

“A Kind of Justice?”

-Amnesty for Human Rights Violations



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Abbreviations

TJ	Transitional Justice
UN	United Nations
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ECOSOC	Economic and Social Council of the United Nations
UDHR	Universal Declarations of Human Rights
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of All Forms of Racial Discrimination
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
IACHR	Inter-American Commission on Human Rights

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1 INTRODUCTION

1.1 Thesis Statement and Research Questions

The aim of this thesis is to explore the justification of amnesty for human rights violations, and further to discuss whether these arguments are justifiable from a transitional justice perspective. I will use these discussions to explore Law 975, as an example of a law where amnesty is included.

1.1.1 Thesis Statement

It is argued that amnesties adopted in a transitional context are usually considered a direct hinder to transitional justice, especially to criminal trials, but also to truth and compensation mechanisms.¹ Yet the paradox is that an amnesty may also form an integrated element of transitional justice mechanism, for example by incorporation in a truth-commissions mandate.² The purpose of this study is to explore this paradox by analyzing the arguments for and against amnesties, and the relationship between amnesty and transitional justice. Thus, the research questions are:

1.1.2 Research Questions

- a) What are the arguments for and against amnesty?
- b) Do transitional justice perspectives allow for amnesty for past human rights violations to be justified?
- c) Is the inclusion of amnesty in Colombia's 'Justice and Peace Law' (Law 975) justifiable from a Transitional Justice perspective?

¹ Freeman (2009): p.19.

² *Ibid.* p.19.

1.2 Justification and Objectives of the Study

*The idea that the normative nature of human rights standards may complicate the practical demands of peacemaking has been a recurrent theme in discussions on the relationship between human rights and efforts to address violent conflict.*³

This statement by Michelle Parlevliet describes a phenomenon that is widely debated around the world when political transitions are discussed. When a country goes from a state of conflict to a state of non-conflict, the question arises of how much justice it is necessary to sacrifice in order to achieve peace. Should abusers of former human rights violations gain amnesty in order to end the conflict? International Center for Transitional Justice expresses in a press release that “countries that undermine justice in the name of stability, risk creating greater instability”.⁴ From this perspective, could there be peace without securing justice? Louise Mallinder argues that amnesty from criminal prosecutions may impact positively upon reconciliation provided that they are accompanied by other transitional justice mechanisms and institutional reforms.⁵ Others again hold that the granting of an amnesty from criminal justice could be seen as the committing of an injustice in order to achieve desirable consequences.⁶ Can the committing of an unjust act to the victims of a conflict be justified if it prevents future injustices? Or, from the other point of view; does the violation of a right give us the right to violate that person’s rights by punishing him or her? These questions together with opposing views on the issue led me to the research questions listed above. I hope the thesis will contribute with some interesting views that are relevant to the development of this discussion. I will now present three arguments for why this study is interesting and relevant:

1.2.1 Amnesty in the debate of ‘Peace vs. Justice’

The first objective of this study is to explore the aspect of amnesty for human rights violations. The debate of ‘peace vs. justice’ has been widely discussed for many years⁷ and

³ Parlevliet (2009): p.2

⁴ International Center for Transitional Justice, press release (2006).

⁵ Mallinder (2008): p.18.

⁶ Greenawalt (2000): p.191.

⁷ Sriram (2004), Andreassen and Skaar (1998), Rangel Suárez (2009).

two conflicting views have emerged; that there is no peace without justice and that justice is necessary to achieve peace; and, on the other hand, that it is necessary to sacrifice some justice to achieve the overall goal of peace. Recent literature on the topic shows more nuanced and less divided approaches, where one starts to see the development of theories that contains aspects from both ‘sides’ of the debate. The former Secretary-General of the UN, Kofi Annan, states:

*We should know that there cannot be real peace without justice, yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive. But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.*⁸

This statement exemplifies the ongoing debate of ‘peace’ and ‘justice’ in the aftermath of widespread atrocities. One aspect that is still controversial in the peace vs. justice divide is the question of amnesty; should perpetrators for former human rights violations be put on trial or could amnesty laws better contribute to peace and reconciliation? There are two main reasons why I have chosen to focus on the aspect of amnesty in the debate of ‘peace vs. justice’:

I. The Controversial Nature of Amnesty

Amnesty is, as Ronald Slye puts it; “one of the most controversial mechanisms contemporary societies have used to address violent pasts”.⁹ We are in a stage of the anti-impunity struggle where the amnesty bar is higher than it has even been.¹⁰ Still, states are continuing to rely on amnesties when confronted by conflict despite the growth of the human rights movement and international criminal justice.¹¹ Circumstances leading to the invocation of amnesties still abound and will continue to do so as long as there are rebels negotiating the laying down of arms or repressive leaders negotiating the terms of their

⁸ UN Doc. S/PV.4833 (2003): p.3.

⁹ Slye (2000): p.170.

¹⁰ Freeman (2009): p.3.

¹¹ Mallinder (2008): p.29.

departure.¹² As Freeman points out; because of this controversy it is difficult to defend amnesty, especially after World War II when the human rights regime was established.¹³ However, my opinion is that even if the subject is controversial, and maybe even *because* of that, it is important to discuss.

II. The Oversimplification of Amnesty

The subject of amnesty has too often been distorted through oversimplification,¹⁴ and tends to be seen as a tool for gaining impunity for former human rights crimes, and a practice that violates the rights of the victims.

The debate of whether to grant blanket amnesty or to secure accountability through criminal prosecutions are the two extremes which by some is understood as a discussion of *impunity vs. criminal accountability*, rather than taking into account the diversity of amnesty laws and the variation of accountability measures. One understanding is that “amnesties represent Faustian pacts with the ‘devil’ in the forms of torturers and murderers, where rights such as truth and justice are scarified for political stability”.¹⁵ This is an example of the supposedly contradictory goals of peace and justice, and between amnesty and accountability.

However, there are many grey zones between the two extremes and the views are many with regards to the legitimacy of amnesty laws for human rights violations. This study will argue for the need for a more nuanced account of amnesties, combined with transitional justice mechanisms. As Freeman states; “Amnesty is an issue that will not go away. The question is what one can do about it to limit the concessions to impunity”.¹⁶

1.2.2 The Use of the Transitional Justice Perspective

The second objective of this study is to discuss the aspect of amnesty for human rights violations from a transitional justice perspective. As noted in the former section, amnesty

¹² Freeman (2009) :p.4

¹³ *Ibid.*

¹⁴ *Ibid.* p.12.

¹⁵ Mallinder (2008): p.1-2.

¹⁶ Freeman (2009): p.31.

often becomes a part of an ‘either – or’ discussion; *either* impunity through amnesty, *or* accountability through criminal prosecutions. Two views that represent this divide on how to confront crimes have emerged; *Retributive justice* which emphasizes criminal prosecutions; and *Restorative justice* which emphasizes more alternative accountability measures. Yet, the field of transitional justice has highlighted that there is actually a broad spectrum of choices available to respond to past human rights violations.¹⁷

It is possible to say that transitional justice contains elements of both Retributive and Restorative justice. These views, especially the Restorative model, have traditionally been used in discussions related to less serious crimes, but in recent years they have gained more attention also with regards to human rights violations. Transitional justice, however, specifically deals with how to confront human rights violations. Interpreting amnesty from a transitional justice perspective would therefore give a comprehensive approach to a situation where serious human rights violations have occurred.

Another interesting aspect of using a transitional justice approach is that it is linked to traditional *conflict resolution* approaches. In some literature the term conflict resolution and the term Restorative justice are being used without distinction,¹⁸ and Restorative justice has from the 1990s become a significant and recognized tool of alternative conflict resolution.¹⁹ Containing aspects of Restorative justice, transitional justice also embraces various conflict resolution measures. But while conflict resolution traditionally has dealt with how to *get out* of a conflict, transitional justice is aimed to deal with the *aftermath* of a conflict. These dimensions are interesting for the purpose of this study as it opens up for a broader understanding of the potential of the transitional justice approach, the potential to deal with both *past* and *present* human rights violations.

However, as can be seen from the conflicts in the world today, it is not obvious when a country goes from a stage of conflict to a stage of non-conflict. This study argues that one not only has to look beyond the justice and peace divide, as current literature on the issue

¹⁷ Freeman (2009): p.6.

¹⁸ Ex. Fattah (2004).

¹⁹ Barton (2003): p.1.

stresses, but also beyond the conflict/non-conflict divide. In this way, the ideas and perspectives from transitional justice approaches can be used not only to deal with past human rights violations, but also to reach a more effectively way out of a conflict.

1.2.3 The Colombian Case as an Example

The third objective of this study is to analyze the aspect of amnesty for human rights violations by looking into a specific example; Law 975 of Colombia. The Colombian case is interesting when discussing the views on amnesty from a transitional justice perspective for two reasons. The first reason is connected with the argument already mentioned about transitional justice mechanisms usually dealing with *past* human rights violations. Colombia has started its transitional justice process through Law 975, but is still in a state of conflict. As Laplante states: ‘Colombia chose transitional justice mechanisms *pre-post-conflict*’.²⁰ This makes the Colombian case particularly relevant, as we are forced to rethink the concept of transitional justice as it in this case is used not only after conflicts, but also as a tool to get out of a conflict.

Secondly, the main tool to deal with transitional justice in Colombia is the ‘Justice and Peace Law’ (hereinafter Law 975). The law deals with both the victims of the conflict and the victimizers (members of illegal armed groups) in the same legal instrument. This controversial aspect of the law has been criticized nationally and internationally and by victims- and human rights organizations, as it is seen as an instrument that guarantees impunity for the former armed groups, rather than a law that secures justice. This study aims to give an analysis of the aspect of amnesty in Law 975 in order to discuss whether it can be justified from a transitional justice perspective.

1.3 Methodology

This thesis is multidisciplinary, and mainly combines the disciplines social science and law. My background is within social science, thus a method within this discipline will be

²⁰ Laplante and Theidon (2006): P.51.

used. Philosophical and pedagogic reasoning will also be used in discussing the legitimacy and justification of amnesty. I will use existing literature on transitional justice and amnesty, and in the fifth chapter, Law 975 of Colombia.

1.3.1 Structure of the Thesis

This study is organized in five chapters, with this introduction as the first chapter. In the second chapter the theory and background for the further study will be laid, addressing amnesty and accountability mechanisms, the transitional justice approach, and the place of amnesty in the context of the UN. The third chapter deals with arguments *against* the introduction of amnesty laws, addressing arguments of state obligations, deterrence, promote the respect for the rule of law, victims' rights, and the creation of a human rights culture and a lasting peace. Chapter four deals with the arguments *for* of amnesty laws, and addresses the arguments of practical obstacles to accountability, amnesty as necessary evil, stability and public security, peace, reconciliation, the focus on the victim, and the effect of criminal prosecutions. In chapter five these arguments, and the transitional justice perspectives on the matter, will be explored through an analysis of the Colombian case.

1.3.2 Sources

The sources used in this study will mainly consist of existing literature on the subject of amnesty. The book 'Amnesty, Human Rights and Political Transitions' by Louise Mallinder gives a comprehensive overview of the content and scope of amnesty. I will use this book as primary source when presenting the framework of amnesty laws. Other authors such as Charles K. B. Barton, M. Cherif Bassiouni, Mark Freeman, Kent Greenawalt, and Ronald C. Slye have made useful contributions to the debate of amnesty, and will also be important sources of reference in this study. In addition will documents provided by the UN be referred to.

1.3.3 Scope and Limitations of the Study

All political transitions are unique and it is not possible to predict how an amnesty law will affect one certain society. Therefore, one can argue that it is not possible to justify or condemn amnesty as such without taking into account the specific conditions. Still, I will

argue, a discussion and analysis regarding the justification of amnesty laws in general is crucial in order to be able to explore the legitimacy of a specific amnesty law in a specific country. This study does not include in-depth studies of the Colombian context, and it could be argued that by leaving out the historical and political context, one would not be able to present an accurate picture. However, the aim of chapter 5 is not to explore the aspect of amnesty *within* the Colombian context, but rather to explore the actual *text law* as such.

Law 975 was criticized by the Constitutional Court in Colombia, but a final official version incorporating the critique has not yet been made. Therefore, I will in this study use the current public version of Law 975. This could be a limitation of the study as some aspects of the law might not be considered. However, the aspect of amnesty in the law remains in both versions, so this would not have a major effect.

1.4 Clarifications

A clarification of terms is necessary in this study. Amnesty is often used along with *impunity*. For the purpose of this study it is important to stress that the meaning of these words are not the same, although one can stress that an amnesty in practice gives impunity. Amnesty is the granting of impunity in a legal sense, whilst impunity is a practice that is unlawful. The definitional element of an amnesty is that it is legal.²¹ This study will not examine the full range of amnesty laws, but concentrate on the amnesty laws that are introduced as a response to human rights violations. Mark Freeman refers to Professor Ruti Teitel who names such amnesties ‘transitional amnesties’.²² This expression well describes the main theme of this study.

²¹ Freeman (2009): p.17.

²² *Ibid.* p.17.

2 BACKGROUND AND THEORY

In this section I will give an introduction to the content, scope and variety within amnesty laws, the transitional justice approach, and amnesty in the context of the UN. The theories and models presented in this chapter will be used to explore amnesty in chapter three, four and five.

2.1 Amnesty and Accountability Mechanisms

I earlier stressed the importance of not dividing between criminal prosecutions on the one side and impunity on the other, but rather to acknowledge the variation within both of these poles. Over the years the recognition of the content and scope of both amnesty and accountability mechanisms have evolved and the terms tend to enhance a greater specter of mechanisms. The variety of theories, approaches and mechanisms of both amnesty and accountability is crucial when discussing the legitimacy of amnesty. It is important to note, however, that the mechanisms of amnesty and accountability may in some areas overlap.

2.1.1 Amnesty Laws

The word amnesty comes from the Greek word ‘amnéstia’ and means ‘forgetfulness’ or ‘oblivion’,²³ and are official acts that provide an individual with protection from liability – civil, criminal, or both – for past acts.²⁴ Amnesties are also always exceptional, and apply only to individuals who have not yet been prosecuted and sentenced, and are often distinguished from other forms of impunity due to the political context in which they are introduced.²⁵ Amnesty assumes that a crime has been committed, and are therefore retroactive, applying to acts that were committed before the laws were passed.²⁶ An amnesty’s legitimacy depends on different elements such. This sections aims to address this variation of amnesty laws.

²³ Mallinder (2008): p.4.

²⁴ Slye (2000): p.171.

²⁵ Mallinder (2008): p.4.

²⁶ *ibid.* p.5-6.

I. Content and Scope of Amnesty Laws

One can distinguish between *blanket amnesties* and *conditional amnesties*. Blanket amnesty can be described as amnesties that apply across the board without requiring any application or even an initial inquiry into the facts to determine if they fit the laws scope of application.²⁷ The amnesty in Mozambique in 1992 is an example of a blanket amnesty.²⁸ Conditional amnesties requires applicants to perform tasks such as surrendering weapons, providing information on former comrades, admitting the truth about their actions, or showing remorse in order to benefit from amnesty.²⁹ These conditions can also be individualized, so that applicants may only benefit from an amnesty upon successful compliance with its conditions.³⁰ The peace and reconciliation process in South-Africa is an example of conditional and individual amnesty.

II. Methods of Introducing Amnesties

Methods of introducing amnesty laws can also affect the legitimacy. Four different methods by which formal amnesties can be introduced will be presented here, by using Mallinder's list.³¹ The first method is *exercises of executive discretion* which refers to amnesties that are introduced by presidential decrees or proclamations. They are used to release individuals who have been detained for political or religious beliefs, to reduce armed opposition and initiate peace negotiations, or to protect those who are loyal to the regime. The second alternative is *negotiated peace agreements*, granting amnesty in response to demands from insurgents who require safeguards from prosecution before surrendering their weapons. The amnesty in Sierra Leone, 1999, was adopted as part of a negotiated peace accord.³² The third alternative is *statutes* which can be introduced to ratify provisions of negotiated peace agreements or to respond to demands from civil society or the executive. Lastly, the fourth method is *public consultation* through direct public involvement such as consultation programs, through election campaign promises where

²⁷ Mallinder (2008): p.6.

²⁸ Freeman (2009): p.13.

²⁹ Mallinder (2008): p.5

³⁰ *Ibid.* p.5.

³¹ *Ibid.* p.29-36.

³² Freeman (2009): p.13.

voters have the opportunity to express their views, or amnesties could be voted on in a referendum.

III. Reasons for Granting Amnesty

Although states often have multiple objectives, Mallinder presents six different types of motivation for states to introduce amnesties:³³

- I. Amnesty as a reaction to internal unrest and domestic pressure;
- II. Amnesty as a tool for peace and reconciliation;
- III. Amnesty as a response to international pressure;
- IV. Amnesty as a cultural or religious tradition (in certain countries granting amnesty to individuals on national or religious holidays is a well-established tradition);
- V. Amnesty as reparation (used in many political transitions to repair the harm inflicted upon those who are deemed to be opponents of the state due to their ethnicity, or religious or political view); and
- VI. Amnesty as a shield for state agents (may be introduced when governments wish to reward the military for its role in establishing the government's power or eliminating political threats).

2.1.2 Accountability; Content and Scope

Arguments against amnesty are mainly based on the view that criminal prosecutions are the preferable way to achieve accountability and justice. In this respect "amnesty's controversial relation to transitional justice remains principally because of the negative impact of amnesties on the achievement of the aims of criminal prosecutions".³⁴ However, just as the reasons and methods for introducing amnesty are crucial to its justification, there are also variations within accountability ranging from strict punitive measures to measures that may include some sort of amnesty. Bassiouni differentiates between 7 ways in which accountability may occur:³⁵ international prosecutions, international and national

³³ Mallinder (2008): p.41-68.

³⁴ Freeman (2009): p.19.

³⁵ Bassiouni (2002): p.27-39.

investigatory commissions, truth commissions, national prosecutions, neutral lustration mechanisms, mechanisms for the reparation of victims, and civil remedies.³⁶ In the next two sections I will present two developed theories of how to reach accountability which will be useful in the discussion of the transitional justice perspective on amnesty. What is interesting to note is that Retributive and Restorative justice, in despite of being described as two poles, share some of the same values regarding how to confront crimes.

2.1.2.1 Retributive Justice

Rawls defines Retribution as “the view that punishment is justified on the grounds that wrongdoing merits punishment”.³⁷ Retribution carries out what laws threaten, and what parties to the social contract promise to bear.³⁸ Retributive justice is the purpose of the criminal justice system, and often takes the form of trials or tribunals.³⁹

Retributive theories insist that punishment is justified solely by the offenders’ desert and blameworthiness in committing the offence.⁴⁰ The claim is that punishment – which involves doing to wrongdoers things that we ordinarily think of as violating people’s rights, like incarcerating them against their will– is morally permissible because it is what wrongdoers deserve.⁴¹ Thus, the argument against amnesty laws according to this theory will be that offenders of human rights violations *deserve* punishment. By removing the possibility of punishment, amnesties are seen as preventing the retributions that a society needs to correct the social imbalance created by the crime.⁴²

The use of the word *punishment* is confusing in this regard. As for accountability, the word punishment is often linked to criminal prosecutions. However, there is diversity also within the concept of punishment, and to reject criminal prosecutions do not necessarily mean to reject all forms of punishment. One critique to this assumption of prosecutions being the

³⁶ Civil remedies is the development of the right to bring suit by victims and their heirs, which enables them to obtain certain civil remedies). Bassiouni (2002): p.27-39.

³⁷ Rawls (1971): p.11-12.

³⁸ Sorell (1999): p.11

³⁹ Opatow (2002): p.209.

⁴⁰ Lacey (2003): p.176.

⁴¹ Zaibert (2006): p.192.

⁴² Freeman (2009): p.20.

only punitive measure, is that the term retribution is being used to mean nothing more than punishment, which is misleading because it ignores the origin of the Latin word: ‘retribuo’, meaning ‘I pay you back’.⁴³ Bearing this in mind, certain types of amnesties could also serve justice in a retributive way. For example could some kind of conditional amnesty which requires the offender to admitting the truth about their actions and provide for reparations to the offended, *pay the victim back*. Clearly, the views on this depend on how *justice* is understood, which will be the underlying discussion throughout the study.

Whilst Retributive justice can be described as past-based, the next theory of how to confront crimes that will be presented, *Restorative justice*, can be described as present and future oriented.⁴⁴ This model is also described as a reaction to the Retributive justice perspective.

2.1.2.2 Restorative Justice

Restorative justice attempts to repair the harm caused by criminal behavior, and its core values include: mutual respect; the empowerment of all parties involved in the process; accountability; consensual, non-coercive participation and decision-making; and the inclusion of all the relevant parties in dialogue.⁴⁵ In the preamble to the recommendations made to the Council of Europe by the ‘Committee of Experts on Mediation in Penal Matters’, the benefits of restorative justice are summarized as flexible, comprehensive, problem-solving, participatory, and viable alternative to traditional criminal proceedings. It recognizes the victim by giving them a stronger voice, encourages the offenders’ sense of responsibility, and offers a way to reintegration and rehabilitation.⁴⁶

Many definitions of Restorative justice emphasize the importance of a dialogic process, and focus on a face to face meeting with victims and offenders where they themselves must determine the outcome of that meeting.⁴⁷ Advocates for Restorative justice argue that for

⁴³ Barton (2003): p.17.

⁴⁴ Fattah (2004): p.28

⁴⁵ Young and Hoyle (2003): p.200

⁴⁶ Fattah (2004): p.19

⁴⁷ Young and Hoyle (2003): p.201

many offenders it can provide a viable alternative to prison.⁴⁸ However, Barton is more restricted in denying criminal prosecutions as such, and argues that some appropriate level and form of *punitiveness* will enhance the effectiveness of the Restorative justice response, and will often have to form part of agreements to be acceptable to the parties.⁴⁹ He further claims that by failing to recognize this point, advocates for restorative justice are hindering their own cause and creating confusion about it, because of the belief that punishment and retribution are incompatible with restoration.⁵⁰ Young and Hoyle argue that it is a mistake to regard Restorative justice as an un-punitive practice, and it is likely to be seen by many victims as a more punitive response than small fines and conditional discharges.⁵¹ In practice, Barton argues, restorative justice incorporate both punitive and retributive measures, which is important because unless punitive outcomes are allowed to be part of agreements, alternative conflict resolution processes will never be an accepted practice in criminal justice.⁵²

In the context of this study, dealing with human rights violations, it is important to emphasize that Restorative justice is often applied to young offenders who have not committed serious crimes.⁵³ It may therefore be argued that Restorative Justice may not be applicable to cases of human rights violations, as the crimes dealt with here are indeed serious crimes. However, in recent years there has been emerging argumentation for the use of Restorative justice mechanisms as an acceptable way to also confront human rights violations. Young and Hoyle, for example, argue that there are a number of different schemes which use Restorative justice interventions for adult offenders and for more serious crimes.⁵⁴

⁴⁸ Young and Hoyle (2003): p.199

⁴⁹ Barton (2003): p.22

⁵⁰ *Ibid.* p.23

⁵¹ Young and Hoyle (2003): p.208

⁵² Barton (2003): p.21-22

⁵³ Young and Hoyle (2003): p.203

⁵⁴ *Ibid.* p.203

2.2 An Approach to the Debate of Amnesty; Transitional Justice (TJ)

In section 2.1 two developed models of how to reach justice and accountability were presented. However, as noted above, these two models are not necessarily suitable to address past human rights violations. I already mentioned that Restorative justice traditionally has been used to address less serious crimes. As for Retributive justice, it is now generally accepted that full accountability with criminal prosecutions of all the perpetrators after a conflict is often impossible. This means that these two theories cannot automatically be used as models of how to confront past human rights violations, thus other models or perspectives have to be used. Transitional justice (hereinafter TJ) is an approach that has been developed in order to present a more comprehensive and holistic approach to the discussion of how to confront past human rights violations. I will therefore use this approach when discussing amnesty laws. Retributive and Restorative justice will only be used to illustrate aspects of the TJ perspective.

TJ refers to the actions made by a state in a post-conflict country to make up for the past. There are as noted earlier, several definitions of transitional justice, but I will here refer to a definition by the United Nation Security Council:

*The notion of transitional justice (...) comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (...) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.*⁵⁵

I will now briefly present the content of the four most important mechanisms of TJ that are often used to describe what TJ perspectives emphasize.

2.2.1 Criminal prosecutions

Bassiouni differentiated between international prosecutions and national prosecutions when confronting violations.⁵⁶ He further argues that international prosecutions should be limited

⁵⁵ UN Doc. S/2004/616 (2004) :p.4.

⁵⁶ Bassiouni (2002): p.27-39.

to leaders, policy-makers and senior executors, and that there must be prosecutions for at least the four *jus cogens* crimes.⁵⁷ The International Criminal Court (ICC) is the main instrument dealing with international prosecutions, based upon the conviction 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 corporation”.⁵⁸ Prosecutions at the national level should, according to Bassiouni, include all persons who have committed criminal acts, including the four *jus cogens* crimes.⁵⁹

2.2.2 Reparations

Mechanisms for the reparation of victims are a cornerstone of establishing accountability for violations and achieving justice for the victims,⁶⁰ and can include monetary and non-monetary elements, such as restitution of victims’ legal rights, official apologies, monuments, commemorative ceremonies and programs of rehabilitation.⁶¹ Reparations became important in the international community with the adoption of the 1985 ‘Declaration of basic principles of Justice for victims of crime and abuses of power’.⁶² These principles were updated in 2005 with the UN ‘Basic principles on the right to remedy and reparation for victims’.⁶³ Reparations are also a fundamental component of the process of Restorative justice.⁶⁴

2.2.3 Truth-seeking Mechanisms

There are two kinds of truth-seeking measures⁶⁵: truth commissions and international and national investigatory commissions. Truth commissions focus on past events, attempting to discern the overall picture of a conflict, and exist for a finite period of time. Sriram

⁵⁷ UN Doc. A/CONF.183/9 (1998): Genocide, crimes against humanity, war crimes and the crime of aggression.

⁵⁸ UN Doc. A/CONF.183/9 (1998).

⁵⁹ Bassiouni (2002): p.27-39.

⁶⁰ *Ibid.* p.27-39.

⁶¹ Gierycz (2008): p.6.

⁶² UN Doc. A/Res/40/34 (1985).

⁶³ UN Doc. A/res/60/147 (2005).

⁶⁴ Bassiouni (2002): p.27-39.

⁶⁵ *Ibid.* p.27-39.

defines truth commissions as a compromise approach between amnesty and prosecution.⁶⁶ It is argued, amongst others by Bassiouni, that truth commissions can provide some sort of accountability for past human rights violations.⁶⁷ Truth commissions are also a fundamental element of Restorative justice.⁶⁸ International and national investigatory commissions are assigned to document violations by collecting evidence of criminality, in addition to other fact finding information of more general nature.

2.2.4 Vetting and Neutral Lustration Mechanisms

Vetting and lustration programs are initiated to remove past offenders from the public sector.⁶⁹ It is a process whereby individuals who supported or participated in violations committed by a prior regime may be removed from their positions and/or barred from holding positions of authority in the future.⁷⁰ Past offenders can be current political offices and/or social positions, including military police, senators, teachers, doctors, and priests.⁷¹ Accountability for their actions may involve sanctions of which the two most common are publicly revealing an individual's past activity and a ban on holding public office.⁷²

2.3 Amnesty in the Context of the UN

Before turning to the arguments for and against amnesty laws, some general views on amnesty by the UN will be useful in order to get an overview of the place of amnesty in an international context. Recent years have seen an increased focus by the UN concerning amnesty and accountability in conflict and post-conflict societies. There is currently no explicit prohibition of amnesty in any human rights, humanitarian, or criminal law treaty, and no single treaty that in an explicit way discourages any kind of amnesty.⁷³ However, the absence of a prohibition of amnesty is not because of unawareness of the issue. Several

⁶⁶ Sriram (2004): p.12.

⁶⁷ Bassiouni (2002): p.42.

⁶⁸ Opotow (2002): p.209.

⁶⁹ Vinck and Pham (2008).

⁷⁰ Bassiouni (2002): p.27-39.

⁷¹ Nalepa (2009): p.45.

⁷² *Ibid.* p.45.

⁷³ Freeman (2009): p.32.

attempts have been made in order to approach and build a common understanding of the subject.

The first study of the problem of amnesty in the UN was in 1985 by Louis Joinet.⁷⁴ This led to a new study in 1997 that ended with the elaboration of a series of 50 principles to prevent immunity against punishment, divided into four main parts; the principle of the right to know, the principle of justice, the principle of the right to reparation, and guarantees of non-recurrence.⁷⁵ These principles continue to be issues of concern in TC approaches to the present day, and in 2005 an updated set of principles was set forth.⁷⁶

The attempts to strengthen the rule of law have gained attention in the UN system over the last years, and could be seen as an attempt to at least minimize the use of amnesty laws. In a report by the Secretary General on the UN's support for the rule of law it is emphasized that the rule of law and transitional justice issues now are being consistently integrated into the strategic and operational planning of new peace operations. It is further emphasized that Member States now almost universally recognize the establishment of the rule of law as an important aspect of peacekeeping.⁷⁷ In this report it is also referred to a meeting on 'Justice and the rule of law' in 2004, where the President of the Security Council stressed the importance and urgency of the restoration of justice and the rule of law in post-conflict societies, not only to come to terms with past abuses, but also to promote national reconciliation and to help prevent a return to conflict (see S/PRST/2004/34).⁷⁸ Further on, in the 2005 General Assembly World Summit, the Heads of State and Government identified the rule of law as one of four key areas that demanded greater attention, and Member States reaffirmed their commitment to an international order based on the rule of law and international law.⁷⁹ These approaches to strengthen the rule of law illustrate the international commitment to limit the use of amnesty laws, despite the lack of a direct prohibition.

⁷⁴ Andreassen og Skaar (1998): p.64.

⁷⁵ UN Doc. E/CN.4/Sub.2/1997/20 (1997).

⁷⁶ UN Doc. E/CN.4/2005/102/Add.1 (2005).

⁷⁷ UN Doc. A/61/636 (2006): p.1.

⁷⁸ *Ibid.* p.3.

⁷⁹ UN Doc. A/61/636 (2006): p.4.

3 ARGUMENTS AGAINST AMNESTY LAWS

In this section the most common arguments against amnesty will be presented and discussed. I will further explore whether these arguments against amnesty are be justifiable from a TJ approach. Four arguments against amnesty will be explored. These arguments have in common the view that criminal accountability is crucial when confronting human rights violations.

3.1 The Obligation to Ensure Criminal Accountability

Several general human rights conventions ICCPR⁸⁰ and ECHR⁸¹ obligate states to *ensure* the rights enumerated therein. But even though most of the international human rights documents mainly serve to *ensure* the rights, the *obligations* to prosecute and punish are also incorporated in various international documents. For example, in ECOSOC Resolution 2005/30⁸², it is articulated in article 4 that “in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, states have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him”. International conventions that clearly provide for a duty to prosecute humanitarian or human rights crimes are the Geneva Conventions of 1949, the Genocide Convention, and the Torture Convention.⁸³

Furthermore, in 1971 the General Assembly adopted a resolution on war criminals affirming that a state’s refusal to “cooperate in the arrest, extradition, trial and punishment” of persons accused or convicted of war crimes and crimes against humanity is “contrary to the UN charter and to generally recognized norms of international law”,⁸⁴ and in 1973 a resolution consisting a set of principles on the matter was adopted.⁸⁵ Even if these do not

⁸⁰ ICCPR; art 2(1).

⁸¹ ECHR: art 1.

⁸² ECOSOC Resolution 2005/30, art. 4.

⁸³ Scharf and Rodley (2002): p.92.

⁸⁴ Cryer (2005): p.106. (referred to General Assembly Resolution 2840, UN Doc. A/8429)

⁸⁵ UN Doc. A/9030 (1973).

exist to actually *prohibit* amnesties, they emphasize accountability for violations of the rights set forth in the human rights documents.

The Inter-American System of Human Rights has played a role in expanding international human rights obligations.⁸⁶ This began when the IACHR issued a landmark decision on the matter in the ‘Velásquez Rodríguez case’ in 1988, where the court held that “(...) States must *prevent, investigate and punish* any violation of the rights recognized by the Convention (...)”⁸⁷ [emphasis added]. The Inter-American Commission also took a strong position for the duty to prosecute when stating that regarding truth commission the investigations and payments of compensation were “not enough”. In this way, the IACHR became one of the first international human rights monitoring bodies to find amnesty laws contrary to basic human rights principles.⁸⁸ These decisions within the Inter-American System have bridged international criminal justice and human rights law by recognizing that criminal responsibility is fundamental to the punishment of serious human rights crimes.⁸⁹ However, decisions made by the Commission are not legally binding, and therefore states often responded by either ignoring its recommendation, or argues the need to balance peace with justice to justify the laws.⁹⁰

This argument of the obligation to ensure criminal accountability is based on the holding that “amnesties, by their very nature, are exceptions to the obligation to prosecute”.⁹¹ This argument is crucial from a TJ perspective, where the aspect of ensuring criminal accountability is one of the core principles. It is also argued that amnesties also may breach ‘investigation obligations’, which is obligations that may appear in human-rights-related treaties alongside with prosecution obligations. However, there are competing views of whether this *exception* is really a ‘violation’ of the obligation to ensure criminal accountability, and the case would be different if the amnesty includes non-judicial

⁸⁶ Laplante (2009): p.936-939.

⁸⁷ *Ibid.* p.937.

⁸⁸ *Ibid.* p.938

⁸⁹ *Ibid.* p.939.

⁹⁰ *Ibid.* p.938.

⁹¹ Freeman (2009): p.62.

investigations such as truth-recovery mechanisms.⁹² A TJ approach to this might be that amnesties are exceptions to the obligation to prosecute, but there are also other ways to ensure accountability. Yet, criminal accountability for the most serious human rights violations is crucial.

3.1.1 Accountability for Serious Human Rights Crimes

The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁹³ This strong standing regarding the zero tolerance for granting amnesty for serious human rights violations became clear with the creation of the ICC, which came into force on the 1st of July 2002. The fundamental reason for the creation of this court is that the most serious crimes of concern to the international community as a whole must not go unpunished, and to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.⁹⁴ The establishment of the ICC represents both a paradigm shift and the culmination of a recent trend toward accountability for international crimes.⁹⁵ However, states have demonstrated a resolute unwillingness to agree to even the mildest discouragement, and even when negotiating the Rome Statute for the ICC neither a prohibition nor a discouragement was incorporated.⁹⁶

Despite of the lack of a prohibition of amnesty, the UN approach is firm. In a report on ‘The rule of law and transitional justice in conflict and post-conflict societies’ by the UN Secretary-General, it is undertaken by the UN Secretariat to ensure that peace agreements and Security Council resolutions and mandates reject “any endorsement of amnesty for genocide, war crimes, or crimes against humanity (...)”.⁹⁷ Freeman argues that it is

⁹² Freeman (2009): p.41.

⁹³ UN Legal Council, O’Brien (2008): p.4.

⁹⁴ UN Doc. A/CONF.183/9 (1998).

⁹⁵ Freeman (2009): p.73.

⁹⁶ *Ibid.* p.33.

⁹⁷ *Ibid.* p.45.

preferable that an amnesty excludes these kinds of crimes,⁹⁸ but holds fast the importance of exceptions.⁹⁹

The TJ approach has a clear standing regarding the understanding of states' obligation to ensure criminal accountability at least for serious human rights crimes. The fact that there are various mechanisms aiming at securing accountability within TJ perspectives shows that there is an understanding of the different levels of human rights violations. The view is that the most serious violations should be dealt with by ensuring criminal accountability, whilst the other TJ mechanisms can be used to ensure accountability for the *less serious crimes*. Thus, from a TJ perspective, amnesty for serious human rights violations should be rejected. This point is connected with the purpose of strengthening the respect for the rule of law and deter future abuses, which is the next argument.

3.2 Deterrence and the Promotion of the Respect for the Rule of Law

A second argument against amnesty is that criminal accountability deters future abuses and strengthens the respect for the rule of law,¹⁰⁰ and that failure to punish encourages cynicism about the rule of law and distrust toward the political system.¹⁰¹ According to this argument, accountability mechanisms are important because they tend to shore up legal and social controls which are preventive.¹⁰² Bassiouni states that accountability mechanisms appear to be solely punitive, but they are also preventive through enhancing commonly shared values and through deterrence.¹⁰³ The international community, lead by the UN, has given this subject a lot of attention. Several resolutions on the subject have been adopted, and it is stated on the websites that “Establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, and to the effective protection of human rights (...)”.¹⁰⁴

⁹⁸ Freeman (2009): p.25.

⁹⁹ *Ibid.* p.8.

¹⁰⁰ Sriram (2004): p.7.

¹⁰¹ Scharf and Rodley (2002): p.90.

¹⁰² Bassiouni (2002): p.51.

¹⁰³ *Ibid.* p.52.

¹⁰⁴ UN and the rule of law: <http://www.un.org/en/ruleoflaw/index.shtml>.

Mallinder acknowledges that amnesties could encourage distrust toward the political system, but believes that the positive benefits of trials only can be achieved where the necessary evidence and resources are available to put individuals on trial, and where the prosecutions do not reignite the violence.¹⁰⁵ Freeman agrees with Mallinder and argues that not every amnesty is inherently at odds with deterrence, an amnesty that makes non-repetition a condition of retaining its benefits would be consistent with the goal of deterrence.¹⁰⁶ However, as Mallinder notes, in many situations amnesties are introduced repeatedly rather than a definitive closing of the past.¹⁰⁷ Slye expresses concerns about this aspect and stresses that the use of amnesties will create an expectation that such amnesties will be available in the future, and thus decrease deterrence against future violations.¹⁰⁸ This aspect of amnesty of tending to repeat itself would surely weaken the rule of law rather than strengthen it.

From a TJ perspective it could be argued that the aspect of deterrence and the aspect of promoting the respect for the rule of law are strong arguments against the introduction of amnesty laws as the overall goal of TJ is “to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”.¹⁰⁹ However, the way in which the amnesty is introduced may have an effect on the public opinion. According to Mallinder and Sriram, amongst others, this has a great impact on how amnesty is received by the civil society. One method of introducing amnesty that might promote belief in the system is through ‘public consultation’. If a successful inclusive public consultation process occurs, it could be argued that amnesty might also promote respect for the law. It might also be said, however, that a successful inclusive consultation process to occur in a post-conflict society may not be very likely to occur, given lack of stability.

¹⁰⁵ Mallinder (2008): p.16-17.

¹⁰⁶ Freeman (2009): p.21.

¹⁰⁷ Mallinder (2008): p.68.

¹⁰⁸ Slye (2000): p.183.

¹⁰⁹ UN Doc. S/2004/616 (2004):4.

3.3 Victims' Rights

The argument regarding victims' rights are presented under this chapter of 'arguments against amnesty laws' as there has traditionally been an understanding that criminal accountability is a necessity to secure victims their rights; and that amnesty is contradictory to this goal. TJ advocates argue that this is a crucial aspect when discussing amnesty laws, and one of the main arguments against the practice of these laws. However, as this section will show, there are many arguments stressing that in certain circumstances, amnesty laws may better serve the victims' rights, but that this depends on the amnesty.

3.3.1 The Right to *Truth*

In the literature there is no single answer to whether the granting of an amnesty works against the right to truth or contributes to it. The question most debated deals with the quality of the truth revealed in an amnesty hearing as opposed to a trial. One argument is that trials produce information that is more reliable because they not only provide direct testimony from the accused, but also produce information that has been subjected to the rigors of legal process and the rules of evidence.¹¹⁰ The contra argument claims the opposite; that trials are generally ill-suited in providing a complete history of past atrocities,¹¹¹ and that "the threat of trials can also lead to intensive perpetrator efforts to destroy evidence of mass crime, thus significantly endangering truth recovery efforts".¹¹²

Slye defends the latter position, and argues that the lessons from the South-African amnesty process shows that formal trials are not the only, nor the best forum where victims' rights to truth can be met.¹¹³ He holds that the quantity, and most likely also the quality, of the information elicited from amnesty hearings was higher than what would have been elicited from criminal trials.¹¹⁴ Greenawalt argues that if a truth commission can

¹¹⁰ Slye (2000): p.172-173.

¹¹¹ Bassiouni (2002): p.32.

¹¹² Freeman (2009): p.24.

¹¹³ Slye (2000): p.173-174.

¹¹⁴ *Ibid.* p.177.

draw testimony from those to be granted amnesty, much more will be revealed about past abuses than would be possible in criminal trials and it would take much less time.¹¹⁵

Another aspect that is debated is the question of what setting the offender is likely to tell the whole truth; in an amnesty hearing or in a trial. Scharf and Rodley argue that the most authoritative rendering of the truth is possible only through the crucible of a trial that accords full due process, and that the granting of an amnesty encourages the guilty to try to escape the judgment of history by reinventing the truth.¹¹⁶ Slye, in contrast, argues that the participation of the accused in an amnesty hearing is at least as good as in a trial because in an amnesty hearing it is the accused that initiate and voluntarily participate in the proceeding because they are seeking a benefit.¹¹⁷ However, as Slye points out, a challenge for both trials and amnesty hearings is that defendants and applicants will tailor their testimony based on the legal requirements for, in the first case, acquittal, and in the second, amnesty.¹¹⁸

The form of the amnesty is of importance at this point. Whether it is blanket; conditional; and in the case of the latter, what conditions that are emphasized; is crucial with regards to the amnesties' potential to contribute to revealing to truth. Mallinder emphasizes the combination of amnesty with accountability measures as crucial in order to achieve a genuine truth. She argues that in addition to the 'carrot' of the amnesty, the 'stick' of prosecutions is arguably necessary, as without the genuine threat of legal proceedings the highest level offenders are unlikely to apply for amnesty, which will inhibit the degree to which the truth is uncovered.¹¹⁹

One conclusion that can be drawn from the above discussion is that the revealing of the truth in an amnesty process is crucial for it to be legitimized by the victims. From a TJ perspective this aspect is important, and a TJ approach would not support an amnesty unless it assists the work of other TJ mechanisms.

¹¹⁵ Greenawalt (2000): p.203.

¹¹⁶ Scharf and Rodley (2002): p.90.

¹¹⁷ Slye (2000): p.173-174.

¹¹⁸ *Ibid.* p.175.

¹¹⁹ Mallinder (2008): p.15.

3.3.2 The Right to *Justice*

This argument suggests that accountability for the offenders would best secure the victims' right to justice. Scharf and Rodley states that to the victims, amnesty represents the ultimate in hypocrisy: "while they struggle to put their suffering behind them, those responsible are allowed to enjoy a comfortable retirement".¹²⁰ There are two elements to question in this statement: One, would criminal prosecutions of the violators automatically help the victims to put their suffering behind them? According to Restorative justice perspectives, this is not necessarily the best way to *put the suffering behind*, and other means of accountability may better heal the wounds and contribute to reconciliation. One of the aspects Sriram notes as one of the main reasons for those who argue that past human rights abuses must be punished is how the victims *feel*.¹²¹ However, is it the actual *punishment* that decides how the victims feel, and is prosecutions the only way of punishing violators to obtain justice? Advocates for Restorative justice might disagree to this point, and argue that trials do not automatically mean that the victims are able to put the suffering behind them.

The second question is: will those responsible enjoy a *comfortable retirement*? This depends on the amnesty, as some forms of amnesties include alternative forms of punishment, what is above referred to as conditional amnesty. Greenawalt differentiates between six dimensions along which amnesties may vary, where three of these include forms of punishment. This includes the possibility for the amnesty to be 'partial', which allow for a smaller degree of punishment or liability for damages. The amnesty may not protect persons from 'consequences other than legal liability', ex. being fired from jobs etc, and the amnesty may include 'alternative scheme to compensate victims'.¹²²

But what about the victims' right to justice? Would they not want the offenders to be put behind bars? Evidence suggests that the public is much less vindictive than is commonly supposed, and that the more people know about the circumstances of an offence and an

¹²⁰ Scharf and Rodley (2002): p.91.

¹²¹ Sriram (2004): p.6.

¹²² Greenawalt (2000): p.195.

offender, the less punitive they tend to become.¹²³ In addition, those who have recently been victims are generally no more punitive than non-victims.¹²⁴ Mallinder discusses the diversity of views on amnesty among victims within transitional states, and argues that victims' needs and wishes relate to the context. They may be willing to prioritize concerns such as peace, stability and reconstruction over measures to prosecute those responsible for past crimes. Victims views towards amnesty are not static, she argues, and it is common that it changes over time. They may prioritize physical security in the aftermath of mass violence, but as time passes and the climate becomes more secure, their needs may change to concerns of and support for prosecutions or truth-recovery.¹²⁵

As earlier claimed, elements of Restorative justice are included in TJ perspectives. TJ mechanisms as truth-seeking, lustration and victims reparation are examples of Restorative justice, and the Restorative argument will thus be of importance in order to interpret whether an amnesty can be justified with regards to the victims' right to justice. I will therefore present a Restorative argument to the question of amnesties' effect on the victims' right to justice.

Restorative justice holds offenders accountable by requiring them to explain how they think their actions might have affected others. Through dialogue it is hoped that the victims' feelings of anger or fear towards their offender will be alleviated and that offenders will experience genuine remorse and develop a greater sense of empathy.¹²⁶ Of course, this must be seen as the ideal outcome for victims and offenders. Skeptics might argue that offenders, at least some in cases of grave violations, could be so damaged by the violence and conflict that *a genuine remorse* might not be realistic. However, for the offender, it is likely to believe that meeting with the victim face to face will probably give a much stronger impression and understanding of the suffering he or she has caused the victim, than jail time.

¹²³ Young and Hoyle (2003): p.219.

¹²⁴ *Ibid.* p.220.

¹²⁵ Mallinder (2008): p.12.

¹²⁶ Young and Hoyle (2003): p.200.

As for the victim, it is not sure that the anger or fear towards the offender will alley, and there is a possibility that they feel that the offender do not get the punishment he or she deserves. Greenawalt claims that for victims that have an opportunity to testify and face offenders, perhaps a kind of justice is done. But, Greenawalt claims, even if this opportunity is valuable, it is not equivalent of criminal punishment, and there is still a widespread understanding that ordinary justice is desirable for the individuals involved.¹²⁷ Amnesty may be reducing future injustices, but this does not eliminate the elements of injustice.

The argument against amnesty for the sake of the victims' right to justice depends of course upon the understanding and definition of justice. From a perspective of TJ, the concept of justice will include criminal prosecutions, reparations, and truth-seeking, leaving its likely view on conditional amnesty open for discussion.

3.3.3 The Right to Remedy and Reparation

The right to remedy is established in various human rights treaties, and includes both judicial and non-judicial mechanisms.¹²⁸ The obligation to ensure an effective remedy in the event of a human rights violation appeared as early as the adoption of the UDHR.¹²⁹ This right is also articulated in ICCPR¹³⁰, CERD¹³¹, and in ECHR¹³². According to the UN 'Basic principles on the right to remedy and reparation for victims', the victims' right to remedies include a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation.¹³³ This definition of the victims' right to remedy and reparation is wide, and does not exclude measures others that criminal prosecutions. Bassiounis presentation of the seven ways in which accountability may occur could be used to summarize the measures that may be used to secure the victims' right to remedy and reparation:

¹²⁷ Greenawalt (2000): p.200.

¹²⁸ Freeman (2009): p.40.

¹²⁹ *Ibid.* p.39.

¹³⁰ ICCPR, article 2 (3).

¹³¹ CERD, articl 6.

¹³² ECHR, article 13.

¹³³ UN Doc. A/RES/60/147 (2005): p.6, section VII.

international prosecutions, international and national investigatory commissions, truth commissions, national prosecutions, neutral lustration mechanisms, mechanisms for the reparation of victims, and civil remedies.¹³⁴

It might also be argued from a ‘realpolitik’ perspective that ‘equal and effective access to justice’ (a) may be difficult or even impossible in a conflict/post-conflict society where the numbers of victims and offenders are numerous. This principle opens up for interpretation of what is meant by ‘justice’. And it is not implicit that by justice it is meant criminal prosecutions.

Principle (b) also opens for interpretation and discussion regarding what is actually an ‘adequate, effective and prompt reparation for harm suffered’. Scharf and Rodley argue that “prosecuting and punishing the violators would give significance to the victims suffering, and serve as partial remedy for their injuries, help them restore dignity, and prevent private acts of revenge”,¹³⁵ but can there be a kind of reparation even in cases where amnesty is included? Reparations can also be investigatory commissions or truth commissions.¹³⁶ So it might be argued, that a conditional amnesty processes which includes truth-seeking mechanisms may serve as reparation. In this way, truth-seeking mechanisms could also facilitate ‘access to relevant information concerning violations and reparation’ (principle c). However, the views are conflicting whether truth-commissions or trials actually contributes to the most accurate and widespread truth (see discussion in section 3.3.1), and this would also be contextual.

Reparations are an important part of TJ mechanisms, and are viewed as a crucial aspect of how to make up for the harm done when confronting past human rights violations. However, reparations can from a TJ perspective be secured in different ways, both judicially and non-judicially. Whilst “an amnesty that remove the right to go to court to obtain civil relief for human rights violations would directly contradict the right to

¹³⁴ Bassiouni (2002): p.27-39.

¹³⁵ Scharf and Rodley (2002): p.90.

¹³⁶ Bassiouni (2002): p.38-39.

remedy”,¹³⁷ an amnesty that is accompanied by other TJ mechanisms does not necessarily violates these rights.

3.4 The Creation of a “Human Rights Culture” and a Lasting Peace

The last argument against amnesty laws that will be discussed, is the holding that accountability is crucial to create a ‘human rights culture’ in a society where the rights are respected, and thus build the foundation for a lasting peace. The idea is that “a society is not reconciled with its violent past unless it works toward the creation of a culture of respect for fundamental human rights”.¹³⁸ This point is closely linked to the argument in section 3.2.

In the international community this is a strong argument against amnesty, as can especially be seen in the UN system. The UN Secretary General states in a report on ‘The Rule of Law and Transitional Justice’, that the UNs experience in the past decade has demonstrated that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.¹³⁹ Likewise, the General Assembly of UN stressed in a report that impunity for serious crimes and atrocities which may have occurred before, during and after the conflict can seriously jeopardize peace building efforts during an early phase.¹⁴⁰

In order to achieve this, it is argued for the importance of a viable criminal justice system. The idea is that only a viable criminal justice system can protect and guarantee accountability, avoid impunity and ensure a lasting peace.¹⁴¹ Another aspect of this argument is that if those responsible for war crimes are included in the peace process (as would be the case in an amnesty hearing), those individuals as well as their agenda are

¹³⁷ Freeman (2009): p.40.

¹³⁸ Slye (2000): p.171.

¹³⁹ UN Doc. S/2004/616 (2004): p.3.

¹⁴⁰ UN Doc. A/63/881-S/2009/304 (2009): summary.

¹⁴¹ Bassiouni (2002): p.54.

legitimized, and it is likely to be an increased possibility of continued atrocities or a fundamentally flawed peace agreement.¹⁴² According to these last two aspects, an amnesty, which by nature does not support the criminal justice system, and which includes the responsible in the process, would not support the creation of a human rights culture and a lasting peace.

Barton argues that in terms of long-term solutions to criminal behavior, the successfulness will depend on the degree that it succeeds in a) challenging the offender's psychological mechanisms of moral disengagement; b) aiding the moral and social development of the offender, so that they learn from the experience; c) aiding emotional healing from the trauma of the criminal incident; and d) tempering unequivocal disapproval of the offender's wrongful behavior with expressions of respect for the individual as part of a community (reintegration). He further argues that these conditions will tend to be realized under conditions of *empowerment* of the victims and the offenders, and that empowerment is fundamental in Restorative justice.¹⁴³ According to this view the promotion of respect for human rights and thus a lasting peace has little to do with criminal prosecutions, it rather depend upon alternative mechanisms of accountability. To reach and seek to transform the root-causes of the conflict are according to this view crucial, and criminal prosecutions alone will not serve this purpose. Mallinder argues that where an attempt is made to address the root causes of the conflict, there is a greater chance for a lasting peace to develop, and that a conditional amnesty may better address these root causes than criminal prosecutions.¹⁴⁴

The important thing will be, from a TJ perspective, that there is enough accountability to create a human rights culture and secure a lasting peace. It is argued that a society is not reconciled with its violent past unless it works toward the creation of a culture of respect for fundamental human rights.¹⁴⁵ There are two reasons for that: one cannot be reconciled if there is a feeling of injustice; and the lack of accountability for the past endangers the

¹⁴² Williams (2002): p.117.

¹⁴³ Barton (2003): p.59-60.

¹⁴⁴ Mallinder (2008): p.16-17.

¹⁴⁵ Slye (2000): p.171.

creation of a human rights culture.¹⁴⁶ Slye states that in the case of recent amnesties there is some suggestion that amnesties that incorporate little, if any, accountability do not enjoy legitimacy a few years after their promulgation.¹⁴⁷

3.5 Concluding Remarks: What Kind of Justice?

This chapter has presented four arguments against amnesty, and two findings have been significant. The first finding is that the arguments presented *against* amnesty may also be used as arguments *for* amnesty. This is particularly clear with regards to the victims' rights. Secondly, this chapter has illustrated that TJ perspectives in many of the sections would be likely to represent a view that at least some kind of amnesty could be acceptable, and secure a degree of accountability. However, for an amnesty to be justified from a TJ perspective it has to be a conditional amnesty. It must be accompanied with TJ mechanisms, and ensure criminal accountability for the most serious crimes. The underlying view of the TJ perspectives is that some form of accountability is crucial when confronting human rights violations.

According to opponents of amnesty, amongst them Bassiouni, there is a view that the dilemma of peace vs. justice has in most conflicts been resolved at the expense of justice.¹⁴⁸ This aspect is the core of the arguments against amnesty; that it works against justice. But what is meant by justice? What is just to some might be unjust to others. The concept of justice is vague and the meaning depends on the context.

After a decade-long debate on how to “reconcile” peace and justice or how to “sequence” them, the debate is no longer between peace and justice but between peace and what kind of justice.¹⁴⁹

This statement by the UN shows the growing recognition that there is a variety of ways to reach justice, and that criminal prosecutions is not the only answer. There are various ways to confront past human rights violations and approach the aspect of amnesty in this process, and the views are many on, as noted above; *what kind of justice* that is preferable.

¹⁴⁶ Slye (2000): p.179.

¹⁴⁷ *Ibid.* p.182.

¹⁴⁸ Bassiouni (2002): p.53.

¹⁴⁹ UN Doc. SG/SM/12446 L/3147 (2009): paragraph 6.

4 ARGUMENTS FOR AMNESTY LAWS

In this section the most common arguments for and attempts to justify amnesty will be presented and discussed. I will further explore whether these arguments for amnesty are justifiable from a TJ approach. Six arguments for amnesty will be explored. These arguments have in common the view that the current criminal justice system, which emphasizes criminal prosecutions, does not, or at least not always, serve its purposes of promoting peace and justice in a post-conflict society. In contrast, these six arguments claim that amnesty, or more accurate; *some forms* of amnesty, may better serve these purposes.

4.1 Practical Obstacles to Accountability

The argument that there are practical obstacles to full accountability through criminal prosecutions is often used to justify amnesty laws. The basis for this argument is that it will in most cases be impossible to punish all of the offenders after a conflict, and that amnesty may solve this problem by at least securing the impunity to occur ‘de jure through the granting of amnesties’, rather than ‘de facto through the failure of a state to enforce legal norms either willingly or as a result of an insufficient legal infrastructure’.¹⁵⁰ The argument is based upon the conviction that an amnesty at least would not to the same degree as impunity *discourage* respect for the rule of law.

Bassiouni argues that accountability never should be bartered away for political settlements.¹⁵¹ But, he adds, this does not necessarily mean that every individual violator must be prosecuted in order to assure accountability.¹⁵² Boraine states that full accountability is not always possible in a society in transition, and that even when a tribunal has been appointed, it is not always possible to fulfill in its entirety the mandate to bring to books all of those who have been involved in the human rights violations. In addition, he states, criminal prosecutions are time-consuming and securing evidence leading to a conviction is often problematic. Most countries are unable to afford costly

¹⁵⁰ Bassiouni (2002): p.26.

¹⁵¹ *Ibid.* p.7.

¹⁵² *Ibid.* p. 41-42.

trials, so relatively few will be prosecuted and the majority of offenders will go free.¹⁵³ Another obstacle that Mallinder presents is that for justice to be effective it is required that the proceedings be fair and the rights of the accused respected, which is not always the case in periods of conflict, as the legal infrastructures may be in a state of collapse, or there may be a lack of financial resources and trained and impartial personnel.¹⁵⁴

Bassiouni's argument in this section well describes the TJ perspective on the problem of introducing amnesty because of practical obstacles to accountability. In a TJ perspective, practical obstacles are not necessarily a good reason to barter away accountability. Yet, where full accountability is not possible, truth-seeking and lustration mechanisms are options that can serve to at least secure some of the victims' rights and to ensure some degree of accountability. Still there is a concern that bartering away accountability means that 'peace' is prioritized before justice. This is problematic from a TJ perspective where there is a believe that justice is a necessity to achieve peace. However, this assumption of prioritization is debated. Freeman claims that focusing on peace as the first step in a transitional sequence does not necessarily imply that justice is a lower priority, and he refers to Moses Okello:

*If the preferred sequencing is peace followed by justice, this in no way signals that justice is a lower priority than peace – quite the opposite, in fact- whichever way you look at it, trying to ensure that the environment is conducive for a comprehensive pursuit of justice...is definitive proof that you want real justice to be done.*¹⁵⁵

4.2 The Lesser Evil Argument

The lesser evil argument is based upon the view that there is a contradiction between 'peace' and 'justice', and that there is a "very real danger that prosecutions intended to strengthen the rule of law and nascent democracy could have the reverse effect".¹⁵⁶ This justifies the introduction of an amnesty at the basis that it would be a 'lesser evil'. A statement by John Rawls in the book 'A theory of justice' well explains this argument: "an

¹⁵³ Boraine (2000): p.147.

¹⁵⁴ Mallinder (2008): p.14.

¹⁵⁵ Freeman (2009): p.19.

¹⁵⁶ Sriram (2004): p.10.

injustice is tolerable only when it is necessary to avoid an even greater injustice”.¹⁵⁷ This holding has been widely criticized for bargaining away justice for political settlements, and it is believed, also from a TJ perspective, that this will not create a lasting peace and a ‘human rights culture’ where human rights are respected. Mark Freeman, in contrast, is amongst them who defend this view and argues that:

*it is quite easy to criticize the ‘lesser-evil’ argument as an outsider who has never known, or who does not directly face massive and entrenched terror. But that for persons who suffer under it daily, the immorality of amnesty choices is not as easy to judge, and they may be prepared to tolerate sacrifices to justice that in any other context would be unthinkable to them. Faced with a choice between survival and justice, we should not be surprised if justice ranks as a lower priority, where the amnesty may represent the least worst option at a particular point in time.*¹⁵⁸

Opponents of this argument hold that this is not a sufficient reason to overlook other rights, and that this in fact is a violation of victims’ rights. Freeman, however, argues that rejecting an amnesty may also be a violation of other rights. This could be the case if for example the threat of prosecutions against a small number of leaders is in the way of reaching peace in the context of a civil war, and an amnesty could prevent the murder and maiming of potentially hundreds of people. He raises the following question: “if an amnesty could prevent a social cataclysm, could its opposition be defended – legally or otherwise – merely on the basis of a prior legal obligation to prosecute?”¹⁵⁹

The argument of amnesty as the lesser evil might not be a sufficient argument to overlook other rights from a TJ perspective. Yet, truth-seeking mechanisms and vetting, which are a part of the TJ approach, could also be seen as a *second-best option* where trials are deemed too destabilizing.¹⁶⁰ So when full criminal accountability is not possible in the aftermath of a conflict, truth-seeking mechanisms or vetting could at least serve some level of accountability and be a *lesser evil*.

¹⁵⁷ Rawls (1971): p.4.

¹⁵⁸ Freeman (2009): p.23.

¹⁵⁹ *Ibid.* p.59.

¹⁶⁰ Roht-Arriaza (2006): p.3.

4.3 Stability and Public security

A fourth argument for amnesty is the question whether accountability should be the top priority by a fragile democracy, or if the priority should be stability and public security. Sriram argues that there is a very real danger that prosecutions intended to strengthen the rule of law could have the reverse effect. Thus, she argues, reformers may have to accept amnesties and other compromises.¹⁶¹ Even if one ideally might want to punish perpetrators for abuses, the fear of retribution by those perpetrators may be convincing that amnesty are preferable to coups.¹⁶²

Introducing amnesties because stability and public security are prioritized is often seen as a violation of certain rights, especially victims' rights. Freeman however, reaches another conclusion. He ranks public security at the top of the list of priorities, and describes that the thought of living with impunity is insignificant compared with the thought of living with open, armed conflict or state terror.¹⁶³ He further claims that a person may place general value on justice, but if he or she suddenly had to choose between survival and justice, this would undoubtedly affect the way that person values justice.¹⁶⁴

The stability argument can be interpreted from two angles. One is the views presented above; that criminal prosecutions may create reactions in the society that seems destabilizing, thus an amnesty may create more stable conditions where peace can be reached. It can be argued, however, that this is a *short term* situation and outcome. The other angle is the view, which is shared by TJ approaches, that accountability in the *long term* is necessary in order to create legitimacy and democratic stability, and that criminal accountability is an important measure to accomplish this.

4.4 Peace

The argument of peace is one of the most common justifications for introducing amnesty laws. The view is that where mercy is shown to former enemies, the justification for further

¹⁶¹ Sriram (2004): p.10.

¹⁶² *Ibid.* p.10.

¹⁶³ Freeman (2009): p.8.

¹⁶⁴ *Ibid.* p.7.

violence will diminish and the conditions for a lasting peace could develop.¹⁶⁵ Even though the UN generally advocates the importance of the rule of law, this argument is also recognized. The former Secretary-General stated the following in a meeting about justice and the rule of law:

*If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive.*¹⁶⁶

However, there are still strong arguments for the need for accountability in order to, as discussed above, achieve a *lasting peace*. Kofi Annan continues his statement:

*But (...) if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.*¹⁶⁷

These statements exemplify that an agreement on the dilemma is still not reached, and the debate continues between those who emphasize justice and those who emphasize peace. Those who advocate for criminal prosecutions as a necessity in order to achieve a lasting peace, often argue that “the attainment of peace is not necessarily to the exclusion of justice, because justice is necessary to attain peace”.¹⁶⁸ It is according to this view claimed that accountability must be recognized as an indispensable component of peace and eventual reconciliation.¹⁶⁹ I will now present arguments that are commonly being used to justify amnesty in this context of the goal of achieving peace while at the same time securing some degree of justice in order to achieve a *lasting peace*.

4.4.1 The importance of the Form of the Amnesty

Mallinder states that granting amnesty does not mean that peace will be achieved, but that the failure of amnesty to end violence may not be attributed to the amnesty itself but rather

¹⁶⁵ Mallinder (2008): p.16-17.

¹⁶⁶ UN Doc. S/PV.4833 (2003): p.3.

¹⁶⁷ *Ibid.*

¹⁶⁸ Bassiouni (2002): p.8.

¹⁶⁹ *Ibid.* p.26.

to the wider political context in which it was introduced.¹⁷⁰ According to this it is argued for the recognition of the variety of amnesty laws, and for an understanding of this variety as crucial to the justification and legitimacy of the amnesty.

I. Content and Scope

It is not obvious what kind of amnesty that would better promote peace, whether blanket or conditional. However, what has been argued is that blanket amnesty that do not require any conditions, is no longer ‘accepted’ by the international community. Still, one can argue that certain kinds of limitations may hinder peace with for example insurgency groups which do not agree with these limitations in order to reach a peace agreement. On the other side, conditional amnesties that requires applicants to perform tasks such as surrounding weapons, may contribute to a decrease in violence. What becomes relevant in this discussion is the distinction between short term and long term goals of peace. Advocates for TJ might at this point argue that in order to achieve a lasting peace, limitations are crucial. However, as Freeman points out, it is important to recognize that even a principled amnesty cannot guarantee accountability in practice.¹⁷¹

II. Methods of Introducing Amnesty

The method of which the amnesty is granted can substantially affect the amnesty’s potential to contribute to peace.¹⁷² In the theory chapter four different methods by which formal amnesties can be introduced were presented.¹⁷³ The first method was *exercises of executive discretion*. Mallinder points out that in introducing amnesty by executive discretion there is a risk for arbitrary exercises of presidential discretion, and suggests that a process of debate and negotiation better would strengthen the rule of law. The second method was to introduce amnesty laws as part of *negotiated peace agreements*. According to Mallinder, this method can potentially be more democratic than presidential decrees as they involve representatives of the parties to the conflict or transition process and

¹⁷⁰ Mallinder (2008): p.12.

¹⁷¹ Freeman (2009): p.31.

¹⁷² Mallinder (2008): p.29.

¹⁷³ *Ibid.* p.29-36.

international observers. The third method was through *statutes*. Mallinder argues that the legitimacy of this method can be reduced in different ways; for example for those who do not support the regime, when the politicians are not elected, or where it is approved by a bare majority in a divided legislature. Mallinder notes that in such cases consultation is desirable and that attempts should be made to address the concerns of those who are against the amnesty. The fourth method is through *public consultation*. In this proceeding, argues Mallinder, the inclusiveness of the consultation process will depend on the conditions within each transitional state, where the quality of the communication infrastructure and the security concerns may destabilize the process.

From a TJ perspective, emphasizing victims' rights to truth, justice and reparation, it would be important to include the victims in the amnesty process. Regarding the three first methods of introducing amnesty, through *exercises of executive discretion*, *negotiated peace agreements*, and *negotiated peace agreements*, the victims' voice would be limited, as Mallinder points out. The fourth method, however, amnesties introduced through *public consultation*, have a greater chance of including the parties to the conflict, and would seem to be the method that best correspond with the values of TJ.

III. Reasons for introducing amnesty

In the theory chapter Mallinder presented six different types of reasons for states to introduce amnesties. I will in this section focus on the first motivation that has to do with amnesty as a reaction to internal unrest and domestic pressure, as I see this as the most important to this discussion on the amnesty's impact on peace.

Mallinder differentiates between three types of reactions to internal unrest and domestic pressure.¹⁷⁴ The first one, amnesty to consolidate power, is used as a show of strength to demonstrate that any opposition does not pose a threat to its rule. The second, amnesty to pacify serious unrest, could be used for example to pre-empt threatened military coups where a new regime has taken office but military remains powerful, or in the wake of failed

¹⁷⁴ Mallinder (2008): p.41-46.

military coups to pacify the military and encourage their corporation with the government. The third form, amnesty to end violent conflict, can potentially contribute to reducing human right violations when a conflict is ongoing by creating conditions to enable peace negotiations to occur.

The two first reactions, amnesty to consolidate power and amnesty to pacify serious unrest, could be seen as connected to the argument of amnesty for stability reasons. However, from a TJ perspective, it might be argued that criminal prosecutions better would create this stability, as discussed above. If the third reaction, amnesty to end violent conflict, can contribute to reduce human rights violations by creating conditions to enable peace negotiations to occur, as Mallinder argues, this reason for amnesty may seem justifiable from a TJ perspective. But in any case, irrespective of the reasons for introducing the amnesty, a TJ perspective would emphasize that some sort of accountability is necessary for the amnesty to be justified.

4.5 Reconciliation

The argument for amnesty as a contributor to reconciliation is based upon the conviction that looking towards the future, rather than reliving the pain and suffering of the past, is the way to reconciliation.¹⁷⁵ The idea is that this would make a clean break with the past, creating a common starting point for all members of society from which a better future may be created. However, the validity of this argument will depend on how reconciliation is defined. The goals of reconciliation have been described as ‘coexistence’, ‘normalcy’, and ‘social (and moral) reconstruction’.¹⁷⁶ Yet, one can impose different meanings into these definitions, and it might be argued that these goals can be achieved through an amnesty as well as through trials. The debate of short-term vs. long-term outcomes is also relevant in this discussion, and would be the issue of debate between those who are pro- and those who are against amnesty.

¹⁷⁵ Mallinder (2008): p.46-48.

¹⁷⁶ Roht-Arriaza (2006): p.12.

One argument against this holding is that reconciliation cannot be used to foster impunity against punishment,¹⁷⁷ and that without justice through prosecutions there can be no reconciliation. Slye claims that accountability is important to reconciliation not only because of its impact on victims, but also for its impact on the perpetrators because if there is a widespread feeling amongst victims that the perpetrators are ‘getting away with it’, reconciliation will be difficult.¹⁷⁸ He also argues that accountability is important to the perpetrators because it is connected to their ability and willingness to contribute to reconciliation, and it may increase the possibility that perpetrators will be reintegrated in the society by bringing some form of closure to that chapter of their life.¹⁷⁹

The argument of amnesty as a contributor to reconciliation is strongly challenged by TJ perspectives. According to TJ approaches, accountability for former human rights violators is crucial for the victims to be reconciled with the past. However, truth-seeking, reparations and lustration are all alternative accountability mechanisms, and can accompany an amnesty. But still, criminal prosecutions are an important element of TJ, at least for the most serious crimes.

4.5.1 The importance of the Form of the Amnesty

The same overview of the methods and reasons for introducing amnesties that was used in the section on peace can be used in this section, as this variety is also important when discussing the argument of whether amnesty can be seen as a contributor to reconciliation.

I. Content and Scope

From a TJ approach, an amnesty would need to be conditional and individual in order to serve as a tool for reconciliation. Using Greenawalt’s list of the variations within amnesty laws¹⁸⁰, it would seem likely that those variables that best seem to serve the purpose of reconciliation from a TJ perspective is an amnesty that is: 1) limited, 2) require

¹⁷⁷ Andreassen and Skaar (1998): p.66.

¹⁷⁸ Slye (2000): p.179.

¹⁷⁹ *Ibid.* p.180.

¹⁸⁰ Greenawalt (2000): p.195.

applications, 3) requiring truth-telling, 4) including civil liability, 5) is partial, 6) does not protect persons from consequences other than legal liability, and 7) include alternative scheme to compensate victims.

II. Methods of Introducing Amnesty

As for the goal of achieving peace, the preferable methods in order to achieve reconciliation from a TJ perspective would be through public consultations. This is a view shared by Mallinder. She claims that for any amnesty program to contribute effectively to national reconciliation, it is desirable that it is implemented following the method of widespread consultation.¹⁸¹

III. Reasons for Introducing Amnesty

Mallinder presented six different types of reasons for states to introduce amnesties. I will in this section focus on the second motivation that has to do with amnesty as a tool for peace and reconciliation, as I see this as the most important to the discussion in this section.

Mallinder differentiates between four reasons national governments use to justify amnesty processes by using the argument of reconciliation¹⁸²: reconciliation as *national unity* is based on the argument that achieving such unity is contingent upon closing the books on the past rather than reinforcing grievances and raising tensions by investigating the crimes. Reconciliation as *forgetting* builds upon the idea of a clean break from the past, and as a way for governments to either hide their own crimes or as a symbol that the period of violence is over. A third reason is reconciliation as *forgiveness*. This method can be problematic as a state can forgive, but not force individuals to forgive their perpetrators. The fourth reason is reconciliation through the *establishment of democracy*. The claim is that transitional states must establish democratic structures for resolving disputes peacefully, and amnesties can contribute to this process as part of a package of reforms that

¹⁸¹ Mallinder (2008): p.60.

¹⁸² *Ibid.* p.49-59.

address the root causes of the violence, by increasing access to decision-making and resources.

Introducing an amnesty in order to achieve ‘national unity’, for the purpose of ‘forgetting’ the violations, or ‘forgiving’ the violators, would not be defensible from a TJ perspective. The goal of national unity by ‘closing the books’ on the past is not in accordance with the TJ view on the importance of investigating past crimes in order to be able to move on. According to TJ the truth about what happened is crucial for reconciliation to occur, and simply try to forget would not serve the goal of reconciliation. As mentioned above, the introduction of amnesty for the purpose of forgiving is also problematic from a TJ point of view, as the victims cannot be forced to forgive. Andreassen and Skaar propose that maybe should a more realistic understanding of reconciliation contain tolerance of the fact that one has to live side by side with the ones that have done the harm, without necessarily forgive the acts committed.¹⁸³ As for the fourth purpose, ‘the establishment of democracy’, this is a core goal of TJ, and the aim of transitions. If an amnesty can contribute to this, it would be likely that an amnesty could be tolerated as part of a broader set of mechanisms including other TJ measures.

4.6 The Effect of Criminal Prosecutions

There are strong arguments for the obligation to ensure accountability at least for serious human rights violations, as discussed in chapter 3. However, a discussion of the effect of criminal prosecutions belongs to this chapter. One can argue from a Retributive perspective that offenders deserve criminal prosecutions. Still, there are views arguing that criminal prosecutions as punishment is not an effective way to confront crimes. Again, these holdings are mainly discussed in relation to less serious crimes than human rights violations, but are still an important contribution to the debate of what is most effective.

The holding that criminal prosecutions are not the only alternative when confronting past human rights violations is based on two variables. Firstly, as Young and Hoyle argue, the lack of evidence that imprisonment has contributed to a reduction in crime has led to a

¹⁸³ Andreassen and Skaar (1998): p.23.

widespread questioning of custodial sentencing.¹⁸⁴ McConville analyzes the use of punishment for crimes, and argues that punishing an adult for a particular behavior will probably suppress the behavior temporarily. He further argues that changing the scripts, beliefs, and attitudes that support that behavior while it is suppressed is much more difficult. As a result, once the punishment is removed, the behavior is likely to return.¹⁸⁵

The second variable is the actual suffering of the person that has violated a certain right; the doing to someone of things that if done to them in other circumstances would violate their most significant rights.¹⁸⁶ This aspect leads to the question whether one has a right to violate others rights. Zaibert questions this rhetoric of treating a person in a way that would otherwise violate his rights, is automatically permissible simply because the person deserves this kind of treatment.¹⁸⁷

From this perspective, as opposed to TJ perspectives, criminal accountability is not only ineffective but also seen as the doing of another unjust. According to TJ perspectives, however, criminal prosecutions are an important part of the approach for reasons mentioned in chapter three. Yet, where criminal prosecutions are not possible, other TJ mechanisms can serve the purpose of accountability.

4.7 Concluding Remarks: An Alternative Way to ‘Justice’?

It has been argued in both chapters three and four that from a TJ perspective amnesty cannot be justified without securing at least some sort of accountability for the responsible. The thought is that if no steps are taken to do good what has been done wrong in the past, a real democracy cannot be built. At the same time, in the short term it might be risky to put people at trial; if the military is not under full civil control and the violators have been put at trials, a government may jeopardize a military coup.¹⁸⁸ Could an alternative way to

¹⁸⁴ Young and Hoyle (2003): p.199.

¹⁸⁵ McConville (2003): p.77.

¹⁸⁶ Matravers (1999): p.109.

¹⁸⁷ Zaibert (2006):p.192.

¹⁸⁸ Andreassen and Skaar (1998): p.19.

justice accompanied by amnesty secure *both* peace through stability, *and* justice for the victims?

This chapter has presented 6 arguments for amnesty. A point of interest with regards to the justification of amnesty from a TJ approach is that TJ perspectives in many of the sections would be likely to agree with the holdings arguing that an amnesty can be justified. But still the requests for some form of accountability are strong. However, it could be argued from a TJ perspective that a conditional amnesty could serve as an *alternative* way to justice. An alternative way that has the potential to both secure peace through stability, and justice through the accompaniment of TJ mechanisms.

5 THE COLOMBIAN CASE AS AN EXAMPLE

The previous chapters have analyzed amnesty and how TJ perspectives may and may not allow for its justification. This chapter attempts to use the arguments and discussions from the previous chapters to explore a specific example of a law where the aspect of amnesty is included; Law 975 of Colombia. The case will be explored by (1) defining its form; and (2) discussing the legitimacy and justification of the law from a TJ perspective. I will explore the legitimacy and justification by using the arguments for and against amnesty.

Law 975 was approved by the Congress on July 25th 2005,¹⁸⁹ and attempts to deal with both *peace* and *justice* in the same document. It is stated in article 1 that the purpose of the law is to facilitate the processes of peace, and the individual or collective reincorporation into civilian life of the members of illegal armed groups, guaranteeing the victims' rights to truth, justice, and reparation.¹⁹⁰ Organizations and scholars have questioned the two-dimension of the law as it deals with both the victims' rights and grants amnesty to demobilized illegal armed groups in the same legal document. However, the inclusion of both peace and justice in the same document is not new. In the UN Charter it is stated that the UN is determined to "establish conditions under which justice and respect for the obligations arising from the treaties and other sources of international law can be maintained (...)". Further it is stated that UN is also determined to "unite our strength to maintain international peace and security (...)".¹⁹¹ This illustrates that these two goals, of peace and justice, have both been integrated parts of the Human rights discourse from the beginning. However, this duality is still worth discussing. An interesting aspect in this study is whether a TJ approach allows for this duality to be justified.

5.1 The Content and Scope the Amnesty in Law 975

I will in this section explore the aspect of amnesty in law 975 by using the schemes of Mallinder presented in section 2.1 in order to decide the content and scope of the aspect of

¹⁸⁹ Law 975 (2005).

¹⁹⁰ *Ibid.* article 1. (my translation).

¹⁹¹ UN Charter, preamble.

amnesty in the law. Further will the establishment of the content and scope be used in the discussion on the justification for the amnesty from a perspective of TJ.

I. The Content and Scope of the Amnesty in Law 975

The aspect of amnesty in Law 975 is linked to the *demobilization process* in Colombia, which is the act of individually or collectively putting down weapons and abandon the illegal armed group.¹⁹² The demobilization process was initiated in 2003 and officially completed in 2006. Law 975 has the role of facilitate the peace process after the demobilization, and to ensure the right to justice by holding the demobilized paramilitaries accountable for their crimes.¹⁹³ Law 975 deals with the process of demobilization in chapter 2 of the law, and amnesty is linked to this process in two ways:

The first way of which a form of amnesty is included in Law 975 is by giving immunity from criminal prosecutions to the demobilized combatants. During the demobilization the combatants was obligated to register their names, level of involvement in the armed illegal group, and if they had violated any human rights or humanitarian law. If they did not admit to any such crimes and had no pending cases against them in the judicial system, these combatants were given immunity from prosecutions (in line with Decree 128 of 2003).¹⁹⁴

The second way of which a form of amnesty is included in Law 975 is through so called *alternative sentences*. Of the 31.671 combatants that had been demobilized In Colombia, 2.716 had criminal proceedings opened against them or admitted involvement in crimes once demobilized, and was thus subject to the process of Law 975. In these cases investigative processes are entered where the accused are confronted with claims by the prosecutor about criminal acts. In regular criminal prosecutions the crimes could be punishable with sentences of between 20 and 60 years in prison, but under the framework of Law 975 an *alternative punishment* of five to eight years (depending on the gravity of the crime) is offered given that the combatant comply with the conditions in the law.¹⁹⁵ In

¹⁹² Law 975, art 9. (my translation).

¹⁹³ García-Godos and Lid (2010): p.27.

¹⁹⁴ *Ibid.* p.28.

¹⁹⁵ *Ibid.* p.28-29.

articles 10 and 11 the requirements are listed, and includes among other things: the surrendering of weapons; the ceasing of all illegal activity; the providing of information on former comrades; the delivering of goods and property gained from the illegal acts (as part of the reparation to the victims); and admitting the truth about their actions.¹⁹⁶ Denial of involvement and/or failure to meet the conditions leads to the transfer of the case to regular legal proceedings following ordinary criminal law.¹⁹⁷

According to this, the term *conditional amnesty* would describe the amnesty in law 975 as it requires conditions to be filled in order to benefit from the amnesty. These conditions are also individualized in so that applicants may only benefit from an amnesty upon successful compliance with its conditions.¹⁹⁸ From a TJ perspective, the conditions, requirements and reduced sentences in Law 975 makes the aspect of amnesty justifiable.

II. Methods used when Introducing Law 975

Among the four methods that were presented by which formal amnesties can be introduced, a combination of three methods was used when introducing the amnesty in Law 975. Firstly, one method by which the amnesty in Law 975 was introduced was through *negotiated peace agreement*, as the origins of Law 975 lies in previous legislative attempts to end the armed conflict.¹⁹⁹ Further, the method of introducing amnesty through *statutes*, may also be a method used to include the amnesty in Law 975, as it was introduced to ratify provisions of the negotiated peace agreement. Lastly, the method of introducing the amnesty through *exercise of executive discretion* can be described as a method for the inclusion of amnesty in Law 975. This method refers to amnesties that are introduced by presidential decrees or proclamations. However, Law 975 is also approved by the Congress (including the critique).

It was earlier stressed that the methods used to introduce an amnesty affects its legitimacy and justification. From a TJ perspective the method of *public consultation* was the

¹⁹⁶ Law 975, article 10 and 11.

¹⁹⁷ García-Godos and Lid (2010): p.28-29.

¹⁹⁸ Law 975(2005): article 10 and 11.

¹⁹⁹ García-Godos and Lid (2010): p.15.

preferred method for the amnesty to be justified. However, this method is the only one that was not used with regards to the inclusion of amnesty in Law 975.

III. Reasons for granting Amnesty in Law 975

There have been many speculations about the reasons for including amnesty in Law 975. Especially speculations considering the amnesty as a shield for state agents, is widely debated. It is not possible, however, to establish the reasons why the amnesty was included in the Colombian law. For this reason a TJ view is also impossible. However, it might be interesting to explore some of the most widely recognized reasoning for including amnesty laws in general, without arguing what could be the case for Colombia. Six different types of reasons for states to introduce amnesties were presented in chapter 1. I will here only mention those that are relevant for the amnesty in Law 975.

One reason for including amnesty is as a reaction to internal unrest and domestic pressure. Mallinder differentiated between three types of reactions to internal unrest and domestic pressure, where the third form was to introduce amnesty in order to *end violent conflict*. As the origin to Law 975 was attempts to end the armed conflict, this is a possible reason. It was argued that introducing amnesty for this reason could potentially contribute to reducing human right violations when a conflict is ongoing, by creating conditions to enable peace negotiations to occur. If this is the case, this reason for amnesty would seem justifiable from a TJ perspective.

Another reason is to introduce amnesty as a tool for peace and reconciliation. Mallinder differentiated between four motivations for introducing amnesty by using the argument of reconciliation, where all may be relevant for the amnesty in Law 975: reconciliation as *national unity*; reconciliation as *forgetting*; reconciliation as *forgiveness*; and reconciliation through *the establishment of democracy*.

I earlier argued that introducing amnesty in order to achieve *national unity*, for the purpose of *forgetting* the violations or *forgiving* the violators, would not be justifiable from a TJ perspective. The purpose of national unity would not be a sufficient reason as it is believed

from a TJ perspective that investigating past crimes is crucial in order to create national unity and reconciliation. The purpose of forgetting or forgiving would not seem justifiable from a TJ perspective (discussed in section 4.5.1). As for the fourth purpose, *the establishment of democracy*, this is a core goal of TJ and would be tolerated by TJ perspectives as part of a broader set of TJ mechanisms.

A third reason for introducing amnesty is as a response to international pressure, and could possibly be a reason for including amnesty in Law 975. The people of Colombia have experienced internal armed conflicts since its independence,²⁰⁰ and the international community has occasionally issued pressure on the government, especially the international human rights movement. The establishment of the ICC, which Colombia ratified in 2002²⁰¹, may also have contributed to international pressure.

5.2 Points of Interest regarding the Aspect of Amnesty in Law 975

I will in this section use the arguments for and against amnesty in chapter three and four, to highlight the aspect of amnesty in Law 975. I will further decide whether the amnesty could be justifiable from a TJ perspective.

5.2.1 The Obligation to Ensure Criminal Accountability

Colombia is state party of The Torture Convention (CAT)²⁰² which is one example of an international convention that clearly provides for a duty to prosecute humanitarian or human rights crimes. Article 2 of the Convention states that “each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.²⁰³ However, does this mean that granting an amnesty would be a violation of this obligation? It was argued in chapter three that *amnesties, by their very nature, are exceptions to the obligation to prosecute*. In this way it could be argued that for example practical obstacles to the fulfillment of full accountability for all the human rights violations, gives the right to make an exception from the obligation to

²⁰⁰ García-Godos and Lid (2010): p.6.

²⁰¹ ICC website.

²⁰² Bayefsky.

²⁰³ CAT, article 2.

prosecute. Whether this is the case for Colombia will be discussed in section 5.2.4. Other arguments used to justify an exception to the obligation to prosecute are stability, public security and peace. The legitimacy for these arguments will be explored in relation to the Colombian case in this chapter.

It was also argued that the TJ approach is that there are other ways to ensure accountability than criminal prosecutions, but that criminal accountability for the most serious human rights violations is crucial. Does the amnesty in Law 975 allow for enough accountability to occur from a TJ perspective? The creation of the ICC established the obligation to ensure accountability for at least the most serious crimes for the member states. However, Colombia made a declaration stating that “none of the provisions of the Rome Statute concerning the existence of jurisdiction by the ICC prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia (...)”.²⁰⁴ Yet, the granting of amnesty does not automatically mean that accountability is not secured. Law 975 ensures alternative accountability mechanisms, such as truth-telling and reparations, which are in accordance with TJ perspectives. The alternative sentences, however, only consist of five to eight years in prison²⁰⁵ whilst, as mentioned, regular criminal prosecutions could consist of sentences of between 20 and 60 years. The question from a TJ perspective will be if 5 to 8 years are enough with regards to serious human rights violations.

5.2.2 Promotion of the Respect for the Rule of Law and the Building of a Human Rights Culture

A second argument against amnesty presented above was the idea that failure to punish human rights crimes encourages cynicism about the rule of law and distrust towards the political system, especially in situations where amnesties are introduced repeatedly. Regarding the case of Colombia, amnesties have been introduced repeatedly; in 1981²⁰⁶,

²⁰⁴ Freeman (2009): p.285.

²⁰⁵ Law 975 (2005): art.29.

²⁰⁶ Freeman (2009): p.332

1982²⁰⁷, and in 2003²⁰⁸. It can be argued that this aspect may affect the respect for the rule of law and thus the goal of deterrence and the creation of a human rights culture.

According to this argument, an amnesty which does not support the criminal justice system would not contribute to the creation of a human rights culture and a lasting peace. As the amnesty in Law 975 includes alternative accountability measures and reduced sentences, these additional alternative accountability measures could from a TJ perspective contribute to the creation of a human rights culture even with the presence of an amnesty. Again, the question from a TJ perspective will be if there is *enough* accountability to create a human rights culture and secure a lasting peace, and if the pattern of repeating amnesty might in fact promote *disrespect* for the rule of law.

5.2.3 Victims' Rights

The rights of the victims are emphasized in Law 975, and introduced in article 6, 7, and 8 which aim to secure the victims' right to truth, justice and reparation. But how does the aspect of amnesty affect the rights initially given to the victims?

Regarding the right to *truth* it was argued that an amnesty accompanied by truth-seeking mechanisms can reveal much more about past abuses than would be possible in a series of criminal trials and it would take much less time. In order to benefit from the amnesty in Law 975, truth-telling is required. Article 7 of the law establishes the right to the truth by stating that the victims have the inalienable, full, and effective right to learn the truth about the crimes committed by illegal armed groups.²⁰⁹ In addition does victims have the right during the amnesty hearings to follow proceedings directly, ask questions through their representatives, provide information to advance the process, and assist in identifying related events or the whereabouts of hidden assets, mass graves etc.²¹⁰ In this sense, the amnesty in Law 975 would seem to be justifiable according to TJ perspectives.

²⁰⁷ Freeman (2009): p. 336.

²⁰⁸ *Ibid.* p. 329.

²⁰⁹ Law 975, article 7. (my translation).

²¹⁰ García-Godos and Lid (2010): p.29.

As noted above, from a TJ perspective, the concept of *justice* will include criminal prosecutions, reparations, and truth-seeking. Law 975 contains all these elements. Article 6 of the law establishes the right to justice by stating that the State has the duty to undertake an effective investigation that leads to the identification, capture, and punishment of persons responsible for crimes committed by the members of illegal armed groups.²¹¹ The *alternative sentences* included in Law 975 also serve the victims' right to justice, and secure a degree of accountability, even with the presence of the amnesty. According to these elements of justice in Law 975, it seems likely to be accepted from a TJ perspective.

As we have seen, the right to reparation is articulated in ICCPR (art 2 (3)), and CERD (art 6), amongst others, which Colombia is State party of.²¹² The right to reparation and remedy was in the UN 'Basic principles'²¹³ defined as including (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation. By nature, an amnesty makes the first element of this definition difficult to obtain, and the Colombian case is no exception. However, according to Law 975 the victims are able to file cases, and *alternative sentences* may thus be an outcome. The second and third elements are also given attention in the law, in article 8 and 7 respectively. Article 8 establishes the right to reparation, stating that the victims' right to reparation includes the actions taken for restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²¹⁴ Article 7 is connected to the right to truth, and is referred to above.

Reparations can also be guarantees against repeated violations.²¹⁵ Article 8 of Law 975 articulates the connection between the rights of the victims and the *alternative sentences* of the victimizers, stating that the victims' rights and guarantees of no repetitions are

²¹¹ Law 975 (2005): article 8 (my translation).

²¹² Bayefsky.

²¹³ UN Doc. A/RES/60/147 (2005): p.6, section VII.

²¹⁴ Law 975 (2005): article 8 (my translation).

²¹⁵ Bassiouni (2002):p. 38-39.

understood, amongst other things, as demobilization and dismantlement of the illegal armed groups.²¹⁶

Throughout the paper it has been argued that the form of the amnesty, whether it is blanket, conditional or something in between, have major impact on the amnesty's potential to contribute to the victims' right to truth, justice and reparation. In the Colombian case, truth-seeking mechanisms, reparations and limited criminal prosecutions are conditions that are required in order to benefit from the amnesty. From a TJ perspective this aspect is crucial, as a TJ approach would not support an amnesty unless it assists the work of other TJ mechanisms such as truth-commissions and reparations. Another important aspect is that the goals of justice and reparation for the victims of the Colombian armed conflict would most likely not be achieved without the effective demobilization and reintegration of illegal armed actors.²¹⁷ In this way, the amnesty, which the demobilization process is an integrated part of, is important to secure victims' rights. However, a weak aspect of this kind of amnesty is that the degree to which justice is achieved depends on whether the members of the former illegal armed group apply for the amnesty and admit their crimes. If they do not apply or admit the crimes, the victims' right to justice will be limited.

5.2.4 Practical Obstacles to Accountability and the Lesser Evil Argument

Could the argument that there are practical obstacles to the securing of full accountability through criminal prosecutions be used to justify the amnesty in Law 975? As noted above, criminal prosecutions are time-consuming and securing evidence leading to a conviction is often problematic, especially in conflict/post-conflict societies as Colombia, where the conflict has been going on for many years and the perpetrators are numerous.

From a TJ perspective, where full accountability is not possible, truth-seeking, reparations and lustration mechanisms are options that can serve to secure some of the victims' rights and to ensure some degree of accountability. The Colombian case can fit into the category of countries where full accountability is not possible, and a conditional amnesty securing

²¹⁶ Law 975 (2005): article 8 (my translation).

²¹⁷ García-Godos and Lid (2010): p.46.

some degree of accountability would thus be the alternative. This point of discussion is closely linked with the argument for amnesty as a lesser evil.

The lesser evil argument, as noted, is based upon the view that an amnesty may be a lesser evil when full accountability is not possible. Could the amnesty in Law 975 be justified on the basis that it is a *lesser evil*? I earlier argued that full criminal accountability would not be possible in Colombia, and that other TJ mechanisms thus could be useful in order to reach an alternative accountability. As the amnesty in Law 975 is accompanied with other TJ mechanisms as truth-seeking mechanism and reparation, this amnesty could at least contribute to some level of accountability and be a *lesser evil*.

5.2.5 Stability, Public Security and Peace

Should criminal accountability be top priority in Colombia, or should the priority be stability, public security and peace? In the case of the latter, is the amnesty in Law 975 necessary to secure this? In order to attempt to answer these questions specifically related to the Colombian context, an in-depth study of the Colombian conflict would be necessary. However, some points can be discussed related to the Colombian case without needing to discuss the Colombian conflict as a whole.

From a TJ perspective, the form of the amnesty is crucial to the justification and legitimacy of the amnesty for the purposes of reaching stability, public security and peace. Introducing amnesty on the basis of these reasons would not necessarily be legitimized from TJ perspectives as TJ approaches emphasize accountability as crucial to achieve a lasting peace. Still, the amnesty in Law 975, by being a conditional amnesty, reaches some of the goals of TJ such as truth, reparations and reduced sentences, which would also contribute to stability and peace.

5.2.6 Reconciliation and a Common Starting Point

Would the amnesty in Law 975 contribute to reconciliation and a common starting point? Included in Law 975 alongside with the amnesty are mechanisms that will secure some sort of accountability, and may contribute to reconciliation more effectively. However, the question is again if there is *enough* accountability to ensure effective and long-term

reconciliation, as accountability for former human rights violators is crucial according to TJ approaches for the victims to be reconciled with the past.

The argument for amnesty as a contributor to creating a common starting point is more complex in the Colombian case, as there is still a conflict in the country. This makes the TJ process in Colombia an unusual and widely debated case, as TJ is “institutional initiatives for dealing with *past* atrocities”²¹⁸ (emphasis added). Because of the ongoing conflict there are reasons to believe that peace will have to be achieved before one can start thinking of a new start. I would argue that the argument for amnesty as a common starting point would therefore not be a valid argument with regards to the Colombian case.

5.3 Concluding Remarks; Is the Amnesty in Law 975 Justifiable?

The aspect of amnesty in law 975 has been widely criticized, and several international and national organizations have expressed their concerns. Human Rights Watch states that Law 975 neither contains effective mechanisms to achieve a genuine demobilization and dismantlement of paramilitary groups, nor satisfy international standards about truth, justice, and reparation for victims.²¹⁹ Amnesty International states on its website that the law will guarantee impunity for human rights abusers.²²⁰ This study, however, suggests that the amnesty in Law 975 to some degree is justifiable in relation to TJ perspectives. Most of the arguments for and against amnesty presented could be used to justify the amnesty in Law 975. Yet, the question is whether there is *enough* accountability for it to be completely justified. However, it is important to emphasize that this is a justification of the *law text*, and not the *implementation* of the law.

Most of the criticism of Law 975 deals with the implementation of the law, but the law text is also being subjected to criticism. It is possible to claim that this criticism relies on the supposed reasons for including the amnesty in the law, holding that the amnesty is a shield for state agents. As mentioned earlier, I will not speculate on this issue. Yet, this being one

²¹⁸ García-Godos and Lid (2010): p.1.

²¹⁹ Human Rights Watch (2005).

²²⁰ Amnesty International (2005).

understanding of the public opinion is in itself an indication that the amnesty fails to contribute to the potential benefits of a conditional amnesty. If there is a mistrust regarding the amnesty amongst the public society from the beginning, the amnesty is unlikely to contribute to stability, peace, reconciliation, or empowerment of the victims. This can contribute to delegitimize the amnesty, but it does not necessarily mean that the amnesty as such is unjust. As I see it, this could be the case for the Colombian amnesty. And as stressed throughout the thesis, the reasons and methods for introducing amnesty, even if it is the public's *understanding* of the methods and reasons, is crucial for it to be considered as legitimate and just.

6 CONCLUSION: "A KIND OF JUSTICE"

One of the main points of discussion in this study has been the supposedly contradictory relation between amnesty and accountability. However, this study argues that many of the arguments against amnesty turned out to be arguments for amnesty, and to some extent, vice versa. Yet, amnesty only seems justifiable from a TJ perspective if it is conditional and contains aspects of accountability. This observation implies that there might not be that great divide between amnesty and accountability as it seems in terms of fulfilling human rights standards, taking into account the diversity within both amnesty and accountability. A statement by the UN in a report on 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', well describes this point:

*Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective.*²²¹

Another point of interest in this study is the finding that TJ can be described as a 'middle-way' between Restorative and Retributive justice, as well as a compromise between the two poles in the 'peace vs. justice' debate; criminal accountability and impunity. The study concludes that TJ perspectives allow for amnesty for past human rights violations to be justified, given that some accountability is secured through truth-seeking mechanisms, reparations, and vetting, and that criminal prosecutions are imposed on the perpetrators for the most serious crimes. So, what are then the implications of these findings?

Firstly, this study might have implications for the understanding of amnesty. The title of Mark Freemans book 'Necessary evils' is one example that well describes what has been the view on amnesty, namely a practice that violates victims' rights, but that still is necessary in certain circumstances. This study emphasizes that amnesty is not the same as impunity. As noted in chapter two, amnesty provides protection from liability. To what degree, depends on the amnesty. Maybe this study can be a contribution to a more accurate

²²¹ UN Doc. S/2004/616 (2004): summary.

presentation of amnesty laws where the variety in content and scope is taken into account, and a recognition that an amnesty might also *promote* victims' rights, given that it is drafted carefully and accompanied with TJ mechanisms.

The findings in this study may also have implications for processes of peace negotiations where the classic question is how much justice is necessary in order to achieve peace. An understanding and recognition of the variation of amnesty laws and accountability measures could potentially open up for a more nuanced discussion about what *kind* of accountability would better serve the goal of both peace and justice in a political transition. An understanding of the fact that *punishment* and *accountability* can include other measures than criminal prosecutions. In this sense the understanding of TJ should also be more nuanced. This study implies that TJ also can serve as a mechanism of *conflict resolution* to get out of a conflict, not just to confront *past* human rights violations.

Lastly; what can the implications of this study be for the Colombian case? For the sake of the victims, one may criticize the law for violating victims' rights to truth, justice and reparations by including amnesty for the perpetrators. When choosing this topic, I initially thought that I would reach this conclusion. I have worked with human rights organizations and victims' groups in Colombia for two years, and their work for human rights and fight against impunity has been one of the reasons why I wanted to look specifically at the Colombian case. The aspect of amnesty in Law 975 is widely criticized by many of these groups, but again, this critique also takes into account the implementation and the historical and political context. In this way this study is limited as it explores the aspect of amnesty only from a theoretical point of view, and further seeks to reach a conclusion whether amnesty is justifiable from a TJ perspective. However, the ones who should be making this conclusion are people that are finding themselves in these situations. In this way, an in-depth study of the Colombian case accompanied with fieldwork would have strengthened the Colombia case in this study.

However, the law text is a tool that has to be used actively by the victims in order to claim their rights. Having this in mind, I believe that a study focusing exclusively on the law text could in this way be useful. There is a point in *not* taking into account the political and

historical dimensions, as this potentially could contribute to a conclusion doming the law as unjustified based on the political context, rather than what is actually promised in the law.

Writing this thesis about the justification of amnesty law, the underlying topic has been the very understanding of *justice* itself, and what kind of justice an amnesty may serve. It turns out that my view, based on the interpretation of the law from a TJ perspective, is that Law 975, as well as amnesty laws in general, has the *potential* to secure accountability and justice, given that it is a conditional amnesty. They have the potential to lay the necessary conditions to balance peace with justice. At least *a kind of justice*.

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