctly important role.¹⁷⁰

The most important condition is a full disclosure of the facts and acknowledgement of responsibility.¹⁷¹ This condition is best dealt with by the establishment of a so-called Truth and Reconciliation Commission (TRC).

A TRC is defined and described as "an official, temporary, non-judicial fact finding body that investigates a pattern of abuses of human rights or humanitarian law committed over a number of years. This body takes a victim-centred approach and concludes its work with a final report of findings of facts and recommendations.

(...) Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster ac-

¹⁶⁸ Yasmin Sooka, "Dealing with the Past and Transitional Justice: Building Peace through Accountability", *International Review of the Red Cross*, (2006) 88, 318.

¹⁶⁹ Ambos (2007), 47.

¹⁷⁰ *Ibid.*, 33.

¹⁷¹ *Ibid.*, 47.

countability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past”¹⁷². The broader the participation in a TRC and the more democratic and transparent this process has been, the more legitimacy will the amnesty enjoy.¹⁷³

Of course, TRCs depend on the main political actors and their willingness and co-operation.¹⁷⁴ If the entire society co-operates they can be an effective means of establishing a “global truth”, which goes beyond the mere judicial truth thereby contributing to national reconciliation and constituting an integral part of a society’s restoration process.¹⁷⁵

It is important that TRCs are separate institutions, created formally by law, rather than established through executive policy.¹⁷⁶ Additionally, the commissioners who are appointed should be “perceived as above politics”¹⁷⁷, so that they are not viewed as biased. Finally, the mandate of TRCs should be broad enough to provide a complete picture of the past.¹⁷⁸

¹⁷² Report Secretary General transitional justice, para. 50.

¹⁷³ Ambos (2007), 47.

¹⁷⁴ Paul Seils, “The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commission of El Salvador and Guatemala and their Effect in Achieving Post-Conflict Justice” in: M. Cherif Bassiouni and Dean C. Alexander (eds.), *Post-Conflict Justice*, (2002), 793.

¹⁷⁵ Alex Boraine, *A Country Unmasked, Inside South Africa’s Truth and Reconciliation Commission*, Oxford: Oxford University Press, 2001, 295 et seq.; Garth Meintjes, “Post-Conflict Justice Issues: Restoring Order and Justice. Report of the Rapporteur” in: Christopher Joyner (ed.), *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Sirakusa Conference 17-21 September 1998*, (1998), 463.

¹⁷⁶ Louise Mallinder, “Can Amnesties and Transitional Justice be Reconciled?”, *The International Journal of Transitional Justice*, (2007) 1, 225.

¹⁷⁷ Jeremy Sarkin, “The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda”, *Human Rights Quarterly*, (1999) 21 (3), 805 et seq.

¹⁷⁸ Mallinder (2007), 225.

In this sense, a TRC may claim international recognition, especially vis-à-vis the international criminal justice system.

The counter-example to the Rwandan case and the most famous example of a conditional amnesty process is found in the law that established South Africa's Truth and Reconciliation Commission (TRC)¹⁷⁹. According to this Act an individual amnesty could be granted upon application to a specific Amnesty Committee within a framework of a trial-like procedure, exposing the applicant to public scrutiny.¹⁸⁰ The conditions were that the applicant fully discloses all committed acts and that these acts could be considered political offences. The amnesty provisions have been approved by the South African Constitutional Court¹⁸¹, arguing that the chosen approach was necessary in order to cross the "historic bridge" on the way to national reconciliation and unity. This decision was controversial but it can be considered as the most important decision of a court on amnesty in transitional phases and the South African model is recognized as a relatively successful one¹⁸².

The reasons why such conditional amnesties have to be respected are that they can be an expression of a nation's self-determination and lead to peace and reconciliation in situations where prosecutions would not.

In summary, acceptable amnesties should have democratic legitimacy ("expression of a free will"¹⁸³). They should promote a genuine desire to promote peace

¹⁷⁹ "Promotion of National Unity and Reconciliation Act 34 of 1995"

¹⁸⁰ Ambos (2007), 48.

¹⁸¹ *AZAPO et al. vs. the President et al.* (25 July 1996) Case CCT 17/96 (Constitutional Court of South Africa).

¹⁸² Ambos (2007), 26; Tomuschat (2002), 347.

¹⁸³ O'Shea (2004), 263.

and reconciliation, should be limited in scope and conditional, and they must be accompanied by reparations.¹⁸⁴

Concerning the latter point, it is submitted that it should be common sense that an amnesty from civil liability should never be acceptable, as civil actions are focused on repairing the damage to the aggrieved party rather than inflicting suffering on the person who caused the loss, meaning that the objective is the compensation of the victim which always should be imperative to eliminate as fully as possible the victim's past as well as future material damage.¹⁸⁵ Maybe this is the point where, in my opinion, the decision of the South African Constitutional Court in the *AZAPO* case can be criticized most.

Respecting these arguments is only possible if the justice element in transitional justice is understood broadly¹⁸⁶ as an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. This implies that one has to have regard for the rights of the accused, for the interests of victims, and the well-being of society at large,¹⁸⁷ the aim being to restore or even reconstruct such a society (in the sense of "creative justice").¹⁸⁸

VI. Amnesty and the International Criminal Court

The increasing importance of the ICC, which represents a negotiated expression of the views of the international community on the priorities for global justice,¹⁸⁹

¹⁸⁴ Mallinder (2007), 227, 228.

¹⁸⁵ O'Shea (2004), 87.

¹⁸⁶ Mallinder (2007), 220.

¹⁸⁷ Report Secretary General transitional justice, para. 7.

¹⁸⁸ Desmond Tutu, "Reflections on Moral Accountability", *International Journal of Transitional Justice*, (2001) 1, p. 7.

¹⁸⁹ O'Shea (2004), 316.

makes it inevitable to examine its law with regard to peace processes and amnesties.

The amnesty issue, as well as the issue of alternative accountability measures,¹⁹⁰ was not specifically addressed in the ICC Statute, but was left to the Court. The ICC Statute has a limiting effect on national amnesties in principle insofar as the States Parties are obliged to co-operate with the Court, for instance, by surrendering a person who is protected by a national unconditional amnesty. This follows from the international law principle that a state may not rely on its municipal law as an excuse for not complying with its international obligation.¹⁹¹ Consequently, domestic unconditional amnesties cannot bar the ICC's jurisdiction.

However, the ICC Statute, as a flexible instrument, and the ICC as a flexible accountability mechanism,¹⁹² do have possibilities to deal and even respect conditional amnesties. This follows, on the one hand, from the ICC prosecutor's relatively broad discretion with regard to the preliminary investigation and the taking of certain investigative measures and, on the other, from the provisions in Articles 16, 17 and 53 of the ICC Statute, which can be interpreted as an indirect recognition of measures refraining from criminal prosecution for the sake of a peaceful transition or the achievement of peace.¹⁹³ Indeed, it appears inconceivable that the ICC pretends to substitute a judgment of a whole nation that seeks peace and justice by other means than strict prosecution¹⁹⁴.

¹⁹⁰ M. Cherif Bassiouni, *The Legislative History of the International Criminal Court, Vol. 1*, New York: Transnational Publishers, 2005, 133 et seq.

¹⁹¹ O'Shea (2004), 119.

¹⁹² Daniel D. Ntanda Nsereko, "The ICC: Jurisdictional and Related Issues", *Criminal Law Forum*, (1999) 10, 120.

¹⁹³ Ambos (2007), 54 et seq.

¹⁹⁴ Goldstone and Fritz (2000), 667.

Article 17, for a number of authors the “most delicate” provision of the ICC Statute in the context of transitional justice¹⁹⁵, organizes the relationship between the ICC and domestic jurisdictions, trying to find an adequate balance between the states’ sovereign exercise of criminal jurisdiction and the international community’s interest in preventing impunity for international core crimes. It follows from this provision that the ICC only acts when States are either unwilling to prosecute or are unable to do so.¹⁹⁶ When it comes to amnesty the applicable provisions are subparas. (a) and (b) of Art. 17 (1). According to these provisions, if a state “in its sovereign wisdom”¹⁹⁷ decides to grant amnesty and not to investigate and/or prosecute, Art. 17 (1) (b) applies. Three conditions must be fulfilled to make the ICC’s intervention inadmissible: the respective state must have “investigated” the case; it must have taken the decision “not to prosecute”; and this decision must not result from unwillingness and inability.¹⁹⁸

A conditional amnesty coupled with the creation of a TRC, and having the purpose to achieve peace and reconciliation can fulfill these requirements. Just because a state grants an amnesty does not mean that the state is unwilling to prosecute, because the amnesty can also be granted in “good faith”¹⁹⁹. This is especially so when we analyse the term “genuinely” (Article 17 (1) (a), (b)), which was inserted to give the unwillingness/inability test a more concrete and objective meaning.²⁰⁰ It is taken to imply good faith and seriousness on the part of the state con-

¹⁹⁵ Carsten Stahn, “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court”, *Journal of International Criminal Justice*, (2005) 3, 719.

¹⁹⁶ Darryl Robinson, “Comments on Chapter 4 of Claudia Cárdenas Aravena” in: Jan K. Kleffner and Gerben Kor (eds.), *Complimentary Views on Complementarity*, (2006), 142.

¹⁹⁷ Nsereko (1999), 119.

¹⁹⁸ Stahn (2005), 710.

¹⁹⁹ Anja Seibert-Fohr, “The Relevance of the Rome Statute of the ICC for Amnesties and Truth Commissions”, *Max Planck Year Book of United Nations Law*, (2003) 7, 570.

²⁰⁰ John T. Holmes, “The Principle of Complementarity” in: Lee, Roy S. (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, (1999), 50.

cerned with regard to investigation and prosecution. Therefore, it would be difficult to argue that a state which opts for an effective TRC with the ultimate goal of peace in mind is “genuinely” unwilling to investigate and/or prosecute. In the end, the admissibility of the case before the ICC depends on the specific content and conditions of the amnesty²⁰¹ and in sum, one may conclude that a conditional amnesty with a TRC results in inadmissibility, but only if an effective TRC grants an amnesty on an individual basis under certain strict conditions as listed above.²⁰²

Article 16 of the ICC Statute allows the UN Security Council to hold an investigation or prosecution on the basis of a resolution under Chapter VII of the UN Charter. For example, this provision kicks in to prevent a situation identified as a threat to or breach of the peace (Articles 39 and 40 UN Charter). Thus, the Council is able, by such a decision, to even lend international validity to a national peace process with an amnesty.²⁰³ The weakness of this norm in regard to amnesties is, on the one hand, that such a decision of the UN Security Council can only be valid for a limited period of time, and on the other, that the International Criminal Court, being an independent international institution and deciding autonomously about its jurisdiction²⁰⁴, has the power to indirectly review the Security Council’s decision.²⁰⁵

Finally, the most explicit gateway of the ICC Statute for the recognition of alternative processes of national reconciliation, including the granting of an amnesty, is the interest of justice clause in Article 53 (1) (c) and (2) (c).²⁰⁶ By this “politi-

²⁰¹ Ambos (2007), 64.

²⁰² Ibid., 65.

²⁰³ Seibert-Fohr (2003), 583.

²⁰⁴ Ambos (2007), 68: speaking of a *Kompetenz-Kompetenz* of the ICC in relation to the UN Security Council.

²⁰⁵ William Schabas, *An Introduction to the International Criminal Court 2nd ed.*, Cambridge: Cambridge University Press, 2004, 84; against this view, for example, Seibert-Fohr (2003), 584.

²⁰⁶ Dugard (1999), 1014.

cal” provision the drafters of the ICC Statute wanted to give the ICC’s prosecutor an additional instrument to exercise a discretion, going beyond the rather “technical”²⁰⁷ Article 17. There is no other clause in the ICC Statute allowing so explicitly for policy considerations²⁰⁸. The notion of “justice” in Article 53 ICC Statute is a characteristically broad one,²⁰⁹ and allows for the consideration of complex transitional justice problems.

These three provisions show that, although the ICC is primarily a criminal court concerned with individual responsibility and not with issues of peace and security,²¹⁰ it must be, and is, “part of the transitional justice project”²¹¹.

VII. Selective Prosecution Approach as a Proposal

As elements of necessity push transitional societies into adopting quickly-devised mechanisms for facilitating democratic transition and national peace,²¹² in my opinion, in countries undergoing transition it would be best to combine a conditional amnesty for lower-level offenders with selective prosecutions of the “most responsible”²¹³. This approach has the benefit that efforts to establish peace can be reconciled with those efforts to achieve justice, just as this is the main goal of transitional justice²¹⁴. Those who perpetrated the worst crimes must be prosecuted, while those who cannot be qualified as “main perpetrators” escape prosecution

²⁰⁷ Ambos (2007), 69.

²⁰⁸ Mahnush H. Arsanjani, “The International Criminal Court and National Amnesty Laws 1999” in: *Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law*, (1999), 67.

²⁰⁹ Ambos (2007), 71.

²¹⁰ *Ibid.*, 55.

²¹¹ Luis Moreno-Ocampo, “Transitional Justice in Ongoing Conflicts”, *International Journal of Transitional Justice*, (2007) 1, 8.

²¹² O’Shea (2004), 294.

²¹³ With the same proposal, for example, Mallinder (2007), 214, 223.

²¹⁴ Ambos (2007), 1.

and can take part in building the future instead. If the validity of international criminal law depends on the affirmation of its authority through punishment²¹⁵ that does not necessarily mean that it is required to prosecute every perpetrator, as this would not be a realistic obligation.²¹⁶ It can suffice that only the most responsible perpetrators are brought to justice.

Consequently, the most important question in this context would be how to distinguish main perpetrators from those who should not be regarded as such.

There are various possibilities that come to mind. For example, one could differentiate according to the victims' or public demand; the gravity of the committed crimes; or to the varying levels or roles of the perpetrators.

As regards the first differentiator, there is the problem that recent experience shows that the victims' demands for accountability and justice often, if not always, conflict with the mostly official efforts towards peace and reconciliation.²¹⁷ Empirical data show that the overwhelming majority of the victims demand accountability in the form of criminal prosecutions, trials and punishment,²¹⁸ and that they reject amnesty²¹⁹. But as transitional justice aims primarily to reconstruct the society as a whole and to redress the individual victim only secondarily, this cannot be the crucial differentiator to distinguish between the various perpetrators.

With regard to the second differentiator, one faces related problems. The core international crimes are all of such gravity that it is hardly possible to constitute a

²¹⁵ O'Shea (2004), 80.

²¹⁶ Mallinder (2007), 214.

²¹⁷ Ambos (2007), 8.

²¹⁸ Ernesto Kitza and Corene Rathgeber and Holger Rohne, *Victims of War. An Empirical Study on War Victimization and Victims' Attitudes towards Addressing Atrocities*, Hamburg: Hamburger Edition Online, 2006, 97.

²¹⁹ Kitza and Rathgeber and Rohne (2006), 112, 114, 121.

hierarchy.²²⁰ The ICC Statute's clear commitment to the fight against impunity is considered an expression of *opinio iuris* that amnesties for the ICC crimes are mostly prohibited²²¹ and in most cases amnesty for war crimes, crimes against humanity, and genocide has been excluded.²²²

However, the best method to distinguish between different perpetrators is to consider their varying levels of culpability and their status and role within the crime. The category of the "most responsible" is – having regard to hierarchical structures - considered to include the planners, leader and persons who committed the most serious crimes and who could also comprise the political, administrative and military leadership.²²³ Within this framework one could furthermore differentiate between principals and accessories, as well as the attempt and the completion of the crime.

Although, at first glance, it could be unsatisfying for the victims seeing the "normal soldier" who "pulled the trigger" being granted amnesty even for the core international crimes, by proper public education aimed at making amnesty understandable²²⁴, governments could explain the chosen approach and convince their citizenry that for their country, finding itself in a particular situation, the future is more important than the past. Such targeted prosecutions would best reconcile peace and justice, and would also generally pass the complementarity test of the ICC Statute, therefore rendering the ICC's intervention inadmissible.²²⁵

²²⁰ Claudia Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof*, Berlin: Berliner Wissenschafts-Verlag, 2005, 93.

²²¹ Helmut Gropengießer and Jörg Meißner, "Amnesties and Rome Statute of the International Criminal Court", *International Criminal Law Review*, (2005) 5, 300.

²²² Juan E. Méndez, "National Reconciliation, Transitional Justice and the International Criminal Court", *Ethics and International Affairs*, (2001) 15, 36.

²²³ Stahn (2005), 707.

²²⁴ Roth-Arriaza (1995), 20.

²²⁵ Robinson (2003), 500 et seq.

VIII. Conclusion

In conclusion, the trend in international (criminal) law is moving in the direction of fighting against impunity rigorously. The establishment of the International Criminal Court symbolizes this development. Nevertheless, the same ICC will, one day, be compelled to address the question of whether or not to accept national grants of amnesty as a defence to prosecution for international crimes.

Notwithstanding the enormous practical importance of exemptions from criminal prosecution within the framework of transitional justice, the current practice and debate suffers from a lack of clear rules and criteria that could help to reconcile peace and justice in situations of transition.²²⁶ This has to be changed.

Although not much room exists in international law for amnesties, they stay a useful instrument for extreme and special situations, especially with regard to transitional phases. Immanuel Kant said: “The very concept of peace entails the idea of amnesty”²²⁷, but if used at all, any exception to punishment must be carefully and narrowly drawn.²²⁸

From the discussion above, it follows that neither the restorative effect of amnesty and forgiveness should be overestimated, nor the notion of reconciling power of (criminal) justice underestimated.²²⁹ In my opinion, it is best to combine these two possible ways to deal with the past. By this is meant adopting the “selective prosecution approach” as proposed in this study.

²²⁶ Ambos (2007), 13.

²²⁷ Immanuel Kant, *Metaphysik der Sitten, Rechtlehre*, 1797, § 58.

²²⁸ Roth-Arriaza (1995), 22.

²²⁹ Ambos (2007), 12.

But finally, as every transition is different, requiring a consideration of the circumstances in each concrete situation,²³⁰ the tension between peace and justice will stay, and the closer a state's situation approaches this tension, the more the government will be placed on the horns of a dilemma in deciding which way to go.

10 357 words



²³⁰ Susan Kemp, "The Inter-Relationship between the Guatemalan Commission for Historical Clarification and the Search for Justice in National Courts", *Criminal Law Forum*, (2004) 15, 69.

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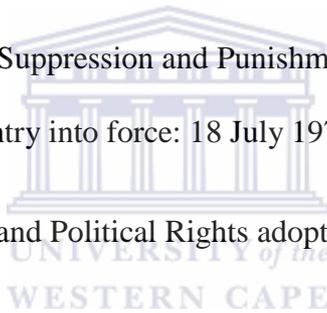
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 - (Second) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
 - (Third) Geneva Convention relative to the Treatment of Prisoners of War.
 - (Forth) Geneva Convention relative to the Protection of Civilian Persons in Time of War.



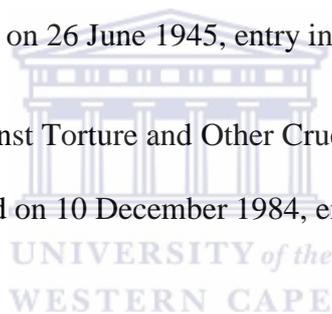
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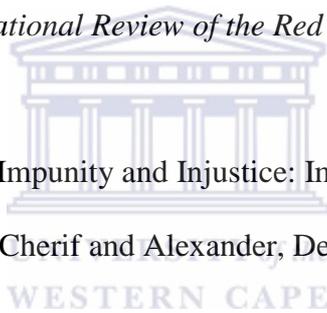
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List of Abbreviations

ICC – International Criminal Court

ICC Statute – Rome Statute of the International Criminal Court

TRC – Truth and Reconciliation Commission

UN – United Nations

UN Charter – Charter of the United Nations

