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AVOIDING AMNESTY IN THE AGE OF ACCOUNTABILITY

A Comparative Analysis of Colombia's Proposal for Alternative Sentencing
and South Africa's Conditional Amnesty

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ABSTRACT

One of the more conspicuous symptoms of the anti-impunity movement in transitional justice is a growing objection towards the use of amnesty. While international standards are slowly but surely building a legal barricade to prevent amnesty and impunity, states are searching for alternative measures capable of persuading hostile actors to demobilise. One promising solution to this is Colombia's proposal for prosecutions accompanied by alternative sentencing in the *Marco Juridico de la Paz*, which aims to demobilize the guerillas and end a 50-year conflict. But for this proposal to be a genuine alternative to amnesty rather than a political attempt to avoid international legal obligations, it must satisfy victims' requirements for truth, justice and reparations. This paper, therefore, compares the proposal for alternative sentencing in Colombia with the South African conditional amnesty to determine whether alternative sentencing is an acceptable alternative in our 'age of accountability'.

ACRONYMS

ACHR	American Convention on Human Rights
ANC	African National Congress
AUC	Autodefensas Unidas de Colombia
AZAPO	<i>Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa and Others</i> , Constitutional Court of South Africa, Case No. CCT17/96, July 25 1996
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRP	Community Reconciliation Process
CRR	Reparation and Rehabilitation Committee (South Africa)
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ELN	Ejército de Liberación Nacional
FARC	Fuerzas Armadas Revolucionarias de Colombia
GRR	UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Convention of Civil and Political Rights

ICRC	International Red Cross Committee
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
JPL	<i>Ley de Justicia y Paz</i> (Justice and Peace Law)
LFP	<i>Marco Juridico para la Paz</i> (Legal Framework for Peace)
NP	Afrikaner National Party
OP	Office of the Prosecutor of the International Criminal Court
PNURA	Promotion of National Unity and Reconciliation Act (1995) (South Africa)
TRC	Truth and Reconciliation Committee (South Africa)
UN	United Nations

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AVOIDING AMNESTY IN THE AGE OF ACCOUNTABILITY: *Alternative Sentencing in Colombia's Legal Framework for Peace*

INTRODUCTION

The debate surrounding “peace v justice” is perhaps the most salient motif of the short yet turbulent lifespan of transitional justice. Although wars have been waged and peace agreements brokered since the beginning of human civilisation, the dawn of the human rights movement has brought with it a heightened global sensitivity to the voices of individual people and communities, which in turn has influenced the ebb and flow of both peace and justice.

Since the time of the Nuremberg trials, post-conflict academia has fluctuated in its approach to the debate, with both the peace and justice camps falling into and out of favour as the field of transitional justice developed. The ‘peace’ camp seemed to surge forward in the 1980s and 1990s during the Latin American “third wave”¹, which embraced truth commissions in place of Nuremberg-style international tribunals, but quickly lost favour after pushing its boundaries further than civil society would allow since provided with the armour of the human rights movement. Amnesty was the double-edged sword for the peace camp, and the blanket or non-conditional amnesties that were adopted in Latin American during that time triggered a monumental backlash from victims’ groups, human rights advocates and institutions.

Characteristically lagging behind policy and practice, international law is finally catching-up to this movement, and while it was once acceptable for authorities to play the peace card and bring in unconditional amnesties excusing gross violations of human rights, the global society is now spinning a legal, political and moral web of accountability that ensures that wrongdoers are brought to justice and victims are healed. Since the Latin American ‘spring’, we have seen a rapid consolidation of the “justice cascade”,² where criminal trials and tribunals have replaced amnesties as the must-have accessory in a post-conflict context. It is in this context, following the

¹ See generally: Huntington, 1993.

² Lutz & Sikkink, 2001.

establishment of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and ultimately the creation of the International Criminal Court (ICC) that Ban Ki Moon famously announced in 2010 that “the old age of impunity is over... in its place, slowly but surely, we are witnessing the birth of a new Age of Accountability”.³

Yet the optimistic “Age of Accountability” has neglected to fully acknowledge that amnesties are more than simply mechanisms for impunity, they are utilitarian tools, undeniably effective at incentivising wrongdoers to relinquish control and preventing immediate violence. Statesmen and political actors, therefore, have been reluctant to fully embrace the ‘age of accountability’, which has led to a certain dualism between theory and practice, and has permitted certain amnesties, especially conditional amnesties, to slip through the web of accountability. Moreover, conditional amnesties such as the South African amnesty are undoubtedly more palatable from the perspective of both civil society and authorities, and the precise status of these mechanisms is even more uncertain in the international arena. Nonetheless, in light of the justice cascade and the growing global antipathy towards the use of amnesty, state players will have to consider alternative methods that are capable of appeasing the increasingly loud global population calling for accountability, which now includes the authoritative voice of the ICC, ominously ready to intervene as soon as the amnesty siren is sounded.

This is precisely the context in which the Colombian government is now operating. Under the shadow of the Inter-American Court of Human Rights (IACtHR or Inter-American Court) and the ICC, geopolitically situated in the thick of the anti-impunity forest, Colombia’s current peace talks with the Fuerzas Armadas Revolucionarias de Colombia (FARC) are an unprecedented opportunity for the two parties to reach an agreement ending a 50-year conflict without the use of amnesty. The challenge is to devise an agreement that is lenient enough to entice the guerrillas to put

³ Ban Ki Moon, Address to the Review Conference on the International Criminal Court: “An Age of Accountability”, Kampala (Uganda), 31 May 2010.

down their arms, yet licit enough to comply with the materialising international call for accountability.

One of the most circulated solutions to this dilemma is the potential use of an alternative sentencing mechanism, whereby certain members of the FARC will be criminally prosecuted for their human rights violations and if found guilty will be spared regular life-sentences typically affiliated with such egregious crimes, and instead compelled to serve potentially reduced sentences in an “alternative facility”, or perform community service in order to repay their debt towards society. A method such as this might very well be capable of achieving the pragmatic benefits associated with amnesty and incentivising demobilisation, as well as avoiding the legal repercussion that might follow the use of amnesty. Yet adoption of this method simultaneously runs the risk of being perceived as an artful manoeuvre to avoid international criticism and legal backlash without addressing the underlying normative problems affiliated with amnesty. Consequently, it will not be enough for alternative sentences to simply comply with the current international impunity movement; they must also be capable of holistically trumping the achievements of amnesty and must be substantially effective in achieving the immediate goals affiliated with post-conflict societies, such as truth, justice and reparations.

In order to examine this contention, this paper aims first to critically analyse the global status of amnesties with the intent of determining to what extent an alternative solution to amnesty is required by international law and practice. It then outlines the use of conditional amnesty in the South African Truth and Reconciliation Commission (TRC) and the proposal for alternative sentences in Colombia, with an emphasis on the legality and legitimacy of each approach through the lens of international law. Finally, the impact of each of these approaches on the achievement of truth, justice and reparations is comparatively analysed to determine whether the adoption of alternative sentences is merely a reactionary mechanism for achieving the results of conditional amnesty while avoiding international criticism, or whether this technique is holistically preferable to conditional amnesty from a more ethical perspective.

PART 1

**AMNESTIES, THE AGE OF ACCOUNTABILITY AND ALTERNATIVE
SENTENCING**

1.1 THE UTILITY OF AMNESTIES IN TIMES OF TRANSITION

A conceptual justification for granting amnesty can be deduced from the etymological origin of the word, which derives from the Greek “amnestia” meaning forgetfulness of a past wrong.⁴ This forgetting of past wrongs on behalf of the state is historically grounded in the intent to distance a reformed or victorious regime from a past period of violence or political instability; aptly illustrated within the rhetoric surrounding the post-Franco amnesty in Spain, in which the *Pacto del Olvido* (Pact of Forgetting) was justified on the basis of “closing the past” and moving into a new era.⁵ Although the current international global climate would most likely reject the *Pacto del Olvido* if it were attempted today, the use of amnesties and its equivalents as a mechanism for inducing stability dates back to the very creation of law itself.⁶ Its utility is grounded in notions of realpolitik and sovereignty, and “the ultimate sovereign prerogative of states to begin and end wars”.⁷

Even in the past half-century, since the end of World War II and the normalisation of international human rights standards and accountability, the global community has been hesitant to unequivocally deny the utility of amnesties. Indeed, the only explicit mention of amnesties in the plethora of multilateral human rights or humanitarian treaties is Art. 6(5) of the 1977 Protocol II to the Geneva Conventions encouraging the use of amnesty in post-conflict situations.⁸ Moreover, and much more

⁴ Lessa & Payne, 2012, p. 3.

⁵ Mallinder, 2009, p 13.

⁶ For example, an equivalent to amnesty is mentioned in the Hammurabi Code from 1700BC, one of the earliest legal codes known to man (Lessa & Payne, 2012, p. 3); there is also evidence of amnesties used by Athenians at the end of civil war circa 404 BC (Weisman, 1972, p. 530).

⁷ Perry, 2011, p. 77.

⁸ Freeman & Pensky, 2012, p. 44.

recently, the question of amnesties and whether they would indicate an unwillingness to prosecute was only mentioned briefly by the Preparatory Committee for the Rome Statute of the International Criminal Court (Rome Statute) and omitted from the Rome Conference altogether, which seems to indicate a deliberate refusal by states to relinquish their ability to grant amnesty, reflecting the “recognised but exceptional utility of amnesties in peace negotiations”.⁹

Prior to its ideological shift in the 1999 Lomé Accords,¹⁰ the United Nations had also explicitly reiterated the utility of amnesties with the 1985 *Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights*¹¹ (the Joinet Report).¹² In this report, the Special Rapporteur even went to far as to articulate amnesty as a right, the “right to oblivion”.¹³ It is clear, therefore, that even now there is a tentative global consensus in the inherent utility in granting amnesties.

To understand this utility, it is necessary to outline the taxonomy of amnesties and the situations in which they have or could be utilised. In its simplest form, amnesty can be defined as a state act that grants post-facto immunity to an individual or a group from the legal consequences of a given action, usually political.¹⁴ Over time they have distinguished themselves from pardons in that they implicitly eliminate the criminality of the act itself, and necessarily any criminal record that goes with it, whereas a pardon simply expunges the penalty.¹⁵ Though original amnesties were affiliated with the sovereign prerogative to ‘forgive and forget’, to focus on a traditional understanding of amnesty now would “overlook vast differences in the scope and consequences of

⁹ Perry, 2011, p. 80.

¹⁰ Mallinder, 2012, p. 73; UN OHCHR, 2009, p. 3.

¹¹ UN ESC, *Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights* (Preliminary Report by Mr. Louis Joinet, Special Rapporteur), E/CN.4/Sub.2/1985/16, 21 June 1985, para. 7.

¹² Mallinder, 2012, p. 73

¹³ UN ESC, *Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights* (Preliminary Report by Mr. Louis Joinet, Special Rapporteur) E/CN.4/Sub.2/1985/16, 21 June 1985, para. 15.

¹⁴ Perry, 2011, p 79; Weisman, 1972, p. 529.

¹⁵ UN ESC, *Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights* (Preliminary Report by Mr. Louis Joinet, Special Rapporteur) E/CN.4/Sub.2/1985/16, 21 June 1985, para. 5.

amnesty laws”,¹⁶ as they have since developed into heavily nuanced political and legal mechanisms with multiple variations and interpretations.

Amnesties may be granted during conflict, post-conflict, in non-conflict situations, post-authoritarian rule and during facilitated transitions.¹⁷ They can be granted to both state and non-state actors,¹⁸ and although the source of legality for an amnesty should derive from a state authority, this might be the executive or legislative, and can be in response to a request either by civil society or a particular group of beneficiaries (such as an exiting elite).¹⁹ Amnesties can be blanket or conditional, and are often accompanied by other transitional justice mechanisms. Though the focus of this paper is on the utility of amnesty in effecting transition, amnesties can also be granted for regular non-political domestic crimes during peacetime, for example the Portuguese amnesties granted in the 1970s to alleviate the prison population.²⁰

Within most of the aforementioned contexts of transitions and conflicts, however, the utility of amnesties is traditionally staunchly grounded at the far end of the “peace” spectrum of the “peace vs. justice” debate that plagues transitional justice academia.²¹ Amnesties’ utility in catalysing peace lie in their ability to encourage disarmament and demobilisation of combatants, entice authoritarian regimes to relinquish power (and consequently eliminate the potential for spoilers), build trust between two opposing parties and facilitate peace agreements.²² These preliminary objectives purportedly contribute to the consolidation of peace, democracy and the safeguarding of human rights in the long-term.²³ When amnesties are used in conjunction with other transitional justice mechanisms - such as the South African conditional amnesty that functioned as part of the Truth and Reconciliation Commission

¹⁶ Mallinder, 2009, p. 14.

¹⁷ Lessa & Payne, 2012, p. 4.

¹⁸ *Ibidem* p.4

¹⁹ Mallinder, 2012, pp. 75-76.

²⁰ Decree Law no 259/74, Portugal, 15 June 1974; see also: UN ESC, *Study of Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights* (Preliminary Report by Mr. Louis Joinet, Special Rapporteur), E/CN.4/Sub.2/1985/16, 21 June 1985, para. 5.

²¹ It should be noted that in recent years, many have tried to reconcile the two “opposing” objectives of the peace v. justice debate by claiming that the two objectives are complementary rather than oppositional. See for example: International Centre for Transitional Justice, 2011.

²² Transitional Justice Institute at the University of Ulster, 2013, Guideline 4.

²³ Lessa, Olsen & Payne, 2012, p. 336.

(TRC) and was granted conditionally in exchange for a full confession - they are also able to contribute to the realisation of other transitional goals, such as the revelation of truth and reparations for victims.²⁴ The realisation of these other, more idealistic goals reveals the less pragmatic, more ‘romantic’ justification for granting amnesty, which is perhaps most conspicuously apparent in the documentation surrounding the adoption of the South African Truth and Reconciliation Commission.

From a utilitarian perspective, amnesties are capable of achieving the immediate cessation of conflict by inducing aggressors into demobilisation and disarmament, but from the perspective of the architects of the TRC, amnesties also contribute to the “promotion of national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”.²⁵ This rather romantic formulation for amnesty suggests that not only are they “necessary evils”²⁶, but they might actually be ethically desirable mechanisms that promote national unity and reconciliation through the cathartic power of forgiveness. Moreover, a sense of ‘justice’ or morality might also be found in amnesty when viewed from a philosophically consequentialist perspective which claims that a lesser injustice will be ultimately just if it is capable of preventing further, greater injustice in the future - however this will be discussed in more detail below.²⁷ Thus according to the rhetoric of those who adopt amnesty, the utility of such a mechanism goes beyond the political realm and transverses into the ethical. It is nevertheless possible that this is simply prose retrospectively adopted to make impunity more palatable, and many still consider the adoption of amnesty as nothing more than a political tool.²⁸

²⁴ Transitional Justice Institute at the University of Ulster, 2013, Guideline 4.

²⁵ *Promotion of National Unity and Reconciliation Act*, 34 of 1995, South Africa, Schedule 2, s.31(1).

²⁶ See generally: Freeman, 2009.

²⁷ See for example: *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Foreword, para. 22: “had the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa”

²⁸ Whether amnesties are actually successful in achieving these goals, however, is another question, one that is considerably more difficult to answer. Variable such as the presence of other transitional justice mechanisms and the social, historical and political context of the state can be powerful influences.

1.2 THE DEMISE OF AMNESTY AND THE RISE OF THE AGE OF ACCOUNTABILITY

Despite the apparent utility of amnesty, within the last number of decades, amnesties preventing the prosecution of human rights violations have been subjected to a barrage of criticism from international human rights bodies, civil society, academics and legal professionals. This criticism was not fostered in a social vacuum, and the demise of amnesties is closely correlated with a number of pivotal incidents and developments on the global stage of international law and politics. This section seeks to critically examine how and why many amnesties are no longer considered an acceptable mechanism within the transitional justice toolbox.

As mentioned above, the use of amnesty or its equivalent can be traced back to antiquity, but the appropriate starting point in a discussion of its demise is indubitably the end of the Second World War.²⁹ Although there is no independent event or single moment in time that heralded the beginning of the ‘age of accountability’ and the invalidation of amnesties, the last 60-70 years have exhibited what Lutz and Sikkink have termed “norm-affirming events” that provide proof of a “justice cascade”,³⁰ in which the prevalent ideology is one of anti-impunity which necessarily includes an unprecedented disdain for the use of amnesty. In the period following World War II, with the establishment of the United Nations and the consolidation of contemporary human rights, the concept of individual, universal rights began to solidify as independently enforceable rights, exercisable outside the limits of state sovereignty.³¹ This caveat on Westphalian notions of sovereignty and non-interference opened the doors for international accountability and marked the beginning of the end of the sovereign prerogative to prioritise social stability over individuals’ rights to justice.³² According to Lisa Laplante:

“[T]he human rights movement suddenly planted serious questions about [amnesty’s] legitimacy through three main arguments: first, international law creates a state duty to investigate, prosecute, and punish those responsible for serious violations of human

²⁹ Laplante, 2009, p. 917.

³⁰ See generally: Lutz & Sikkink, 2001.

³¹ Lessa & Payne, 2012, p. 1.

³² Laplante, 2009, p. 922 & p. 931.

*rights; second, international law also provides victims a fundamental right to justice (the “victims rights argument”); and third, post-conflict policy recognizes that criminal justice is good for democracy and the rule of law.”*³³

Although these early developments of human rights focused on state accountability rather than individual, the monumental impact of the Nuremberg Trials, sometimes heralded as the ‘birth of transitional justice’³⁴ marked the emergence of the concept of international criminal liability for human rights violations.³⁵ The significance of the Nuremberg Trials cannot be underrated, as not only do they mark the first time that the international community accused, tried and committed individuals for offences against humanity as a collective, but, as the nominal forbear of transitional justice, the trials placed an early emphasis on criminal prosecutions as the paradigm for justice during transitions, implicitly neutralising the acceptability of amnesty.

Despite this early endorsement of criminal trials, the period following World War II, influenced by the Cold War, displayed an international resistance to accept the idea of international accountability, and Westphalian ideologies persisted.³⁶ This persistence of the sovereign prerogative was reinforced in the Latin American “third wave of democratisation” from the 1970s to the 1990s, when Southern Cone countries perpetually employed the use of broad or blanket amnesties in order to facilitate transitions from dictatorial regimes or military rule into democracy.³⁷ Outgoing regimes, notably in Argentina, Chile, Peru and Brazil insisted on amnesty provisions as ‘carrots’ to facilitate their exit and reintegration into society.³⁸ Like the influence of the Nuremberg trials as a “norm affirming” event, the impact and influence of the Latin American third wave amnesties is monumental, as “the cynical, disingenuous exploitation of amnesties that arose in Latin America during the 1970s and 1980s

³³ *Ibidem*, pp. 917-918.

³⁴ See for example: Teitel, 2003, p. 69; the term “transitional justice” itself, however, most probably did not appear until the Cold War era.

³⁵ Sikink, 2012, p. 40.

³⁶ Laplante, 2009, p. 922.

³⁷ *Ibidem*, p. 923.

³⁸ See for example: *Ley de Amnistia*, Ley 26.479, (Congreso del Peru), 14 June 1995; *Ley de Amnistia* Ley 26.492, (Congreso del Peru), 28 June 1995; *Ley de Obediencia Debida*, Ley 23.521, Boletín Oficial (Argentina), 9 June 1987. *Ley de Punto Final*, Ley 23.492, Boletín Oficial (Argentina), 29 December 1986.

arguably helped to stigmatise and trigger a growing aversion to their use as a tool for securing peace”³⁹.

In place of criminal trials, the Latin American transitions pioneered the adoption of truth commissions as accountability mechanisms, though almost uncompromisingly accompanied by an amnesty.⁴⁰ Due to the exploitation of amnesty in Latin America, and the reactions and oppositions of victims, civil society and human rights institutions in response to those amnesties, these countries became the frontline for the battle against impunity. The events leading up to the “third wave” in Latin America involved an unconscionable quantity of massacres, forced disappearances, extrajudicial killings, kidnappings and the like, which inevitably left a wake of tyrannised and disillusioned victims, who were left with no means for reparations after the introduction of broad, blanket amnesties. “Transnational advocacy networks”⁴¹ consisting of lawyers, civil society organisations and victims groups were compelled to work together to find ways to challenge these amnesties and ensure some form of justice and reparations. The IACtHR along with the Inter-American Commission of Human Rights (IACHR or Inter-American Commission) has proven itself to be the most useful means to this end. Decisions from the Inter-American Court, notably the landmark *Velásquez Rodríguez*⁴² and *Barrios Altos*⁴³ cases set a precedent in the region regarding the prohibition of blanket amnesties and the state duty to investigate, prosecute and punish human rights violations.⁴⁴ While this and subsequent cases were not able to extrapolate a direct prohibition on the use of amnesty from the state’s domestic and international obligations, creative litigants were able to effectively circumvent the domestic and international position on the prerogative of states to use amnesty and use existing treaty provisions to question their legitimacy.

Parallel developments from the international arena complemented and reinforced the decisions and influence of the IACtHR and IACHR. Kathryn Sikkink

³⁹ Perry, 2011, p. 94.

⁴⁰ Laplante, 2009, p. 917.

⁴¹ Lutz & Sikkink, 2001, p. 4.

⁴² *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

⁴³ *Barrios Altos v. Peru*, Inter-Am Ct. H.R. (Ser. C) No 83, (2001).

⁴⁴ *Ibidem*; Alvira, 2013, p.23.

has suggested that historically there have been three models for accountability: the immunity or impunity model, the state accountability model and the individual criminal accountability model.⁴⁵ Although these models should not be interpreted as being linear or progressive, the newest model of accountability is indisputably individual criminal accountability. After the Nuremberg trials, which showcased one of the first times in history the international community held state agents responsible for crimes committed against their own citizens,⁴⁶ the concept of international criminal accountability has significantly expanded. The progression from state accountability to individual accountability is manifest in the historical developments from treaties such as the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) and the 1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), which include the specific state duty to prosecute and punish.

The full force of these provisions was demonstrated with the 1998 attempted extradition of Chilean General Augusto Pinochet from the UK to Spain to face trial for torture despite an existing amnesty law in Chile.⁴⁷ This consolidation of international criminal accountability for serious human rights violations effectively denied the ability of individuals to comfortably rely on domestic amnesty provisions to escape prosecution for such violations. The creation of the ICTY and the ICTR in the early to mid-1990s were also crucial developments in this respect,⁴⁸ however the proverbial nail in the coffin for amnesties for serious human rights violations most likely came with the creation of the Rome Statute 1998. As mentioned above, although the Rome Statute seems to rather awkwardly avoid the issue of amnesty, the complementarity provisions of the statute - which permit the Prosecutor to investigate one of the four offences within its scope⁴⁹ when a signatory state is either 'unwilling' or 'unable' to prosecute

⁴⁵ Sikkink, K, 2012, p.23.

⁴⁶ Orentlicher, 1991, p. 2555.

⁴⁷ Rodrigues, 2010, p. 215.

⁴⁸ Freeman & Pensky, 2012, p. 57.

⁴⁹ Namely genocide, crimes against humanity, war crimes and the crime of aggression; see UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, art. 5.

and punish⁵⁰ - essentially act as a fallback accountability mechanism for states that shield offenders with amnesties. Any doubt over the ability of the Office of the Prosecutor (OP) to employ the Rome Statute in such a manner has essentially been quelled by the current Colombian peace process, where the OP has unequivocally communicated that if the state of Colombia were to offer amnesties for serious human rights violations the ICC would classify such an act as being ‘unwilling’ to prosecute, thereby activating the jurisdiction of the ICC itself.⁵¹

Therefore the expansion of international human rights – which emphasised the rights of the individual and the right to justice and truth in particular - along with the evolution of international criminal law culminating in the creation of the ICC, have contributed as both catalysts and subjects of the ‘justice cascade’, ‘norm affirming events’ establishing a global antipathy for the use of amnesty in response to serious human rights violations.

In spite of this theoretical repudiation of amnesty over the last number of decades, however, empirical studies have demonstrated the continued pervasiveness of amnesties, especially in conflict situations, which indicates an apparent rift between legal theory and practice.⁵² Empirical studies on the global adoption of amnesty laws have shown that “amnesty trends have stayed more or less the same since 1979-2009”,⁵³ even demonstrating a rise in amnesty adoption since 2010.⁵⁴ Regional variation, however, does suggest a limited reaction to the anti-amnesty movement, demonstrated by the rapid decline of amnesty use in Latin American in the 1990s,⁵⁵ which might be seen to reflect a response to earlier decisions of the Inter-American Commission and the Inter-American Court regarding the use of amnesty.⁵⁶ However such conclusions

⁵⁰ Ibidem, arts. 17(1)-(2).

⁵¹ Bensouda, Letter from the Office of the Prosecutor of the International Criminal Court to the Constitutional Court of Columbia, 2013.

⁵² Lessa & Payne, 2012, p. 3; Mallinder, 2012, p. 70-71.

⁵³ Mallinder, 2012, p. 80.

⁵⁴ Ibidem, p. 82.

⁵⁵ Ibidem, p. 83.

⁵⁶ *Consuelo et al. v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993).; *Mendoza v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Report No. 29/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 154 (1993).

ignore circumstantial explanations, which might suggest that the decline in amnesty use is simply reflective of the fact that the majority of conflicts and transitions in Latin American occurred during the 1970s to 1980s, and therefore a reduction in the 1990s simply reflects a decline in the *requirement* for amnesties.⁵⁷ Similarly, the rise in amnesties since 2010/2011 is largely in response to the Arab Spring.⁵⁸ An alternative explanation for the persistence of amnesties generally suggests that the growing threat of prosecution and trials has forced outgoing regimes or governments to require more onerous guarantees against prosecution, consequently supporting the idea of a ‘justice-cascade’ as opposed to negating it.⁵⁹

1.3 THE STATUS OF AMNESTY UNDER INTERNATIONAL LAW

The contextual outline described above regarding the position of amnesties and the existence of the ‘age of accountability’ indicates a certain degree of resistance to the acceptability of amnesties in the present day. As has been demonstrated, however, states continue to adopt amnesties, which jeopardises the claims made by proponents of the ‘justice cascade’. This duality might indicate that the current resistance has not transcended the academic or moral realm into a peremptory legal norm. Even so, the global aversion to amnesty within the academic and moral arena is nonetheless capable of seriously influencing policy decisions both at the state and international level, as we will see when examining the Colombian example.

1.3.1 International Treaty Obligations

Under international human rights law, neither treaties nor customary international law provide an explicit general prohibition on the use of amnesties in response to human rights violations. No multilateral UN treaty makes specific reference to the prohibition of amnesties, however a common creative approach has emerged

⁵⁷ Mallinder, 2012, p. 71.

⁵⁸ Ibidem, p. 82.

⁵⁹ Sikkink, 2012, p. 21.

whereby a prohibition is inferred predominantly by the implicit or explicit state duty to prosecute violations⁶⁰ as well as the right to a remedy for victims of violations.⁶¹ Two examples of the explicit duty to prosecute have already been provided in the Genocide Convention and the CAT, however comments, resolutions and communications from the Human Rights Committee and the Economic and Social Council seem to infer this duty in relation to violations of other conventions as well, including the International Convention of Civil and Political Rights (ICCPR).⁶² However, this duty to prosecute and punish in relation to violations of the ICCPR articulated in comments and communications might not be considered a strictly binding legal obligation, as “at its strongest, the committee ‘urges’ prosecution”.⁶³ In fact, the drafters of the ICCPR considered and rejected a proposal to include the duty to prosecute under Art. 2(3) of the Convention.⁶⁴ Prosecution is required, however, in the CAT, the Genocide Convention, the Geneva Conventions in relation to grave breaches,⁶⁵ (including non-international armed conflicts)⁶⁶ and the International Convention for the Protection of All Persons From Enforced Disappearances.⁶⁷ With the exception of Protocol II of the Geneva Conventions, the duty to investigate and prosecute is generally limited to the prosecution of state agents,⁶⁸ and in conventions such as the CAT the wording can be ambiguous, permitting a certain margin of appreciation in deciding how exactly to

⁶⁰ It should be acknowledged that this implicit or explicit duty to prosecute is more certain for gross or systematic human rights violations.

⁶¹ Freeman & Pensky, 2012, p. 46.

⁶² See for Example: UN HRC, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCCPR/C/21/Rev.1/Add.13, 26 May 2004; General Comment 24; UN HRC, *CCPR General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Art 41 of the Covenant*; AAPR/C/21/Rev.1/Add.6; 4 November 1994

⁶³ Schabacker, 1999, p. 7.

⁶⁴ Orentlicher, 1999, p. 2570.

⁶⁵ Although the Geneva Conventions might be technically classified as breaches of international humanitarian law, the overlap between human rights violations and humanitarian law violations is well-established, therefore a duty to prosecute breaches under those conventions often implies a duty to prosecute human rights violations (see Geneva Academy of International Humanitarian Law and Human Rights, Briefing, 2014)

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

⁶⁷ Genocide Convention Art. 1; Convention Against Torture Art. 6; International Convention for the Protection of All Persons From Forced Disappearances Art. 6.; First Geneva Convention Arts. 49-51; Second Geneva Convention Arts. 50-52; Third Geneva Convention Arts. 129-131; Fourth Geneva Convention Art. 146-148.

⁶⁸ Freeman & Pensky, 2012, pp. 47-48.

prosecute.⁶⁹ Importantly, although Protocol II of the Geneva Conventions extends the duty to prosecute from the primary conventions to non-international armed conflicts, that Protocol also contains an express requirement to grant amnesty in Art 6(5). The International Committee for the Red Cross (ICRC) has since attempted to limit the scope of that article by stating that it can only provide combat immunity in interests of national unity, but cannot cover attacks against civilians.⁷⁰ Nevertheless, this provision has been used by domestic courts to uphold amnesties in response to human rights violations, for example by the South African Constitutional Court in the landmark *AZAPO* case which confirmed the legality of the South African 1995 Promotion of National Unity and Reconciliation Act.⁷¹

In addition to the duty to prosecute, an inferred prohibition to amnesty can be drawn from the right to remedy provided in various multilateral treaties.⁷² For example, the ICCPR Art 2(3) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Art. 6 both require that a state party provide a remedy in response to violations of those conventions. Freeman & Pensky have suggested that there are two different interpretations of this duty: a broad approach which requires that the right to a remedy include the right to demand prosecution, and a narrow approach which simply requires states to make a good faith effort to provide some form of compensation in response to violations, which does not necessarily have to include prosecution.⁷³ Which of these approaches is adopted tends to vary across regions and institutions and it is uncertain whether either one can be considered an irrefutable legal principle.⁷⁴

Although these treaties are the most effective hard-law documents for deriving an implied prohibition of amnesties under the international system of human rights

⁶⁹ Ibidem, p. 47.

⁷⁰ ICRC, *Customary International Humanitarian Law Database; Rule 159. Amnesty*; available at <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule159> (consulted 13 July 2015); Perry, 2011, p. 84.; Mallinder, 2010, p. 21.

⁷¹ *Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, Constitutional Court of South Africa, Case No. CCT17/96, July 25 1996.

⁷² Freeman & Pensky, 2012, p. 48.

⁷³ Ibidem, pp. 48-49.

⁷⁴ Ibidem, p. 49.

protection, the UN has also published a number of documents that clearly demonstrate the position of the UN regarding amnesties and encourage member states to adopt similar positions. In particular, The Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Impunity Principles)⁷⁵ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles for the Right to Reparations)⁷⁶ set out detailed requirements for state duties to avoid impunity by prosecuting individual offenders, and to grant specific methods of reparations respectively. These documents emphatically contribute to the argument against the use of amnesty and they elucidate the current legal position of the UN, leaving very little doubt as to the UN's policy adoption of the implied prohibition of amnesties for serious human rights violations.

1.3.2 International Customary Law

International treaties and customary international law are the two most widely cited legal sources in support of an inference prohibiting the use of amnesties. In order for a norm to qualify as customary international law, it is generally understood that two elements must be satisfied: first, there must be a general (not universal) state practice; and second, that state practice must be accepted as law (also known as the requirement for *opinio juris*).⁷⁷

In relation to the prohibition of amnesty, it is uncertain whether there is a general international state practice opposing the use of amnesty.⁷⁸ It is important to acknowledge that especially within the field of human rights, there is a marked

⁷⁵ UN Commission on Human Rights, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102; cited in Orentlicher, 1999, p. 2570.

⁷⁶ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 2006.

⁷⁷ United Nations, *Statute of the International Court of Justice*, 18 April 1946, ISBN No. 92-9227-227-6, art. 38; Klabbbers, 2013, p. 26.

⁷⁸ Mallinder, 2010, p. 826.

difference between what states say and what they do.⁷⁹ While a significant number of states have adopted treaties (such as the Genocide Convention or the CAT) and issued statements declaring an open opposition to impunity and accepting the responsibility to punish human rights violations, the fact that states continue to enact amnesties in response to these violations makes it difficult to draw a conclusion regarding this requirement. Furthermore, in establishing the existence of general state practice, “what matters in particular is that those states whose interests are especially affected by a customary rule participate in its making”.⁸⁰ Therefore it might be significant that the states that “require” amnesties for the facilitation of transitions or ending conflicts (such as the Arab Spring states), are not necessarily the same states that most actively oppose amnesties.

With respect to the *opinio juris* element, which requires that the general practice be accepted as a legal duty as opposed to a moral or political one,⁸¹ commentators have suggested that this test is satisfied either by the mere existence of general and consistent state practice (which essentially results in the collapsing of these two elements) or when states have unequivocally stated their motivation as legal.⁸² Regardless of which of these tests is adopted, it is exceptionally difficult to determine whether states that punish human rights violations and refuse the use of amnesty do so out of political motives or legal ones.⁸³

In spite of this apparent uncertainty regarding the permissibility of amnesty under international customary law, *jus cogens* prohibitions, such as torture and genocide, must be treated as illegal under customary international law. This has been used by some as grounds for claiming that states are obliged to investigate, prosecute and punish violations of *jus cogens*.⁸⁴ The universality and non-derogability of *jus cogens* would seem to imply that states cannot adopt laws that protect those who violate

⁷⁹ Schabacker, 1999, p. 11.

⁸⁰ Klabbers, 2013, p. 27.

⁸¹ Schabacker, 1999, p. 11.

⁸² *Ibidem*, p. 12.

⁸³ *Ibidem*.

⁸⁴ Freeman & Pensky, 2012, p. 52.

them.⁸⁵ This conclusion, however, is certainly contestable and no consensus seems to emerge from the dilemma. An attempt to elicit an international prohibition of amnesty from customary international law seems to inevitably lead to conclude that there is at minimum a rapidly emerging customary norm to prohibit amnesties in response to certain human rights violations.

1.3.3 International and Regional Jurisprudence⁸⁶

The decisions from international courts regarding the use of amnesties are extremely important as they undoubtedly contribute to the crystallisation of legal norms and “reinforce and consolidate a network of case law” that is often referred to by international and national institutions.⁸⁷ The ICC, the ICTY and the ICTR have all contributed to the emergence of the ‘age of accountability’. In particular, as has already been mentioned, the influence of the Rome Statute and the operations of the ICC have been crucial in pressuring states to employ mechanisms to investigate, prosecute and punish serious violations of human rights. The ICC’s influence on the peremptory normalisation against the use of amnesties is largely enforced by the complementarity provisions of the Rome Statute, whereby the ICC will initiate prosecution of an individual only when a member state is unwilling or unable to prosecute themselves.⁸⁸ The ICC in the past has considered that a state who grants amnesty for those whose actions fall within the scope of the Rome Statute are to be considered ‘unwilling’ to

⁸⁵ *Ibidem*, p. 53.

⁸⁶ It should be noted that this section considers predominantly judicial decisions relating to amnesty, and as such has not included the decisions from the African Commission on Human and People’s Rights, however it should be mentioned that the African Commission has made a number of statements acknowledging the prohibition of amnesty in obiter, and will purportedly soon directly consider the legality of the Ugandan Amnesty Act (2013). The recently created African Court on Human and People’s rights has not yet had the opportunity to consider the legality of amnesty legislation in the African region see for example: Global Justice, 2014; *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples’ Rights, 11 May 2000, paras. 82, 83; Obura, 2011, p. 24

⁸⁷ Freeman & Pensky, 2012, p. 57; moreover, the decisions of international courts and tribunals are persuasive sources of law given that they are included as one of the four sources of reference for the International Court of Justice (see: United Nations, *Statute of the International Court of Justice*, 18 April 1946, art. 38)

⁸⁸ UN General Assembly, *Rome Statute of the International Criminal Court*, arts.17(1)-(2), 2010.

prosecute.⁸⁹ Decisions from the special tribunals and courts, specifically implementing elements of international law in exceptional criminal circumstances, have also been influential in the anti-amnesty movement. From the jurisprudence of these tribunals, one seminal case emphasising the international duty to prosecute *jus cogens* crimes is the *Furundzija* case from the ICTY, where the judges suggested that:

*“[I]t would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and would not be accorded international recognition”.*⁹⁰

This opinion reflects the prevalent approach taken by these tribunals, enforcing the idea that the prohibition of amnesties is becoming a peremptory norm, especially in the international arena and in circumstances such as exceptional tribunals where international standards override domestic legislation.

1.3.3.1 Inter-American Court of Human Rights

The Inter-American system for human rights, namely the Inter-American Commission and Inter-American Court, has undoubtedly been the most active opponent to the use of amnesty in response to human rights violations. Although the core operative convention for those bodies, the American Convention on Human Rights (ACHR) does not explicitly deal with amnesties, the Court and Commission have been remarkably innovative in their interpretations of the ACHR. This approach is in part due to the fact that the Inter-American bodies have had to respond to a profusion of international and non-international armed conflicts within their jurisdiction, and thus

⁸⁹ Bensouda, Letter from the Office of the Prosecutor of the International Criminal Court to the Constitutional Court of Colombia, 2013.

⁹⁰ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1998.

have had ample opportunity to develop a specific and comparatively rigid amnesty jurisprudence.⁹¹

The quintessential decision of the Inter-American Court regarding the permissibility of amnesties is the case of *Barrios-Altos v Peru*.⁹² Before this case, the Court had already insisted that states have a duty to investigate, punish and compensate violations of the Convention in *Velasquez Rodriguez v Honduras*.⁹³ In *Barrios-Altos*, however, the Court made explicitly clear that any state enacting amnesty would constitute a violation of this requirement.⁹⁴ *Barrios Altos* examined the extrajudicial execution of 15 people by state-sanctioned death squads in the Lima suburb of Barrios Altos, and is the first time the permissibility of an amnesty law was directly challenged in the Court under the ACHR.⁹⁵ The Court found that granting amnesty for such crimes was incompatible with rights to judicial protection and to due process under articles 25 and 8 of the ACHR respectively, but also that amnesty was incompatible with the overall principles and general obligations of states under Articles 1 and 2.⁹⁶ With respect to the general permissibility of amnesties, the Court stated:

*“all amnesty provisions, provisions on prescriptions and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violation such as torture, extrajudicial, summary or arbitrary execution and forced disappearances, all of them prohibited because they violate non-derogable rights recognised by international human rights law”.*⁹⁷

⁹¹ Binder, 2011, p. 1205.

⁹² *Barrios Altos v. Peru*, Inter-Am Ct. H.R. (Ser. C) No 83, (2001); it should be noted that the Commission had already addressed the permissibility of amnesties in prior cases, most notably in the *Lucio Parada Cea et al v El Salvador, Case 10/480*, Inter-Am.Ct.H.R.(Ser. C), No. 1/99 (1999).; *Masacre Las Hojas v. El Salvador, Case 10.287*, Inter-Am.Ct.H.R.(Ser. C), No. 26/92 (1993).

⁹³ *Velásquez Rodríguez vs. Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paras. 174-176; Alvira, 2013, p. 127.

⁹⁴ Rodriguez Rescia, 2010, p. 258.

⁹⁵ Amnesties had been indirectly addressed in previous cases before the Commission; see for example *Consuelo et al. v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Report No. 28/92, Inter-Am.C.H.R., OEA/Ser.L/V/II.83 Doc. 14 at 41 (1993); *Mendoza et. al. v. Uruguay*, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, Inter-Am.Ct.H.R.(Ser. C), No. 29/92 (1993).

⁹⁶ *Barrios Altos v. Peru*, Inter-Am Ct. H.R. (Ser. C) No 83, (2001), para. 43.

⁹⁷ *Ibidem* para. 41.

This particular paragraph leaves very little doubt regarding the court's opinion on the prohibition of not just the Peruvian amnesty, but any amnesty that prevents investigation and punishment of violations under the Convention.⁹⁸ In subsequent cases, via the inception of "conventionality control" the Court goes so far as to suggest that the ACHR maintains a quasi-constitutional function, and that amnesties that are incompatible with the Convention are essentially ineffective from the moment of their creation.⁹⁹ In light of the discussion above and the lack of the general consensus regarding the permissibility of amnesty under international customary law, it is interesting to note that the Inter-American Court often refers to customary international law in support of its prohibition of amnesty, especially in relation to *jus cogens* prohibition of torture and genocide, which seems to corroborate the air of uncertainty permeating the international permissibility of amnesties.

While the *Barrio-Altos* approach has been fairly consistently followed by the Court and the Commission,¹⁰⁰ recent cases have called into question the scope of the Court's prohibition on amnesty, especially whether it applies to all amnesties or only to self-amnesties or blanket amnesties.¹⁰¹ In the case of *Gomes Lund v Brazil*¹⁰², the Brazilian government maintained that its amnesty laws were distinguishable from the *Barrios Altos* or *Almonacid Arellano* amnesties in that they were not self-amnesties.¹⁰³ This argument was rejected, however, and the Court insisted that whether an amnesty could be classified as a self-amnesty, mutual amnesty or a political agreement was irrelevant as long as it prevented the investigation and punishment of violations under the Convention.¹⁰⁴ The Court has also clarified that such amnesties are prohibited even

⁹⁸ Rodriguez Rescia, 2010, p. 258.

⁹⁹ Binder, 2011, p. 1212.

¹⁰⁰ see for example: *Almonacid Arellano et al v Chile, del Rosario Gómez Olivares and ors (on behalf of Almonacid Arellano) v Chile*, , IACHR Series C No 154, IHRL 1538 (IACHR 2006).

¹⁰¹ Alvira, 2013, p. 127

¹⁰² *Gomes Lund v Brazil* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 219 (2010).

¹⁰³ *Ibidem*. para. 1; Alvira, 2013, p. 127.

¹⁰⁴ *Gomes Lund v Brazil* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 219 (2010.), para. 174-175; Alvira, 2013, p. 128; also see *Cantoral Huamani and García Santa Cruz v Peru*, IACHR Series C No 176, IHRL 3041 (IACHR 2007).

if they are popularly approved by referendum and when an investigation of violations has already been carried out by a Truth Commission.¹⁰⁵

A potential exception to this broad prohibition on amnesty, however, can be extrapolated from the judgment of the *Massacres of El Mozote*¹⁰⁶ case, where although the Court ultimately rejected the amnesty under the El Salvadorian Law of National Reconciliation, the Court cited Art 6(5) of the Geneva Convention and suggested that some amnesties in response to non-international armed conflicts are “justified to pave the way to a return to peace”.¹⁰⁷ However, the Court qualified this exception by clarifying that:

*“this norm is not absolute, and persons suspected or accused of having committed war crimes, or who have been convicted of this, cannot be covered by an amnesty... Art 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in non-international armed conflict or who are deprived of liberty for reasons related to armed conflict, provided that this does not involve facts... that can be categorised as war crimes, and even crimes against humanity”.*¹⁰⁸

An examination of the amnesty jurisprudence from the Inter-American Court of Human Rights reveals a relatively austere approach to the use of amnesty and an emphasis on the strict obligation of states to prosecute and punish. Although there are some hints that the IACtHR is softening its approach, especially in transitional circumstances, as Latin American states respond to its severity by implementing increasingly complicated amnesties or pseudo-amnesties, until now the Court has been adapting its jurisprudence and broadening the scope of its prohibition so as to encompass these emerging domestic amnesties and reinforce the rights to justice, truth and reparations.¹⁰⁹

¹⁰⁵ *Gelman v Uruguay* Merits and Reparations, Judgments, Inter-Am. Ct. H.R. (Ser. C) No. 221, tH 222, 229 (2011).; *La Cantuta v. Perú*, Judgment, Inter-Am.Ct.H.R.(Ser. C) No. 162 (2006); Alvira, 2013, p. 128; Laplante, 2009, p. 971

¹⁰⁶ *Massacres of El Mozote and Nearby Places v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 252/83 (2012).

¹⁰⁷ *Ibidem*, para. 285.

¹⁰⁸ *Ibidem*, para. 286.

¹⁰⁹ Rodríguez, 2013, p. 76.

1.3.3.2 European Court of Human Rights

Although the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights, along with their respective conventions, were established within similar timeframes, each of these two institutions has developed in response to diverse regional or international phenomena, and as such their functions and principles have diversified. The ECtHR has operated under a comparatively peaceful climate, and many of the regional conflicts during the lifespan of the Court came under the jurisdiction of the ICTY. Unlike the IACtHR, therefore, the ECtHR has not had to deal with any case where the legitimacy of an amnesty law itself has been challenged (such as *Altos-Barrios*). The ECtHR has, however, had some opportunity to contemplate the legality of amnesties under various provisions of the European Convention of Human Rights (ECHR). An analysis of the case law reveals a somewhat more flexible approach to the use of amnesties by member states, although the Court's approach does seem to be progressively restrictive. Early European Commission of Human Rights cases¹¹⁰ such as *Dujardin v France*¹¹¹ permit the use of amnesties under the requirement for peace and its classification as a "legitimate aim" for deviation from obligations under the ECHR.¹¹²

However, subsequent cases seem to deviate from this position, especially in response to allegations of torture.¹¹³ In the 2009 case of *Ould Dah v France*, the ECtHR claimed that "like the United Nations Human Rights Committee and the ICTY, the Court considers that an amnesty is generally incompatible with the duty on the states to investigate [torture]... the obligation to prosecute criminals should not... be undermined by granting impunity to the perpetrator in the form of an amnesty law".¹¹⁴

¹¹⁰ Although the European Commission is not strictly a Court and does not issue binding decisions, its findings are relevant to the discussion and are important in understanding the future approach of the ECtHR.

¹¹¹ *Dujardin v France*, App. No. 16734/90, (ECtHR, 1991).

¹¹² Seibert-Fohr, 2009, p. 142; even though they expressly recognised the non-derogable nature of Art. 2 violations— see *Dujardin v France*, App. No. 16734/90, (ECtHR, 1991)., para. 244.

¹¹³ Mallinder, 2014.

¹¹⁴ *Ould Dah c. France*, App. No. 13113/03, (ECtHR, 2009).para 16.

Although this rejection of amnesty for torture and other *jus cogens* crimes has been followed by the Court in a number of other cases,¹¹⁵ the rigidity of the principle was called into question in the 2012 case of *Tarbuk v Croatia*,¹¹⁶ when the Court noted (in *obiter*) that states can enact amnesties in response to serious human rights violations such as a violation of the right to life provided that the requirements for necessity, proportionality and legitimate interest are met.¹¹⁷ In the ECtHR's most recent decision discussing amnesties, *Margus v Croatia*¹¹⁸, the Court (again in *obiter*) was fairly explicit in its disdain for amnesties covering torture and crimes under international criminal law, citing both the IACtHR and the Human Rights Committee in support of its position.¹¹⁹ However, in the same judgment, the Court expressly communicates the utility of amnesties for the purposes of reconciliation, and refuses to make an unequivocal statement on the prohibition of amnesties for violations of the ECHR.¹²⁰

Although the ECtHR's position on amnesties remains somewhat unclear, a tentative conclusion might be that the Court will not accept the legitimacy of amnesties that protect violations of international *jus cogens* crimes and crimes under international criminal law (such as the four offences within the jurisdiction of the Rome Statute). Given the *obiter* statements of the Court in *Margus v Croatia*, however, it is likely that if it were presented with the opportunity, the ECtHR would align itself with the emerging international consensus on the impermissibility of amnesties for all serious human rights violations.

¹¹⁵ See for example *Case of Association '21 December 1989' and others v Romania* (European Court of Human Rights, 2012); *Abdulsamet Yaman v Turkey*, App. No 32446/96, (ECtHR, 2004); *Yesil and Sevim v Turkey*, App. No 34738/04, (ECtHR, 2007).

¹¹⁶ *Tarbuk v Croatia*, App. No. 31360/10, (ECtHR, 2012).

¹¹⁷ *Ibidem*, para. 50.

¹¹⁸ *Margus v. Croatia*, App. No. 4455/10, (ECtHR, 2014).

¹¹⁹ *Ibidem*, paras, 23-37, 64, 73.

¹²⁰ Mallinder, 2014.

1.4. A TENTATIVE CONCLUSION ON THE DEMISE OF AMNESTY AND THE AGE OF ACCOUNTABILITY

From this collective examination of the political, legal and academic developments regarding the use of amnesties, it is perhaps suitable to conclude that while there is certainly an *emerging* norm prohibiting the use of amnesties for serious human rights violations, it cannot be said that such a norm is so ingrained into universal or general state practice yet as to have crystallised into an international norm with the status of customary international law. This may in part be due to residual friction between international institutions, such as the UN and the Inter-American Court of Human Rights - attempting to protect the individuals' rights to justice, truth and reparations - and politically motivated state actors, aware of the indisputable utility of amnesty in facilitating transitions or quelling conflict or social unrest.

The inadmissibility of amnesty can be differentiated according to regional particularities and also on a spectrum according to types of human rights violations. With respect to regional variations, thanks to the jurisprudence of the Inter-American Court, Latin American states should be particularly cautious in their use of amnesty for any kinds of human rights violations under the ACHR. Other regions of the world, including Asia and the Middle East, are not susceptible to such a strict supervisory mechanism as the IACtHR, which may partially explain the prevalence of amnesties within these regions. In the African context, the comparatively weak mandate of the African human rights bodies, coupled with a fairly consistent culture of employing amnesty - substantiated by the renewal of the Ugandan Amnesty Act as late as 2013 - would seem to suggest that this region has also not yet translated the international disapproval of amnesty into practice. Recent cases and the Council of Europe's sensitivity to international norms and customs may indicate that future amnesty legislation in Europe protecting prosecution from human rights violations would likely be declared contrary to the principles of the ECHR by the ECtHR.

In addition to these regional variations, it is possible to draw a more general, international spectrum that categorises the impermissibility of amnesty according to

types of violation, types of amnesty and ratification of international treaties. For example, States parties to the Rome Statute will be less likely to enact amnesty for any human rights violations in case they trigger the admissibility provisions of the ICC. Therefore, while there is a growing international consensus on the prohibition of amnesty, whether this consensus has transcended into a peremptory norm is dependent on a myriad of variables. While this status is not necessarily ideal for victims of human rights violations who are denied remedial relief under the protection of amnesty provisions, those states and communities that vehemently oppose amnesties can impose intense political pressure on states that do not. Moreover, while it might be said that from a strictly positivist perspective, amnesties are not strictly prohibited under international law, if we accept a natural law or a constructivist perspective, it is easier to conclude that amnesties are impermissible under international law. Regardless of which theoretical lens we use to examine the permissibility of amnesty, the legal status of conditional amnesties is clearly less illicit than blanket amnesties. In addition to this, the power of reputational accountability cannot be underestimated, and while there may not be strict enforcement mechanisms in place to prevent states from adopting certain forms of amnesty, political reputation and persuasion is an exceptionally powerful tool in political interplay.

1.5 ALTERNATIVE SENTENCING AS AN ALTERNATIVE TO AMNESTY

The “age of accountability” and the global taboo surrounding amnesty has created a legal landscape where states wishing to enact amnesties in response to human rights violations must navigate a legal minefield in order to ensure the success of any such provision. Even states that are not members of regional systems or international treaties imposing specific obligations will most likely face unprecedented resistance from victims and members of civil society, informed by the growing academic opinion on the unacceptability of amnesty and recognition of victims’ rights to truth, justice and reparations. States will also have to manage political pressure from an international community that is progressively more explicit in its condemnation of impunity. This

pressure is exacerbated for states that have recently undergone transition and need to build trust and legitimacy for new institutions, as these goals might be undermined by adopting amnesties that are seen as illegitimate by the international community and national populations.

While some might point to the voluntary nature of international law, or relegate to a sovereignty-based discourse by suggesting that states can essentially enact any legislation without fear of effective interference from the international community, such claims may be harder to sustain since the inclusion of the ICC in the international arena. Governments that plan to enact amnesties benefitting members of an outgoing regime or violent opposition, hoping to tempt these members into laying down arms or relinquishing power without resistance must now factor in the ability of the ICC to spoil this ‘carrot’ by initiating criminal prosecutions on the international level. Additional treaty obligations, especially for Latin American states, contribute to an accumulating number of legal obstacles, which have made it increasingly difficult for amnesties to remain legitimate.

In light of this obstacle course of legal, political and moral impediments, states will need to find alternative mechanisms that can achieve the objectives of amnesty, yet simultaneously avoid castigation by local and international civil society, as well as the ICC. Criminally prosecuting serious human rights violators but offering alternative sentences or sentencing benefits may be a solution to this dilemma. A criminal process followed by a comprehensive reparations strategy would purportedly comply with the state’s international obligations to prosecute, and satisfy victims’ rights to justice, truth and reparations; however the state’s ability to offer reduced, lenient or alternative sentences to the potential spoilers in exchange for cooperation or participation could be enough of an incentive to induce those individuals to cease participation in conflict or relinquish power. This method therefore seems to both achieve many of the objectives of amnesty, while simultaneously satisfying international obligations.

If the international community accepts the use of criminal or similar trials with alternative sentencing as an alternative to granting amnesty, this would be implicitly

suggesting that the necessary element for complying with international obligations and victims' rights is the procedural aspect of the trial process itself, rather than an emphasis on the punishment of offenders. This contention, when taken in conjunction with the rhetoric of the 'justice cascade' seems to imply that special weight is afforded to criminal trials and investigations themselves as satisfying international obligations rather than the subsequent conventional punishment of the offenders themselves. Paul Seils suggests that the purposes of punishment under regular criminal law can include incapacitation, deterrence, reform, retribution and communication,¹²¹ yet in a transitional context, many of these objectives are redundant because the incentive to re-offend for combatants or members of armed groups dissipates after the negotiation of a peace agreement.¹²² What remains as the ultimate objective of punishment during transition is the communicative objective, or the "social affirmation of values".¹²³ This may be due to the symbolic significance of a public conviction of criminal guilt, as well as the special weight that is afforded to the revelation of truth and admission of wrongdoing that is traditionally thought to accompany criminal investigations and trials. When a state charges an individual, submits them to an investigation and trial process and determines guilt, it signifies to the victim and broader society that the state does not condone the actions committed by the guilty. If we accept therefore that the procedural element of the investigation and prosecution itself is sufficient to comply with international obligations, then the use of criminal investigations and trials followed by alternative sentencing may theoretically be capable of replacing amnesties in transitional or post-conflict contexts. According to Seils:

*"the mixed approach here has many attractions. It acknowledges the notion of condemnation as an important social function; it privileges the idea of persuasion in trust-building efforts to rehabilitate the criminal; and it decentralises the perpetrator and makes society as a whole a serious component in the punishment dialogue."*¹²⁴

Indeed, previous transitional justice projects have successfully made use of similar methodology as part of a broad transitional framework. The Gacaca Courts in

¹²¹ Seils, 2015, p. 8.

¹²² *Ibidem*, p. 12.

¹²³ *Ibidem*, p. 11.

¹²⁴ *Ibidem*, p. 13.

Rwanda utilised traditional justice mechanisms with traditional sentencing, in combination with criminal trials and truth commissions, as part of a comprehensive and relatively effective transitional justice scheme.¹²⁵ In Timor-Leste, ‘minor’ offenders were exempt from prosecution if they were willing to participate in a truth commission and provide reparations or community service in agreement with the victims they had mistreated.¹²⁶ Both of these approaches, however, were effectively amnesties or pseudo-amnesties as they precluded the possibility of a formal prosecution and criminal sentencing. In contrast, both Colombia’s 2005 Justice and Peace Law and Northern Ireland’s 1996 Good Friday Agreement both involved reduced sentences following a criminal trial process.¹²⁷ Other than these two attempts, which had limited success, there is a distinct lack of comparable transitional justice frameworks that have included formal criminal trials followed by alternative sentences such as those proposed for the current Colombian process. The incentivising nature of the process and the imposition of lenient sentences on the wrongdoer, however, makes alternative sentencing a comparable to the process of granting a conditional amnesty, and as such may risk attracting a similar backlash from victims, whose perceptions of justice may be inexplicably linked to concepts of penal punishment.

¹²⁵ Flacks, 2006, p. 8.

¹²⁶ *Ibidem*, p. 13.

¹²⁷ Seils, 2015, p. 7.

PART 2

CONDITIONAL AMNESTY IN SOUTH AFRICA AND ALTERNATIVE SENTENCING IN COLOMBIA

2.1. THE SOUTH AFRICAN AMNESTY

2.1.1. Contextual Background

When the Afrikaner National Party (NP) won a general election in 1948, they swiftly followed through on their biggest election promise to establish “separateness” (the literal translation of apartheid), and from the 1950s to the 1960s the ruling Afrikaner elite had implemented a series of legislation that saw black South Africans displaced and compelled to live in designated rural areas, blocked from effective participation in politics and segregated from public services and facilities.¹²⁸ The NP’s greatest political opposition, the African National Congress (ANC), was banned by the South African government in 1960 and in response to this attempted act of political repression, many of the anti-apartheid political movements felt compelled to take up arms, which inevitably led to decades of clashes between armed political factions and state forces. By the time FW de Klerk was sworn in in 1989, the violence has escalated into a full state of emergency, and it had become clear that negotiations were necessary to prevent a seemingly inevitable civil war.¹²⁹

Within his first few years in office, de Klerk had lifted the ban on the ANC and released Nelson Mandela from prison after lengthy negotiations. From 1990 until 1993 Mandela, de Klerk and other political representatives negotiated for the enactment of an interim constitution that would lay down guidelines for transition to a fully democratic South Africa and elections in 1994.¹³⁰ The interim constitution came into force in 1993 and contained specific guarantees for conditional amnesty, a corollary feature of the

¹²⁸ *Ibidem.*

¹²⁹ *Report of the Truth and Reconciliation Commission of South Africa*, Vol. 1 Ch. 5, 1998, paras. 57-59.

¹³⁰ *Ibidem.*

compromise reached by the negotiating parties, despite the fact that the NP requested a blanket amnesty.¹³¹

From a pragmatic perspective, it is not difficult to understand why the negotiating parties selected a conditional amnesty to facilitate transition. First, because the ruling minority maintained enough power to be able to spoil the goals of Mandela and the ANC,¹³² especially since cooperation of the security forces would be crucial in protecting the result of the future election.¹³³ This creates a different set of requirements to an overthrow or takeover model, and a compromise is required by equally matched parties both wishing to ensure stability.¹³⁴ A second pragmatic reason to choose amnesty may have been the multifaceted nature of the conflict - members from every political party had taken part in violence and committed human rights violations, therefore amnesty was beneficial for all the parties at the negotiating table.¹³⁵

The architects of the Truth and Reconciliation Commission (TRC), however, rarely justify its mechanisms from a pragmatic perspective. The rhetoric surrounding the amnesty process is one of forgiveness, reconciliation and *ubuntu*, the indigenous South African community philosophy of “I am a person because of other persons”.¹³⁶ Indeed, the epilogue of the 1993 Interim Constitution (the legal foundation for amnesty) states “there is a need for understanding, but not vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not victimisation”.¹³⁷

This emphasis on healing and reconciliation over revenge and retribution is emphatically championed by the TRC’s magnanimous chairperson, Archbishop Desmond Tutu. Tutu and other hardliner proponents for what they termed “restorative”

¹³¹ Goldstone, 1995-1996, p. 493.

¹³² *Report of the Truth and Reconciliation Commission of South Africa*, Vol. 1 Foreword, 1988, para. 21.

¹³³ Sarkin, 2004, p. 49.

¹³⁴ *Ibidem*, p. 32.

¹³⁵ See for example, *Report of the Truth and Reconciliation Commission of South Africa*, Vol. 1 Foreword, 1998, para 1: “our country is soaked in the blood of her children of all races and of all political persuasions”.

¹³⁶ Stuit, 2010, p. 85.

¹³⁷ *Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution)*.

justice often claimed that such justice was characteristic of African jurisprudence.¹³⁸ In his autobiography, Tutu says:

*“retributive justice... is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence”.*¹³⁹

Accordingly, the South African choice to use amnesty was heavily cloaked in rhetoric of reconciliation, peace and forgiveness. The success of the TRC would heavily depend on this justification, and the media and discussion surrounding the TRC during its operation was acutely focused on kindling African unity through *ubuntu* and reconciliatory, community focused motifs. These motifs are reflected in the legislative Act creating the TRC and the Amnesty Committee, which claims that the granting of amnesties to those who made full disclosure contributes to the overarching goal of the commission, “to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”.¹⁴⁰

2.1.2. Operative Framework

The interim constitution governed the country through South Africa’s first democratic elections in 1994, unsurprisingly won by Mandela’s ANC. Although the interim constitution provided the constitutional basis for the creation of the amnesty committee, the precise terms and operations of the commission were to be decided by the new, democratically elected government.¹⁴¹ These provisions were transferred to

¹³⁸ Gade, 2013, p. 11; Tutu, 1999, p. 51.

¹³⁹ Tutu, 1999, p. 51.

¹⁴⁰ *Promotion of National Unity and Reconciliation Act*, Act. 34 of 1995, (South Africa), s. 3.

¹⁴¹ With respect to amnesty, the interim constitution specifically states “in order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, parliament under this constitution shall adopt a law determining a firm cut off date... and providing for

the new, permanent constitutions in 1996,¹⁴² and provide the legal foundation for the creation of the 1996 *Promotion of National Unity and Reconciliation Act* (PNURA), which prescribes the precise functions and mechanisms of the TRC. The PNURA provides for the creation of three independent but cooperative committees – the Committee on Human Rights Violations, the Committee on Amnesty and the Committee on Reparation and Rehabilitation.¹⁴³ The Amnesty Committee’s primary function was to receive and hear applications for amnesty, which could only be granted provided that the applicant complied with certain conditions. This function is particularly significant within a historical context, as it is the first time a truth commission has specifically been allocated the power to grant amnesty.¹⁴⁴

Under the PNURA, amnesty could be granted only in relation to an act with a political objective when the applicant had made full disclosure of all relevant facts.¹⁴⁵ These elements – political objective and full disclosure – were the two fundamental requirements for amnesty under the TRC, but the committee’s interpretation of these elements was not always consistent.¹⁴⁶ According to the PNURA, an ‘act’ could be an “offence or delict”, which could incorporate gross violations of human rights as well as more minor crimes.¹⁴⁷ Sections 20(2)-(3) of the PNURA set out a two-step test for determining whether an action had a “political objective”.¹⁴⁸

The first step requires that the action be “an offence or delict” connected with the mandate of a political party or a state institutions.¹⁴⁹ This requirement for “offence or delict” is important, as it is the only provision in the PNURA that requires some

the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed”; Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution); Du Bois-Pedain, 2012, p. 256.

¹⁴² *Constitution of the Republic of South Africa*, Act no. 108 of 1996, s. 6(22): “all the provisions relating to amnesty contained in the previous Constitution under the heading “National Unity and Reconciliation” are deemed to be a part of this new constitution”.

¹⁴³ *Promotion of National Unity and Reconciliation Act*, Act. 34 of 1995, (South Africa), s. 3(3).

¹⁴⁴ Sarkin, 2004, p. 3.

¹⁴⁵ *Promotion of National Unity and Reconciliation Act*, Act. 34 of 1995 (South Africa), s. 20.

¹⁴⁶ Sarkin, 2004, p. 59.

¹⁴⁷ *Promotion of National Unity and Reconciliation Act*, Act. 34 of 1995 (South Africa), s. 1.

¹⁴⁸ Du Bois-Pedain, 2012, pp. 239-240.

¹⁴⁹ *Promotion of National Unity and Reconciliation Act*, Act. 34 of 1995 (South Africa), s. 20(2); du Bois-Pedain, 2012, p. 239.

confession of guilt. During the infamous Steve Biko hearing, for example, the applicants' request for amnesty was rejected because they claimed to have accidentally killed Mr Biko, and which effectively meant that they were not admitting to criminal guilt and consequently had not committed an "offence or delict".¹⁵⁰

The second step of the test for "political objective" sets out six more subjective criteria that the Amnesty Committee should refer to in deciding whether an act had a "political objective".¹⁵¹ These criteria generally require the committee to consider the motive, context, object, gravity, source and proportionality of the act committed.¹⁵² These provisions were used to exclude applicants who had committed ordinary offences, or whose actions were grossly disproportionate to the purported political objective, or who were acting out of personal ill-will towards the victim.¹⁵³ However, this disproportion did not correlate to whether the political objectives themselves were legitimate or 'moral', instead it involved a more factual analysis of whether the applicant's conduct did in fact fall within the scope of the political objective, however immoral or illegitimate that objective may be.¹⁵⁴ Therefore the gravity of the particular act in question was of much less concern to the Committee than whether the applicant had a political objective or told the truth. This second requirement for "full disclosure" was perhaps the priority of the amnesty committee, so to reject amnesty based on moral impermissibility of the offence would have jeopardised the applicants' ability to make full disclosures and the overall objectives of the TRC.¹⁵⁵ While the Committee did not interpret this requirement for truth in a judicial or criminal sense, they did require that the applicants make a "full disclosure of all relevant facts", which was interpreted as "truthful disclosure, [not] accurate description where inaccuracies are a result of faulty memory or faulty reconstructions".

¹⁵⁰ Truth and Reconciliation Commission of South Africa, Hearing AC/99/0020.

¹⁵¹ *Promotion of National Unity and Reconciliation Act*, Act. 34 of 1995 (South Africa), s. 20(3).

¹⁵² *Ibidem*; *Report of the Truth and Reconciliation Commission of South Africa*, Vol. 6 Sec. 1 Ch. 1; paras. 19-20.

¹⁵³ *Report of the Truth and Reconciliation Commission of South Africa*, Vol. 6 Sec. 1 Ch 1, 2003, paras. 31-34; Lessa & Payne, 2012, p. 250.

¹⁵⁴ Du Bois-Pedain, 2012, p. 252.

¹⁵⁵ Lessa & Payne, 2012, pp. 252-254.

While a great number of applications were rejected for not complying with the “political objective” requirement,¹⁵⁶ the Amnesty Committee accepted the vast majority of applications that made it past that *prima facie* test.¹⁵⁷ Even so, the effectiveness of the TRC was called into question given the relatively low number of participants compared to incidents of political violence; the disproportionately low number of white, state participants; and the eventual loss of credibility when accompanying criminal trials were not pursued for those who were refused amnesty or did not apply.¹⁵⁸

2.1.3. The Legality & Legitimacy of Conditional Amnesty

Aside from these preliminary criticisms regarding the effectiveness of the South African amnesty process, some commentators have suggested that the overall legitimacy of the scheme was undermined because of its illegitimacy under international law. A separate but equally significant claim is that while the TRC may have been permissible at the time, the amnesty provisions would be illegitimate under the current legal climate.

A discussion of the former contention seems somewhat less problematic, as during the 1990s the global community was still in the early stages of developing distaste for amnesty. Furthermore, at the time of the creation of the TRC, South Africa’s repertoire of ratified international treaties was certainly not as numerous as it is today, as most of the core UN treaties were only ratified in the late 1990s by the post-apartheid government.¹⁵⁹ Any question of domestic constitutionality was dispensed with in the landmark *AZAPO*¹⁶⁰ case from the South African Constitutional Court. In that case, the families of members of political party Azanian People’s Organisation challenged the amnesty provision in the PNURA, claiming that it was contrary to the

¹⁵⁶ *Truth and Reconciliation Commission of South Africa*, hearing AC/2001/248 (on the murder of Justice Mbizana); cited in Sarkin, 2004, p. 252.

¹⁵⁷ Lessa & Payne, 2012, p. 250.

¹⁵⁸ See generally: Sarkin, 2004.

¹⁵⁹ UN OHCHR, Status of Ratification Interactive Dashboard, 2014.

¹⁶⁰ *Azanian People’s Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, Constitutional Court of South Africa, Case No. CCT17/96, July 25 1996.

provisions of the interim Constitution, in particular the right of access to a court.¹⁶¹ Although the Constitutional Court specifically rejected the direct influence of international obligations on questions of domestic constitutionality,¹⁶² in *obiter* the Court referred to the amnesty provision under article 6(5) of the Geneva Conventions to emphasise that even if international law were to have a direct bearing on their decision, states are encouraged to grant amnesty in circumstances of non-international armed conflicts.¹⁶³ Mahomed DP justified this as follows:

“It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such a conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatized by such a conflict to reconstruct itself... The state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity.”¹⁶⁴

The question therefore of whether the South African amnesty was consistent with South Africa’s international obligations at the time of operation seems to be made somewhat redundant in light of the AZAPO decision and the fact that South Africa’s international obligations were comparatively scarce. Even so, some commentators have suggested that the outcome of the AZAPO case was inevitable in light of the intense national pressure to ensure transition to democracy and “ruling against amnesty then

¹⁶¹ *Ibidem*, para. 8; see also *Constitution of the Republic of South Africa*, Act 200 of 1993, s. 22.

¹⁶² *Ibidem* para. 26.

¹⁶³ *Ibidem*, paras. 28-32.

¹⁶⁴ *Ibidem*, para. 31.

would have been a rash and arrogant betrayal of those who made constitutionalism itself possible, (but) that was then”.¹⁶⁵

Statements such as this highlight the more contentious question of whether South Africa’s amnesty would be considered acceptable if it were to be implemented today. Those who answer this question in the affirmative often make reference to similar lines of reasoning as was adopted by the judges of the AZAPO decision, relegating to arguments that acknowledge a duty to prosecute for human rights violations, but insisting that nonetheless customary principles and international law make a concession for states’ prerogatives to facilitate transitions.¹⁶⁶ Another line of reasoning justifying the legitimacy of that amnesty emphasises the conditional requirements and the importance of political accountability as a substitute for individual accountability.¹⁶⁷ The requirement for full disclosure of the truth and the accompanying threat of criminal prosecution, combined with the public declaration of guilt by the offenders, could be interpreted as satisfying the relatively vague requirements of the international duty to investigate, prosecute and punish.¹⁶⁸

A preference has also been suggested for the allocation of political accountability and restorative justice as more effective measure for avoiding impunity in times of transition.¹⁶⁹ This corner of the ring, however, appears to underestimate the importance of victims’ perspectives. As the AZAPO case demonstrated, the South African amnesty process was heavily criticised at the time by victims claiming a right to justice. It is understandable why victims of serious human rights violations, such as the family members of those who were tortured, murdered or injured during the apartheid regime, would not consider narrative truth telling under threat of prosecution as satisfying a state’s duty to investigate, prosecute and punish. In light of this, the UN Office of the High Commissioner for Human Rights has explicitly claimed that it would not consider the South African amnesty permissible:

¹⁶⁵ Steinberg, 1999; cited in Varney, 2010, p. 297.

¹⁶⁶ See generally: Schabacker, 1999.

¹⁶⁷ Du Bois-Pedain, 2012, p. 258.

¹⁶⁸ *Ibidem*, pp. 258-259.

¹⁶⁹ *Ibidem*, p. 259.

“Although South Africa’s amnesty was not tested before an international human rights body, it is doubtful whether it would survive scrutiny under the legal standards developed by such bodies as the Human Rights Committee and the Inter-American Commission on and Court of Human Rights. These bodies have found amnesties to be incompatible with States’ obligations under relevant treaties even when the State concerned convened a truth commission and provided reparations to victims.”¹⁷⁰

Whether the South African amnesty would be considered permissible today seems therefore to depend very much on who is being asked. The South African authorities would obviously maintain their precedent, however the Human Rights Committee, and potentially the other UN treaty bodies, may consider it impermissible. As for the ICC, whether or not the South African amnesty would be considered “unwillingness” to prosecute is another matter subject to debate.¹⁷¹ On the one hand, the restriction of amnesty along with the accompanying threat of prosecution for those who do not subject themselves to the amnesty process may not be considered “unwillingness” to prosecute,¹⁷² however in light of the ICC’s relatively strict requirements communicated to the Colombian Constitutional Court in 2014,¹⁷³ the threshold for unwillingness to prosecute may be lower than previously thought.

2.2. ALTERNATIVE SENTENCING IN COLOMBIA

2.2.1. Contextual Background

Colombia’s history since the 1940s is riddled by a drawn out and complicated conflict between multiple parties, earning the country a reputation as host of the “world’s longest war”.¹⁷⁴ During these years, all of the parties involved have committed human rights atrocities including extra-judicial killings, torture, enforced disappearances, kidnappings and enforced displacement on an unprecedented scale.¹⁷⁵

¹⁷⁰ UN OHCHR, 2009 p. 33.

¹⁷¹ South Africa has a state party to the Rome Statute since 2000.

¹⁷² Du Bois-Pedain, 2012, p. 257; Freeman & Pensky, 2012, p.63

¹⁷³ Bensouda, Letter from the Office of the Prosecutor of the International Criminal Court to the Constitutional Court of Columbia, 2013.

¹⁷⁴ Vulliamy, 2015.

¹⁷⁵ See generally: Amnesty International, 2015.

The root of the conflict can be traced back to social causes, namely disagreements between the predominantly right-wing Colombian state and a disillusioned rural poor. By the 1960s, the FARC, amongst others, had evolved into organised guerrilla groups from peasant and communist movements.¹⁷⁶ FARC and Colombian state forces have been locked in sporadic warfare since the 1960s, which in turn spurred the creation of anti-FARC paramilitary groups or *autodefensas* groups such as the *Autodefensas Unidas de Colombia* (AUC), allegedly acting under government mandates opposing the activities of the FARC and left wing groups. This ultimately intensified divisions and exacerbated casualties and human rights violations. Despite the continuing violence, the country has managed to maintain a relatively strong commitment to the rule of law and democratic institutions, in particular an active and independent judiciary.¹⁷⁷

Although multiple peace talks with the various guerrilla groups and paramilitaries have been attempted, the Colombian government's previous peace processes have only resulted in the partial or complete dissolution of such groups on two occasions – once in 1989 following a peace agreement with the M-19 guerillas, and more recently in 2005 under the *Ley de Justicia y Paz* (Justice and Peace Law or JPL)¹⁷⁸ intended to demobilise the paramilitaries.¹⁷⁹ In the wake of failed peace talks with FARC and the *Ejército de Liberación Nacional* (ELN) in the 1990s, the government - especially under the previous administration of Álvaro Uribe - has intensified military campaigns, significantly weakening FARC's capacities in the region.¹⁸⁰ This weakening, along with a change from the hardliner Uribe administration to that of Juan Manuel Santos in 2010, and the declassification of FARC as a terrorist organisation laid the foundations for the commencement of renewed peace talks between the Colombian government and FARC in 2012.¹⁸¹

¹⁷⁶ ICTJ, 2009, p. 1.

¹⁷⁷ *Ibidem*, p. 2

¹⁷⁸ *Ley de Justicia y Paz* (Justice and Peace Law) Law 975 of 25 July 2005 (Colombia).

¹⁷⁹ ICTJ, 2009, p. 1.

¹⁸⁰ *Ibidem*.

¹⁸¹ Crisis Group, 2013, p. 9.

The current peace talks between the Santos administration and the FARC, overseen by Cuba and Norway, were made possible by a 2012 legislative Act that foresaw the inclusion of transitional justice mechanisms into Colombian legislation. The *Marco Juridico para La Paz* (Legal Framework for Peace or LFP) amended the Colombian Constitution by inserting a transitory article detailing a framework of application for transitional justice mechanisms, such as a truth commission and criminal investigations, with the purpose of “facilitating the end of the internal armed conflict and attaining a stable and lasting peace, with guarantees of non-repetition and security for all Colombians... and victims’ rights to truth, just and reparation”.¹⁸² Shortly after this amendment was passed, Santos’ government commenced negotiations with FARC based on a negotiating platform incorporating six topics for discussion: agricultural development, political participation, end of the conflict (transitional justice), solution to the drug trade, victims and implementation, verification and ratification of the agreement.¹⁸³

Until now, the two parties have agreed upon three out of six of these issues, but the most contentious point – end of the conflict and transitional justice – remains under discussion in Havana.¹⁸⁴ While negotiators have certainly made significant progress until now, and have most likely come closer to reaching an agreement with FARC than any previous attempts at peace,¹⁸⁵ this final point is undoubtedly the most difficult topic to negotiate and both parties must be willing to make significant concessions if they hope to achieve peace. Deciding on a framework will be exceptionally difficult because of the relatively demanding requirements of the FARC and the need to balance these requests and the achievement of peace with the rights of victims and Colombia’s legal obligations. Importantly, both FARC and certain sectors of civil society see themselves

¹⁸² *Marco Juridico Para La Paz* (Legal Framework for Peace) Law no.1 of 31 July 2012 (Colombia), transitory art. 66.

¹⁸³ See: *Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera* (General Agreement for the Termination of the Conflict and Building of a Stable and Long-Lasting Peace), 26 August 2012, available at <<http://wsp.presidencia.gov.co/Documents/AcuerdoTerminacionConflicto.pdf>> (consulted 12 July 2015).

¹⁸⁴ Washington Office in Latin America, *Peace Timeline 2015*, available at <<http://colombiapeace.org/timeline2015/>> (consulted 12 July 2015)

¹⁸⁵ Isacson, 2014, p. 2.

as political freedom fighters and as such have explicitly stated that their actions do not amount to regular criminal acts.¹⁸⁶

This alleged status is part of what makes negotiations with FARC significantly more difficult than previous processes with the paramilitaries.¹⁸⁷ Because of this contention, the FARC negotiators until now have insisted that any agreement on transitional justice or ending the conflict cannot incorporate regular prison sentences for members of the organisation.¹⁸⁸ This position has been reiterated as recently as March 2015, when FARC negotiators specifically stated “let it be known that no accord is possible that would impose a single day in prison for any guerrilla for having exercised the right to rebel, a precious gift of humanity, in order to end the injustices our people have suffered”.¹⁸⁹ The Colombian government, however, is under intense pressure to comply with these conditions whilst simultaneously ensuring compliance with duties to investigate, prosecute and punish human rights violations under the ACHR, the Rome Statute and other international conventions, as well as ensuring that victims’ rights to reparations, truth and justice are met. Indeed, the current process in Colombia is the first peace process subject to the oversight of the ICC,¹⁹⁰ and the Office of the Prosecutor has not hesitated to inform the Colombian authorities when certain proposals might be considered “unwillingness” to prosecute, activating the intervention of the ICC. Moreover, Colombia is also responding to the limited success of the JPL framework, which was not particularly well-received due to the limited number of paramilitaries to face successful convictions, which consequently left a residual sentiment of disguised impunity.¹⁹¹ This pressure from civil society, coupled with pressure from the ICC and the Inter-American means that Colombian authorities and

¹⁸⁶ Cadena Radial Bolivariana CRB, Voz de la Resistencia, interview with Iván Márquez, 01 April 2013, at <<http://resistencia-colombia.org/index.php/crb/2738-la-paz-frente-a-las-premuras-legislativas-y-electorales>> (consulted 12 July 2015).

¹⁸⁷ Indeed, Colombia is also responding to the limited success of the JPL framework, which was not particularly well-received due to the limited number of paramilitaries to face successful convictions and left a residual sentiment of poorly-disguised impunity.

¹⁸⁸ Cadena Radial Bolivariana CRB, Voz de la Resistencia, interview with Iván Márquez, 01 April 2013, at <<http://resistencia-colombia.org/index.php/crb/2738-la-paz-frente-a-las-premuras-legislativas-y-electorales>> (consulted 12 July 2015).

¹⁸⁹ Washington Office in Latin America, Peace Timeline 2015, available at <<http://colombiapeace.org/timeline2015/>> (consulted 12 July 2015).

¹⁹⁰ Alvira, 2013, p. 134.

¹⁹¹ Gómez Isa, 2013, p. 2

FARC are acting in an unprecedented legal and political environment and are consequently compelled to pioneer unique alternatives to traditional justice mechanisms such as amnesty.

2.2.2. Proposed Operative Framework

In light of these strenuous demands from FARC, civil society and international monitoring mechanisms, negotiators and various civil society organisations have proposed a framework that will seemingly incorporate some form of alternative sentencing for human rights violations. The LFP does not specifically state the exact process and mechanisms for the investigation, prosecution and punishment of offenders but rather outlines the boundaries for any available process.¹⁹² The legislation outlines a set of criteria to be used by the Colombia Congress in determining who are the “most responsible” offenders for crimes against humanity, genocide or systematically committed war crimes.¹⁹³ These “most responsible” should be prosecuted, but regular criminal sentences for such offenders can be substituted by suspended sentences or a form of alternative sentencing.¹⁹⁴ Under the framework, decisions on sentencing should be based on an offender’s cooperation with transitional processes, such as truth-telling, admissions of guilt, disarmament and the provision of reparations.¹⁹⁵ Therefore the provisions of the framework leave open the possibility that minor offenders might be amnestied, but even major offenders might be prosecuted and then excused from penal punishment by either alternative or suspended sentencing.

Although the operational guidelines of the LFP were approved by the Colombian Constitutional Court,¹⁹⁶ the involvement of the ICC has effectively limited the potential scope of the Framework. In two letters addressed to the Colombian

¹⁹² Washington Office in Latin America, Peace Timeline 2013, available at <<http://colombiapace.org/timeline2013/>> (consulted 12 July 2015).

¹⁹³ Marco Juridico Para La Paz (Legal Framework for Peace) (Law no.1 of 31 July 2012) (Colombia), art. (1).

¹⁹⁴ *Ibidem*; Washington Office in Latin America, Peace Timeline 2013, available at <<http://colombiapace.org/timeline2013/>> (consulted 12 July 2015).

¹⁹⁵ Marco Juridico Para La Paz (Legal Framework for Peace) (Law no.1 of 31 July 2012) (Colombia), art. (1).

¹⁹⁶ Corte Constitucional (Republica de Colombia), Sentencia C-579 de 2013.

Constitutional Court in 2013, the ICC's Chief Prosecutor Fatou Bensouda specifically stated that any deal which included amnesty or suspended sentences for serious human rights violations would be considered "unwillingness" to prosecute by the ICC and compel intervention.¹⁹⁷ In these letters, the Prosecutor expressly states that sentences that are "grossly inadequate" in relation to the human rights violations committed will activate the admissibility provisions of the Rome Statute and require prosecution by the ICC.¹⁹⁸ This interference by the ICC is significant as it has effectively limited the options available to the Colombian Government and the FARC, as it is unlikely that either party will want to agree to a deal which can essentially be superseded by the ICC. Consequently the option of suspended sentences has effectively been removed from the negotiating table, as well as any sentences that might be considered so light as to be "grossly inadequate". What is left therefore, is the provision of alternative sentences that comply with the ICC by unequivocally inferring some form of punishment while at the same time satisfying the FARC's insistence on avoiding regular prisons. Thus, International Crisis Group has suggested that the "most responsible" offenders be submitted to a criminal trial process, and depending on their cooperation and contribution to transitional justice processes, be allocated a sentence to be served in an independent, purpose-built facility that imposes some restriction of freedom, potentially including community service work.¹⁹⁹ Similarly, Eduardo Montealegre, Colombia's Prosecutor General, suggested that sentences might be substituted with community service work such as clearing landmines.²⁰⁰ Such arrangements might very well be agreeable to the members of FARC, as they would be symbolically acknowledging their status as exceptional, political offenders as opposed to regular criminals, and would at the same time placate their desire to avoid an agreement resembling a humiliating defeat.²⁰¹

¹⁹⁷ Bensouda, Letter from the Office of the Prosecutor of the International Criminal Court to the Constitutional Court of Columbia, 2013.

¹⁹⁸ *Ibidem*.

¹⁹⁹ Crisis Group, 2013.

²⁰⁰ El Tiempo, 2014; Washington Office for Latin America, 2015.

²⁰¹ Washington Office in Latin America, Peace Timeline 2013, available at <<http://colombiapace.org/timeline2013/>> (consulted 12 July 2015).

Whether these suggestions would comply with the ICC's conditions is unclear, but it seems likely that some form of limitation of freedom with the addition of community service might be punishment enough to avoid the classification of "unwillingness" to prosecute and comply with Colombia's obligations under international law. Importantly, any future agreement will also include the use of criminal trials (with alternative sentencing) used in tandem with a truth commission – which was recently agreed upon by the negotiators²⁰² – and reparations scheme, and might very possibly include the extension of the scheme to military or state personnel involved in human rights violations rather than simply members of FARC.

2.2.3. The Legality & Legitimacy of Alternative Sentencing

Although these proposals for alternative forms of sentencing for the most responsible offenders might be considered in compliance with Colombia's national and international obligations, there is still some doubt regarding how much punishment exactly might be considered enough punishment to comply with Colombia's obligations to investigate, prosecute and punish in line with international obligations and the inter-American human rights institutions. Whether victims' right to truth, justice and reparations are complied with will be dependent both on the mechanisms chosen to prosecute human rights offenders and other mechanisms such as reparations schemes and truth commissions.

Domestically, the LFP has already been declared in line with the Colombian Constitution, subject to a number of parameters that should apply to any subsequent legislation, such as the prohibition of suspended sentences for those "most responsible".²⁰³ However, as has already been mentioned this approval refers merely to the constitutionality of the framework itself, and any future provisions that are implemented by the Colombian government will again be subject to scrutiny by the domestic legal system. Previous experiences with the JPL law have shown that the

²⁰² BBC, Colombia and Farc Announce Truth Commission, 4 June 2015, at <<http://www.bbc.com/news/world-latin-america-33017258>> (consulted 12 July 2015).

²⁰³ Corte Constitucional (Republica de Colombia), Sentencia C-579 de 2013.

constitutional court is not afraid to intervene when legislation falls short of Colombia's international obligations, even when said legislation is part of a peace process.²⁰⁴

Whether the Inter-American human rights institutions, namely the IACHR and the IACtHR will consider such alternative sentences to be in line with Colombia's obligations under the ACHR is unclear, and neither body has explicitly made any statement approving or disapproving of such an option. Some preliminary conclusions might be drawn, however, based on previous comments or statements by the IACHR. The Commission has unequivocally expressed concern at the original drafting of the framework, stating that it "provoke(s) a number of concerns in the area of human rights" despite the Colombian government's insistence that the jurisprudence of the Court and Commission limits a ban on amnesties merely for self-amnesties or when they are not issued as part of a comprehensive transitional justice strategy.²⁰⁵ These concerns have so far been centred on concerns regarding the 'prioritisation' feature of the LFP (i.e. the selection of prosecutions dependent on the seriousness of offences), while the question of alternative sentencing for those offenders has not yet been openly addressed by the Inter-American institutions. When advising the Colombian authorities on the acceptability of the LFP, however, the IACHR did refer to its case law by stating that:

"[I]n order for the State to satisfy its duty to adequately guarantee the range of rights protected by the Convention, including the right to judicial recourse, and the right to know and access the truth, the State must fulfil its duty to investigate, try, and, when appropriate, punish and provide redress for grave violations of human rights".²⁰⁶

While this statement may suggest that the Commission will not impose strict limitations requiring specific forms of punishment, the inter-American system's emphasis on investigation, prosecution *and* punishment might be cause for concern for

²⁰⁴ Crisis Group, 2013, p. 12.

²⁰⁵ Inter-American Commission on Human Rights, Annex to Press Release 144/12, 7 December 2012, at <http://www.oas.org/en/iachr/media_center/PReleases/2012/144A.asp> (consulted 12 July 2015).

²⁰⁶ Inter-American Commission on Human Rights; "Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia" OEA/Ser.L/V/II/ Doc. 49/13, 31 December 2013, para 251, citing *Case of the La Rochela Massacre v. Colombia* Inter-Am Ct. H.R. (Ser. C) No. 163 (2007), para.193.

the Colombian negotiators.²⁰⁷ There is some cause for concern if we consider the previous jurisprudence of the IACtHR regarding the nature or requirements of punishment, in particular the requirement for proportionality in punishment. The IACtHR has fairly unequivocally stated that in order to comply with the right to remedy, sentences in response to human rights violation should be proportional to the crime committed, and penalties must “truly contribute to prevent impunity”.²⁰⁸ Precisely what this requirement entails however is not certain, and a recent judgement Judge Diego Garcia-Sayan hinted at the possibility that the requirement for proportionate and non-illusory sentences may be mitigated by when there is a national interest in securing a peace agreement.²⁰⁹ Given that neither the Commission nor the Court has as yet not issued any statement which unequivocally outlines that Colombia must inflict regular prison sentences for those that violate the ACHR, even though it has expressly communicated that the use of amnesty would not be compatible with that convention, it would seem that the implementation of a criminal trial followed by alternative sentences may comply with the requirements of those bodies.

On the broader international level, how much punishment is required is again an open question. From the previously discussed language of the Office of the Prosecutor from the ICC, it would appear that ineffective or excessively lenient punishment will be incompatible with the complementarity provisions of the Rome Statute, which is largely why suspended sentences no longer are no longer a viable option. However what the minimum threshold for punishment will be is unclear. The Office of the Prosecutor has remained intentionally open on this question:

“[T]he Office will consider the issue of sentences, including both reduced and suspended sentences, in relation to the facts and circumstances of each case. In particular, the Office will assess whether, in the implementation of such provisions, reasonable efforts have been made to establish the truth about serious crimes committed by each accused person, whether appropriate criminal responsibility for

²⁰⁷ See generally: Basch, 2007.

²⁰⁸ *Heliodoro Portugal v. Panama*, Inter-Am Ct. H.R., (Ser. C) No. 186 (2008), para. 203; cited in Seils, 2015, p. 4

²⁰⁹ Concurring Opinion of Judge Diego Garcia-Sayán, *The Massacres of El Mozote and Nearby Places V. El Salvador*, Inter-Am Ct. H.R., (Ser. C) No. 252 (2012), para. 30; cited in Seils, 2015 p. 4

such crimes has been established, and whether the sentence could be said, in the circumstances, to be consistent with an intent to bring the concerned person to justice”²¹⁰

This statement was issued prior to the delivery of the letters outlining concern for the use of suspended sentences, which indicates that the Office is assessing the potential options for punishments on a case-by-case basis as they are proposed. From this statement, however, it would seem that elements considered important by the ICC are truth, justice and allocation of criminal responsibility. The use of criminal trials, intended to expose the truth, allocate criminal responsibility and achieve justice could hypothetically comply with these conditions without the allocation of regular prison sentences. The same elements also seem to be prioritised by other international bodies, such as the UN treaty bodies in their examination of compliance with various treaty provisions. This is especially likely when we consider that the UN Human Rights Committee, in a previous case concerning Colombia, stated that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of art. 2(3), of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life”.²¹¹ From the above discussion on the permissibility of amnesty under international law, the disapproval of amnesty seems to stem from the failure to investigate and prosecute human rights violations, as well as the denial of victims’ rights such as truth, justice and reparations. If criminal investigations and trials are adopted by Colombia, potentially as part of a broader transitional justice project, international obligations to investigate and prosecute may very well be complied with, as the only distinguishing elements between the Colombian proposal and previous mechanisms such as the ICTY or ICTR will be the alternative punishment. Similarly, victims’ rights to truth, justice and reparations may also be complied with without having to implement regular criminal sentences for offenders, though this will be discussed in further detail below. Particular attention should be paid, however, to the requirements of the IACtHR and the requirement for proportionate and non-illusory

²¹⁰ ICC OP, 2012, para. 206.

²¹¹ *Bautista de Arellana v Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995); Seibert-Fohr, 2009, p. 18.

sentencing. If Colombia's alternative sentencing mechanism is deemed disproportionate by the Colombian civil society, there is a credible chance that the IACtHR will find a breach of the ACHR, which would undoubtedly undermine the legitimacy of the process and its advantage over conditional amnesties.

PART 3

A COMPARATIVE ANALYSIS OF THE IMPACT OF EACH APPROACH ON ENABLING TRANSITION

As we have seen, the global taboo surrounding amnesty is largely a result of a moral or ethical opposition rather than a practical one. This is evident in the fact that most opposition comes predominantly from the academic and human rights sphere, rather than from statesmen who might be more concerned with stability and ease of governance than with rights of individuals. The adoption of alternative sentencing, therefore, must be considered not only in its capacity to achieve the same political objectives as amnesty – inducing opposing parties to demobilise and ending conflict - but also in its ability to achieve the broader, social objectives associated with transitional justice mechanisms. So far we have seen that alternative sentencing will be beneficial for governments and officials in so far as they might avoid allegations of impunity and international legal obligations that prevent the use of amnesty, however the potential for alternative sentencing to achieve other objectives of transitional justice must also be examined before it can be considered as a legitimate alternative to conditional amnesty. These objectives are largely varied, however three of the most widely reiterated subheadings regard truth, justice and reparations.²¹²

While there is no single panacea for recovery from conflict and violence, respecting truth, justice and reparations can be seen as a starting point from which to pursue longer-term goals such as lasting peace, reconciliation or the consolidation of the

²¹² These objectives may also alternatively be framed as rights, as international frameworks have explicitly outlined the requirement to respect truth, justice and reparations in contexts of transitional justice.

rule of law: “only when the victims know the whole truth, and when justice has been done and reparation made for the harm caused is it possible for a genuine process of forgiveness and national reconciliation to begin”²¹³. Each of these immediate objectives will be considered in order to determine whether alternative sentencing can or should be used in place of amnesties.

There are three possible answers to such a comparison - first, alternative sentences and conditional amnesty are found to have a similar impact in the realisation of truth, justice and reparations; second, the adoption of conditional amnesty has greater benefits than alternative sentencing; and third the use of alternative sentencing delivers greater benefits than conditional amnesties. From these three possible answers, only the third will genuinely justify the adoption of alternative sentencing in place of conditional amnesties. If alternative sentences are found to have an equal or lesser impact on the realisation of truth, justice and reparations, the adoption of this mechanism could be construed merely as a way to avoid the legal obstacles or institutional criticism that surround amnesties, without addressing the root causes of that criticism.

3.1. TRUTH

Truth is “a highly intangible and nebulous concept”²¹⁴ and as such its meaning and relevance within the realm of transitional justice is difficult to define. The requirement for truth after conflict or during transition is often characterised as a precondition for longer-term goals such as peace, reconciliation and the consolidation of the rule of law.²¹⁵

On the individual level, a collective effort to reveal the truth about conflict contributes to victims’ healing by acknowledging the harm done to them and restoring dignity.²¹⁶ Individual victims’ desire to know what happened to loved-ones, or the reasons why they were personally persecuted has been frequently reiterated during post-

²¹³ Gomez Isa, 2013, p. 5.

²¹⁴ Clark, 2011, p. 246,

²¹⁵ See generally: Meernik, Nichols & King, 2010. It should be noted, however, that the link between truth and objectives such as reconciliation is by no means certain (for example see Gibson, 2004)

²¹⁶ du Toit, 2000, p. 132.

conflict processes.²¹⁷ One victim who participated in the South African TRC articulated this desire by saying: “I would be happy if I knew who killed my son. If I could see them and they could say they shot my son dead, I would be satisfied. I was just hungry for the truth about my son’s death”.²¹⁸

From another, perhaps less-cited perspective, the truth may also be important for individual perpetrators, who may be willing for the opportunity to atone for their misconduct and initiate rehabilitation.²¹⁹ Individual requirements for truth feed into a broader, societal requirement for truth that claims that the revelation of details about human rights violations and the causes of conflict is necessary to create a “common and shared memory”.²²⁰ This requirement for collective memory is purportedly a prerequisite for reconciliation and to prevent reoccurrence of future violations.²²¹ Moreover, certain oppressive regimes intentionally attempt to deny wrongdoing and misrepresent history, adding another dimension to the truth-seeking efforts of transitional justice mechanisms.²²²

The importance of knowing the truth about incidents and causes of conflict has been confirmed in recent years by the tentative articulation of an international “right to truth” or the “right to know”, which is framed as both an individual right of victims but also a collective right of society.²²³ The International Centre for Transitional Justice suggests that the scope of this right requires knowing “to the fullest extent possible: the identity of perpetrators, the causes that led to abuses, the circumstances and facts of violations and ultimate fate and whereabouts of victims in the event of forced disappearances”.²²⁴ This right is explicitly articulated in the International Convention for the Protection of all Persons from Enforced Disappearances²²⁵ and Additional

²¹⁷ See for example: Picker, 2005; Chapman, 2008; van der Merwe, 2008.

²¹⁸ Picker, 2005, p.8.

²¹⁹ Mallinder, 2011, p. 29.

²²⁰ Gibson, 2004, p. 202.

²²¹ Bisset, 2012, p. 33.

²²² ICTJ, Truth and Memory, 2015, at <<https://www.ictj.org/our-work/transitional-justice-issues/truth-and-memory>> (Consulted 12 July 2015)

²²³ Gomez Isa, 2013, p. 5.

²²⁴ González & Varney, 2013, pp. 3-4.

²²⁵ International Convention for the Protection of all Persons from Enforced Disappearances article relating to right to truth, Art 24(2).

Protocol 1 to the Geneva Convention²²⁶. It has also been recognised as a component of the right to a remedy under the ACHR in a number of cases before the Inter-American Court and Commission.²²⁷

Whether articulated as a right or an objective,²²⁸ few commentators dispute the epistemic value of truth in a transitional context. The precise content and scope of truth is far more difficult to discern, however, and involves a far more complex, philosophical consideration. Defining “truth” is an abstract exercise, yet several attempts have been made to categorise the potential meanings of truth in a transitional context. Chapman and Ball make a distinction between a “macro truth” - which reveals broader, underlying causes, patterns and contexts of conflict - and a narrower “micro truth” - which reveals particular details of specific events, cases or people.²²⁹ Alex Boraine, the deputy chairman of the TRC, has made yet another distinction between factual or forensic truth, personal and/or narrative truth, social or dialogical truth and healing or restorative truth.²³⁰ It is these variations of truth that are reiterated in the final report of the TRC.²³¹

The former “forensic” variety of truth may be equated to the specific, narrow concept of truth that might be revealed from a criminal trial, subject to intense scrutiny, subjective and factually reliable but narrow in application.²³² Personal and/or narrative truth refers to the version of truth revealed by an individual in his/her accounting of a particular event or situation,²³³ which may be objectively less reliable yet equally valuable for the individual’s personal catharsis.²³⁴ Social or dialogical truth may be linked to Chapman and Ball’s “macro truth”, a broader conceptual truth about the

²²⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, art. 32.

²²⁷ González & Varney, 2013, p.5.

²²⁸ Although it should be emphasised that ‘truth’ is specifically articulated as a right in multiple international treaties.

²²⁹ Chapman & Ball, 2008, pp. 143-168.

²³⁰ Boraine, 2000, pp. 151-153.

²³¹ *Truth and Reconciliation Commission of South Africa Report*, Vol.1 Ch. 5, paras. 30-45.

²³² Boraine, 2000, p. 151. *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch. 5, paras 30-34.

²³³ Boraine, 2000, p. 152. *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch. 5, paras 35-38.

²³⁴ Hazan, 2006, p. 35.

conflict that is adopted by society and contributes to the realisation of collective memory.²³⁵ Finally, healing and restorative truth refers to “the kind of truth that places facts and what they mean within the context of human relationships – both among citizens and between the state and its citizens”.²³⁶ This final variety of truth may be tied to the requirement for acknowledgement, which goes further than a minimal understanding of truth as simply knowledge and requires that knowledge be publicly accepted by authorities and wrongdoers.²³⁷

In a regular, non-transitional society, not recovering from destructive conflict or situations of mass repression, what we consider to be “truth” might be equated to the more subjective definition affiliated with forensic truth, but in a society recovering from mass atrocities, this version of the truth becomes both less practicable and less desirable. For this reason, the revelation of alternative definitions of truth should be examined when evaluating transitional justice mechanisms.

3.1.1. Truth and Conditional Amnesty in South Africa

Although Ronald Slye suggests that the mere act of granting amnesty to individuals implicitly reveals that there have been misdeeds requiring forgiveness,²³⁸ the ability for non-conditional or blanket amnesties to reveal the truth about conflict is minimal at best. Similarly, a conditional amnesty that simply requires demobilisation or disarmament will seldom have the capacity to make a valuable contribution to some form of truth. A conditional amnesty which is granted only on the condition that the applicant contribute to truth-telling mechanisms, however, has the potential to make a unique and highly valuable contribution to the revelation of various categories of truth. The South African TRC represents the first time in history that amnesty was made conditional upon the revelation of truth. The value of the truth revealed by the TRC lies in the placement of the amnesty process within the larger operative framework of the

²³⁵ *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch. 5, paras 39-42.

²³⁶ *Ibidem*, para. 43.

²³⁷ Boraine, 2000, pp. 152-153; *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch. 5 paras. 43-45.

²³⁸ Slye, 2000, p. 171.

Truth and Reconciliation Commission. If amnesty applicants were simply required to testify before an amnesty committee and subsequently granted an amnesty without making any attempt to place the information within a broader or public truth-seeking effort, the contribution of that amnesty to the revelation of truth would hardly have benefited the South African society.

The South African amnesty was therefore not simply conditional upon the revelation of truth, it was conditional upon participation in the broader process of the TRC itself. It required the individual to make an application for amnesty, present themselves before the commission and make a full, public disclosure relating to all the acts for which they requested amnesty, thus contributing to the idealistic truth-seeking objectives of the commission itself.²³⁹ It is difficult, therefore, to separate the truth-seeking ability of the conditional amnesty from the truth-seeking ability of the truth commission itself.²⁴⁰ As mentioned above, this process of exchanging amnesty for truth-telling was chosen in South Africa instead of Nuremberg-style criminal tribunals, and while this choice was made in part due to political necessity, it was retrospectively justified partially on the basis that a truth commission with a conditional amnesty would have a greater advantage for the revelation of truth than criminal trials, where the perpetrator “has no incentive to tell the truth”.²⁴¹

The final report of the TRC claimed that that the conditional amnesty process that formed part of the Commission was capable of revealing each of the four varieties of truth and as such, the South African “third way”²⁴² revealed a particular truth that went beyond the ‘micro truth’ that might be revealed through a criminal trial process.²⁴³ The TRC claimed to reveal forensic truth by adopting an “extensive verification and corroboration policy to make sure its findings were based on accurate and factual information”, which was then revealed in the TRC Report.²⁴⁴ Personal and narrative truth was revealed because “by telling their stories, both victims and perpetrators gave

²³⁹ Slye, 2000, p. 172.

²⁴⁰ Greenawalt, 2000, p. 190.

²⁴¹ *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Foreword, paras 21-24.

²⁴² Boraine, 2000, p. 145.

²⁴³ *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch. 5, Foreword, paras 17-29.

²⁴⁴ *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, Ch. 5, para. 32.

meaning to the multi-layered experiences of the South African story.”²⁴⁵ Healing and restorative truth was purportedly achieved in the Commission’s efforts to place information within a broader context of history and its acknowledgement of the causes of conflict and the requirement to prevent further conflict.²⁴⁶ Finally, the Commission ostensibly established social truth by providing an environment in which all opinions were considered valuable and open to the public and creating an open process in which dignity and respect encouraged open dialogue.²⁴⁷

The use of conditional amnesty, which ensured the participation and information of perpetrators, potentially contributed to each of these truths by contributing to more factual or accurate information, including the perspectives of perpetrators for the purpose of narrative truth, revealing to a greater degree the causes of conflict to enable social healing and helping to foster an environment where perspectives from every side of the conflict may be heard. While many of these claims relate to the qualitative superiority of the ‘truth’ that emerged following the conditional amnesty process, it is important to note that the architects of the Commission have also suggested that the quantity of truth revealed via the amnesty process was superior to what may have been revealed if they had undertaken criminal trials. Desmond Tutu states in the final report of the TRC that “amnesty applicants often confessed to more gruesome crimes that were the subject of the Basson trial”.²⁴⁸ Some of the greatest setbacks of criminal trials are complicated procedures and extensive costs, which often means that comparatively few cases and offenders will ever be processed. Indeed, this was one of the greatest problems with the TRC’s accompanying criminal trials process, which struggled to secure the conviction of some of the most notorious apartheid collaborators.²⁴⁹

²⁴⁵ *Ibidem*, para 36.

²⁴⁶ *Ibidem*, paras 44-45.

²⁴⁷ *Ibidem*, paras 41-42.

²⁴⁸ *Truth and Reconciliation Commission of South Africa Report*, Vol. 6, Foreword; the trial of Wouter Basson was one of the few criminal trials attempted by South Africa to prosecute some of the offenders who were either refused amnesty or neglected to apply for amnesty, and the resulting failure to secure prosecution in part justified the work of the TRC, but simultaneously undermined the process by removing the threat of prosecution for those who did not apply for amnesty.

²⁴⁹ See for example, *S v Basson*, 2005 (12) BCLR 1192 (CC) (South Africa).

Despite these reported truth-related benefits of the South African TRC and conditional amnesty, there seems to be an indelible rift between the idealistic claims of the Commissioners and the experiences or perceptions of ordinary South Africans who participated in or witnessed the process.²⁵⁰ Many experts or academics who have evaluated the TRC process point to this divergence between the theory and practice of the Commission. Chapman and van der Merwe point to the inability of the TRC and the amnesty process in particular to reveal reliable micro-truth:

*“[T]he [amnesty] committee narrowed its interpretation of full disclosure so that it did not require an accurate description, the revelation of the full information about the case, a probable reconstruction of events or even consistency in the information given... in some cases the committee granted amnesty despite the availability of contradictory evidence on the grounds of memory loss or faulty recollection, ignoring the likelihood that the applicant was lying”.*²⁵¹

This potential shortcoming may be linked to claims that the TRC simply adopted an “acceptable” truth due to political fragility at the time.²⁵² Allegations such as these seem to be in part supported by the statements of many victims who were unsatisfied with the allegedly contracted truth that emerged in the final report.²⁵³

Conversely, others have criticised the amnesty process and the overall process of the TRC for being *too* legalistic and applying an excessively narrow approach in its hearings and application procedures.²⁵⁴ Such an accusation reveals a somewhat paradoxical problem within the Amnesty Committee, whereby the process was justified in part because of inadequacies in judicial proceedings, yet the Committee nevertheless employed judicial methodology in its proceedings. This adoption of a semi-judicial framework perhaps contributed to the macro-level problems with the work of the Commission, particularly the concern that while the Commission was adept in its revelation of details about various human rights violations, it neglected to reveal truths

²⁵⁰ See for example: Gibson, 2004; Sirleaf, 2014.

²⁵¹ Chapman and Ball, 2008, p. 156.

²⁵² Clark, 2011, p. 251.

²⁵³ Picker, 2005, p. 8.

²⁵⁴ Mallinder, 2011, p. 30.

relating to the broader structural causes of apartheid and the links between the regime and those human rights violations.²⁵⁵

One other limitation, which was even acknowledged by Tutu himself,²⁵⁶ is the conspicuous lack of participation in the amnesty process by certain sectors of society, in particular the non-participation of the white community, which left significant holes in the truth-seeking efforts of the Amnesty Committee and ultimately compromised the final revelation of truth.²⁵⁷

In spite of these subsequent criticisms of the Amnesty Committee and TRC's truth-seeking efforts, it is generally accepted that the granting of amnesty did have a positive impact on the revelation of truth, and that a lesser degree of truth, of any variety, would have been revealed if it were not for the conditional amnesty.²⁵⁸ Moreover, empirical studies have also demonstrated the adoption of a least some degree of collective memory as a result of the work of both the Commission and the Amnesty Committee.²⁵⁹

3.1.2. Truth and Alternative Sentencing in Colombia

As has already been mentioned, one of the most conspicuous differences between the South African amnesty model and the Colombian alternative sentencing model is the presence of criminal trials. When considering the potential for alternative sentences to reveal truth, therefore, it is essential to consider the truth-seeking functions inherent within a criminal trial process. The ability for criminal trials to meet the unique demands for truth that emerge within transitional contexts has been highly, and rightly, criticised in recent years, which is in part why many actors have insisted on the inclusion of truth commissions either to accompany or replace criminal trials. Proponents for criminal trials, however, may refer to the quality of the more forensic,

²⁵⁵ Chapman and van der Merwe, 2000, p. 249.

²⁵⁶ *Truth and Reconciliation Commission of South Africa Report*, Vol. 6 Foreword.

²⁵⁷ Clark, 2011, pp. 249 & 251.

²⁵⁸ Mallinder 2011, p. 30.

²⁵⁹ See for example: Gibson, 2004; van der Merwe, 2008.

micro truth that a criminal trial is capable of revealing.²⁶⁰ Another potential benefit of criminal trials suggests that truth-telling in transitional contexts require not just the recovery of facts but also “the official acknowledgement of those facts by an authoritative mechanism, such as legal tribunals or courts”.²⁶¹ Criminal tribunals, therefore, may have the ability to satisfy both limbs of this broader requirement for truth.

These alleged benefits, however, might seem meek when juxtaposed with the comparatively colossal onslaught of criticism relating to the quality of truth exposed during transitional trials. The purpose of criminal trials, focussed on determining the criminal liability of a specific person for isolated acts, along with the strict procedural and evidentiary rules often means that contributions to both macro and micro versions of truth are comparatively negligible.²⁶² Rules of evidence may exclude potentially important information²⁶³ and testimonies and procedures are necessarily focused on the information of the accused, which might not result in a holistic understanding of events capable of contributing to broader objectives of transitional societies.²⁶⁴ This may in turn have a collateral effect on victims of conflict, as “dealing with atrocity within the limits of international criminal law by definition reduces the human experience to what is legally relevant to the primary aim of criminal procedure: determining the guilt of those who happen to stand trial”.²⁶⁵ These were the experiences of international criminals tribunals such as the ICTY, the ICTR and the SCSL, where civil society organisations criticised the ability of those tribunals to contribute to social and historic truths and the creation of collective social memory.²⁶⁶

Moreover, the substantial quantities of resources required to undertake effective and reliable prosecutions will often mean that only a handful of potential defendants will ever actually make it into a courtroom where they are able to “tell the truth”, which

²⁶⁰ Landsman, 1997, p. 83.

²⁶¹ Garbett, 2013, p. 205; citing Cohen, 2009.

²⁶² Bisset, 2012, p. 34.

²⁶³ *Ibidem*.

²⁶⁴ Crisis Group, 2013, p. 31.

²⁶⁵ Brants, 2013, p. 3.

²⁶⁶ Hazan, 2006, pp. 30-31; Clark, 2011, p. 248; Sirleaf, 2014, p. 285.

implicitly limits the quantitative value of truth garnered from trials.²⁶⁷ Those who are chosen to be prosecuted may be disproportionately representative of one particular group, which exacerbates the truncated truth emerging from ordinary trials – the interference of politics can serve as a catalyst for this problem, perhaps best demonstrated by the exclusion of Rwandan Patriotic Front members from prosecution in the ICTR.²⁶⁸

Even after successful prosecutions, the resulting micro or forensic truth may not be mutually accepted by the society, such as in Bosnia and Herzegovina where three versions of truth emerged following the ICTY, one for each ethnic group who chose to interpret the findings of the trials to accommodate their own distinct social beliefs.²⁶⁹ This last claim appears to implicitly contradict those who say trials are useful in not only knowing but acknowledging truth on a broader social scale.

While truth-seeking impediments such as these might lead us to believe that “if we want to know the ‘truth’ about Auschwitz, we would be better to read Primo Levi than a transcript from the trial of a single camp guard”,²⁷⁰ some of the underlying faults with criminal trials might be assuaged by the proposed Colombian framework. Desmond Tutu claimed that criminal trials should be discredited because the perpetrator ‘has no incentive to tell the truth’,²⁷¹ but the Colombian framework, which may potentially mimic the TRC’s process by exchanging truth for a more lenient sentence, seems to provide such an incentive to wrongdoers. The incentive to tell the truth in exchange for alternative sentences might dispel some of the criticism from those claiming that the adversarial nature of trials and the extensive resources required diminish the value of truth revealed. By incentivising FARC and member of the Colombian military to tell the truth, the prosecution process could become less adversarial, more open and less costly. With regard to costs, it is important to note that unlike some other states adopting transitional mechanisms, Colombia has a particularly

²⁶⁷ Landsman, 1997, p. 85.

²⁶⁸ Hazan, 2006, pp. 30-31.

²⁶⁹ Clark, 2011, p. 248.

²⁷⁰ Brants, 2013, p. 3.

²⁷¹ *Truth and Reconciliation Commission of South Africa Report*, Vol. 1 Foreword, para. 24.

functional, independent and well-resourced judiciary, capable of supporting a considerable number of prosecutions.²⁷²

However, Colombia's previous experience under the JPL must act as a cautionary guide with respect to the value of truth revealed from criminal trials. While many have commended the JPL process for its contributions to truth – Crisis Group reports that by 2013 40,000 crimes had been acknowledged and 5,000 bodies recovered as a result of the process²⁷³ – the Colombian authorities have only managed to prosecute a few dozen of the 4,800 paramilitaries identified for prosecution.²⁷⁴ The limitations of criminal procedures have subsequently been acknowledged by the Colombian authorities, and Crisis Group quotes one magistrate confessing that “a transitional justice process is not a criminal trial, and thinking this was our most important error”.²⁷⁵ The overall process, therefore, was largely discredited by Colombian society, who did not either collectively accept the truth as legitimate or consolidate this truth into a broader, macro-level truth about the root causes of conflict, capable of contributing to long-term reconciliatory aspirations. Moreover, in order to objectively contribute to truth-seeking and avoid the illegitimacies associated with the ICTR, prosecutions will have to include not simply members of the FARC but simultaneously Colombian military or security members who have also participated in the violence. This issue is still under intense debate in Colombia, and it is not certain whether the Colombian military will be submitted to the same processes as members of FARC.²⁷⁶

In light of these flaws, the Framework for Peace has expressly called for the creation of a Truth Commission,²⁷⁷ the terms of which have already been agreed upon at the peace talks in Havana,²⁷⁸ whose operations might mitigate some of the requirements

²⁷² Crisis Group, 2013, p. 34.

²⁷³ *Ibidem*, p. 6.

²⁷⁴ *Ibidem*, p. 5.

²⁷⁵ *Ibidem*.

²⁷⁶ Washington Office in Latin America, Peace Timeline 2015, available at <<http://colombiapeace.org/timeline2015/>> (consulted 12 July 2015); the LFP and the peace talks in Havana have clarified that the government forces will be included in the accountability process, however the precise terms of that process are still under debate due to resistance from the Colombian military.

²⁷⁷ *Marco Juridico Para La Paz* (Legal Framework for Peace), Law. No.1 of 31 July 2012, (Colombia), art.(1).

²⁷⁸ Isacson, 2015.

for truth-seeking from trials accompanied by alternative sentences. The relationship between the hypothetical Colombian Truth Commission and trials is not certain, but it is unlikely that the Commission will be able to directly recommend prosecutions.²⁷⁹ The inclusion of a truth commission along with a criminal trials process in the future may be able to ultimately make a very valuable contribution to truth-seeking for Colombian society, far more valuable than if criminal trials, with or without alternative sentences, were adopted in isolation. In sum, judging by the previous experience of the JPL combined with the myriad of inhibitions to truth affiliated with criminal trials, the use of alternative sentencing in Colombia will have controvertible benefits for truth unless accompanied by an effective truth commission and incorporating all members of the conflict.

3.1.3. Conclusion on Truth

In theory, a conditional amnesty process may be better suited to contributing to a broader, social or “macro” truth and collective memory, while criminal trial truth might be better suited to revealing specific, “micro truth”, factually accurate and objective information about particular events or people. The adversarial nature of criminal trials, where offenders may not have either an obligation or incentive to tell the truth, as well as their costs and evidentiary and procedural obstacles mean that both the quantity and quality of knowledge revealed in trials is generally inferior to the potential revelations of a truth commission aided by a conditional amnesty. Some of these problems, however, might be overcome in the Colombian example if the provision of alternative sentences becomes dependent on the revelation of truth, and this becomes enough of an incentive for the FARC to collaborate with the criminal justice system and consequently ease some of the procedural or adversarial difficulties typically associated with judicial processes. The previous experience of the JPL law, however, where so few of the participating paramilitaries were subjected to the criminal justice system despite being offered sentencing benefits, could undermine this assumption. Interestingly, the

²⁷⁹ *Ibidem*; see also: *Marco Juridico Para La Paz* (Legal Framework for Peace), Law. No.1 of 31 July 2012, (Colombia), art. (1).

requirement for truth in the Colombian context may not be a paramount concern, as victims' surveys in Colombia reveal that justice and reparations are more important concerns for the Colombian people, and thus may be more likely to contribute to long-term goals than the revelation of truth.²⁸⁰

3.2 JUSTICE

The term “transitional justice” implies that each of the mechanisms affiliated with this field should be tailored towards promoting some form of justice, however elusive that concept may be. Like truth, justice “is a critical aspect of ensuring respect for human rights and the rule of law, it is necessary to prevent future violations”,²⁸¹ and as such, the requirement to achieve some form of justice during transition or post-conflict periods is seldom questioned. Similar to the requirement for truth, the concept of justice can be beneficial both on the individual level - via the concepts of acknowledgement, restoration of dignity and catharsis - and the societal level - by fostering trust in institutions, marking certain behaviour as unacceptable and facilitating change. However, the precise definition of “justice” is perhaps even more obscure or ethereal than the definition of truth.

While sociologists such as Rawls have produced extensive literature on broader definitions of justice,²⁸² many transitional justice scholars claim that there is a necessary difference between quotidian concepts of justice, and justice within the transitional context. According to Bhargava, the differentiation between quotidian justice and transitional justice lies in the idea that there is a “minimal conception of justice for minimally decent societies”.²⁸³ Although the concept framed in such terms may seem particularly harsh or discriminatory, the idea behind it is that quotidian or criminal concepts of justice are at least to some degree inapplicable in post-conflict societies where the experiences of violence and division are so exceptional and widespread that

²⁸⁰ Centro de Memoria Histórica, 2012, pp. 54-58.

²⁸¹ Sarkin, 2004, p. 33.

²⁸² see Rawls, 1971.

²⁸³ Bhargava, 2000, p. 45.

regular conceptions of justice are inherently disproportionate and unachievable. In societies torn apart by extended periods of violence, it becomes difficult to differentiate between victim and perpetrator, and misdeeds are experienced on a communal level rather than on an individual level.²⁸⁴ It is this acknowledgment of variations in justice that has led to the conceptualisation of “restorative” justice. Justice in the quotidian sense might be equated with criminal or retributive justice, equating justice with retribution for the offender.²⁸⁵ Under this reasoning, quotidian concepts of justice are an ideal form of justice, which necessarily implies that we must acknowledge that our regular conception of justice is a privileged one, applicable in liberal democracies.²⁸⁶ Restorative justice, which may be applicable in post-conflict situations:

“... sees crime as an injury to society and social relations, which should be healed through a process that rebuilds social relations (between the perpetrator and survivor, as well as between the perpetrator and society) through dialogue, personal healing and compensation.”²⁸⁷

While discussions on restorative justice are ubiquitous in the debate on justice during transition there is very little consensus on whether restorative justice is a compromised or diluted version of justice, a superior form of justice,²⁸⁸ or simply an alternative form of justice - qualitatively equal to retributive justice but applicable in different circumstances. In addition to its ability to focus on broader, social healing (which may or not be perceived as a benefit) one of the more frequently cited benefits of restorative justice claims that it is victim-centred, unlike wrongdoer-centred retributive justice.²⁸⁹ Opponents of restorative justice, however, claim that as a diluted form of justice, it might be perceived as a convenient diversionary tool for statesmen, and rather than benefitting victims, it tends to leave them feeling disenchanting and resentful. This line of thinking may be correlated with the thematic progression of the “age of accountability”, which recognises the rights of victims as paramount

²⁸⁴ Mallinder, 2011, p. 7.

²⁸⁵ Garbett, 2013, p. 196.

²⁸⁶ du Toit, 2000, p. 124.

²⁸⁷ van der Merwe, 2008, pp. 30-31.

²⁸⁸ Mallinder, 2011, p. 13.

²⁸⁹ Landsman, 1997, p. 88; Garbett, 2013, p. 196.

considerations and emphasises the benefits of uncompromised justice for rule of law and institutional integrity.

The development of the right to investigate, prosecute and punish is closely linked to the resurrection of quotidian justice, and a rejection of alternative forms of justice during transition. This can be seen in the language of the UN principles relating to Rule of Law and Justice During Transition, which state that “for the UN, justice is an *ideal* of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs” (emphasis added).²⁹⁰

This definition of justice from the UN implicitly recognises three elements that could be seen as essential to the achievement of any form of justice – accountability, punishment and fairness.²⁹¹ According to Thoms et al, “principles of fundamental justice require holding individuals accountable”, which in turn requires some formal and meaningful acknowledgment of wrongdoing and responsibility.²⁹² Ideally, this acknowledgment of responsibility should be made publicly, as “justice should be done and be seen to be done”²⁹³ both for the benefit of the victim and for government institutions that must convey to the public that wrongdoing is intolerable.

Linked to the idea of accountability is the concept of punishment that so often goes hand-in-hand with justice. Multiple studies on victims’ perspectives have shown that victims’ conceptions of ‘justice’ typically involve some form of punishment for the wrongdoer.²⁹⁴ Moreover, the punishment of a wrongdoer and the affiliated gesture that such behaviour is morally unacceptable is said to have broader, societal benefits such as the ability to deter future wrongdoing and consolidate the rule of law.²⁹⁵ While the concept of punishment in itself is central to the idea of justice, the desire of victims to inflict punishment may be alternatively framed as a desire to restore inequalities created

²⁹⁰ UN SC, *The Rule of Law and Transitions Justice in Conflict and Post-Conflict Societies: report of the secretary-general*, S/2004/616, 23 August 2004, para. 7; similarly, in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, access to justice requires individual victims to have the right to a judicial remedy.

²⁹¹ Crocker, 2000, p. 102.

²⁹² Thoms, 2010, p. 1.

²⁹³ Sirleaf, 2014, p. 232.

²⁹⁴ Bisset, 2012, p. 36; Picker, 2005, p. 7.

²⁹⁵ Sirleaf, 2014, p. 231.

during conflict.²⁹⁶ The concept of “an eye for an eye”, often thought to be the predecessor of modern theories of justice, acknowledges that when one person suffers, an imbalance is created that needs to be rectified.²⁹⁷ While “an eye for an eye” is no longer interpreted literally, it contributes to the idea that victims of conflict have their dignity taken away from them and this imbalance needs to be amended to ensure “respect for other persons as equal sources of truth and equal bearers of rights”.²⁹⁸ This necessity to restore equality is manifest in the requirement for reparations, which will be discussed below.

3.2.1. Justice and Conditional Amnesty in South Africa

The relationship between amnesty and justice is taut at best and fundamentally incompatible at worst. Because of the nature of amnesties, which prevent processes such as investigation, prosecution and punishment that are so typically affiliated with quotidian ideals of justice, the use of amnesties has often been equated to an outright denial of justice, constituting an “unconscionable betrayal of the feelings of the victims”.²⁹⁹ This rather stern reproach for the use of amnesties however, is usually associated with the use of blanket or unconditional amnesties.

There are two dominant positions regarding the relationship between conditional amnesties and justice: the first position claims that the amnesty process is inherently an injustice, but this temporary injustice might be justified if it is committed to prevent further, graver injustices.³⁰⁰ The second position claims that by virtue of restorative justice or the exceptional nature of justice during transition, the requirements for punishment and accountability should be construed differently, and thus the use of conditional amnesty can comply with justice because justice no longer involves strict

²⁹⁶ du Toit, 2000, p. 136.

²⁹⁷ *Ibidem*.

²⁹⁸ *Ibidem*.

²⁹⁹ Mallinder, 2011, p. 20.

³⁰⁰ Greenawalt, 2000, p. 190.

conditions for prosecution and punishment.³⁰¹ With respect to the first argument, Greenawalt suggests that:

*“[J]ust as an individual is morally justified in stealing a necklace to prevent a murder, a new regime may be justified in not penalising horrendous crimes, when that is required to terminate the rule of those under who the horrors are committed”.*³⁰²

Applied to the processes of the TRC, therefore, it could be said that the granting of conditional amnesties was an injustice, but might be considered just from a deontological perspective because greater injustice was prevented,³⁰³ ‘justifying the unjust’ and somewhat paradoxically achieving justice. A variation of this line of reasoning proposes that while amnesties are incapable of achieving the same quality of justice as trials, due to the difficulties in bringing criminal trials to fruition, a conditional amnesty will achieve a greater *quantity* of justice and therefore the final ‘sum’ of justice will be greater.³⁰⁴ South Africa’s subsequent attempts at criminal trials seem to validate this contention.³⁰⁵ Olsen, Payne and Reiter succinctly articulate these two lines of argument with respect to the TRC:

*“We have to consider the fact that if a criminal trial process had been pursued in South Africa, it is likely that no justice at all would have been done; firstly because it is unlikely that the country would have been able to achieve peace at all if those at the negotiating table knew that prosecutions would be carried out; and secondly because even if peace had been achieved, the costs and resources required to initiate trials would have resulted in very few wrongdoers even making it to the trials process”.*³⁰⁶

Such claims relating to the justice contributions of conditional amnesty might satisfy academic or metaphysical notions of justice, yet they fail to appreciate the justice requirements of victims and survivors, who may not be willing to accept such abstract brands of justice in place of the more tangible, quotidian or retributive justice they are seeking.

³⁰¹ *Ibidem*, p. 198.

³⁰² *Ibidem*, p. 193.

³⁰³ Greenawalt, 2000, p. 196.

³⁰⁴ *Ibidem*. 196-197.

³⁰⁵ Olsen, Payne and Reiter, 2010, p. 988.

³⁰⁶ *Ibidem*; see also Goldstone, 1995-1996, who claims that in addition to these problems, trials would have “provided a political platform for the apologists of racial oppression” (p. 493)

The second position regarding the use of amnesty during transition attempts to mend this theoretical quandary by readjusting the definitions of justice so that it becomes achievable via conditional amnesty. This was the methodology adopted by the architects of the TRC, who glorified the use of restorative justice as superior to retributive justice, rather than a supplementary or lesser version. Tutu and the other architects of the TRC specifically noted that “if justice is seen merely as retribution, it becomes difficult to make the appropriate connections between amnesty and justice... the tendency to equate justice with retribution must be challenged and the concept of restorative justice considered as an alternative”.³⁰⁷ They consequently proposed the notion that criminal punishment and retribution were not only unnecessary but also undesirable in order to achieve a more social understanding of justice superior in its ability to foster reconciliation.³⁰⁸ The superiority of restorative justice however, seems to be limited to the realm of transitional justice, where reconciliation is a paramount consideration. To this end, the TRC conceptualisation of restorative justice called on traditional African values such as *ubuntu* to promote the ideal of restoration in place of retribution,³⁰⁹ which potentially further limits the applicability of restorative justice to an African context.³¹⁰ The inclusion of both victims and perpetrators in the amnesty process, which fosters the restoration of relationships and the rebalancing of dignity; combined with the attempts of the TRC to establish political accountability in place of individual accountability purportedly contributed to the realisation of accountability, equality and reconciliation. Moreover, advocates of the TRC claim that the amnesty process established individual accountability by publicly acknowledging wrongdoing and also involved some form of punishment by virtue of the shame and social ostracism associated with testifying for amnesty.³¹¹

Each of these claims regarding the benefits of the amnesty process and restorative justice, however, as well as the broader discussion surrounding justice in

³⁰⁷ *Truth and Reconciliation Commission of South Africa Report*, Vol 1 Chapter 5, para. 55.

³⁰⁸ *Ibidem*, para. 66.

³⁰⁹ *Ibidem*, paras 80-88.

³¹⁰ van der Merwe, 2008, p. 24.

³¹¹ Landsman, 1997, pp. 88-89.

conditional amnesty, seem to be permeated with the distinct air of compromise. Ultimately, we must realise that:

“[T]he legitimacy of the TRC in South Africa is, to a large extent, dependent on how it managed to engage survivors on the issue of justice— whether survivors understood and accepted the provision for amnesty and the TRC’s attempt to promote a restorative, rather than punitive, understanding of justice”³¹²

This passage highlights the crucial but somewhat veiled lacuna in the conceptualisation of justice within conditional amnesty, which fails to account for the justice demands of the victims. In fact, victim surveys and opinion polls have suggested that many victims did not feel like ‘ justice was done’ and that “most of the perpetrators managed to shield themselves from moral judgment”.³¹³ Victims’ perspectives on justice seem to highlight some necessity for reparations, punishment, or at least a stronger form of accountability than was offered by the amnesty process, which might lead us to question whether “the possible benefits of a truth commission with amnesty count as aspects of justice or of a broader social welfare”.³¹⁴

3.2.2. Justice and Alternative Sentencing in Colombia

The significance of victims’ perspectives on the impacts of transitional justice processes cannot be underestimated, as it is usually their rights that are most compromised during conflict³¹⁵ and it is they who will consequently have to “bear the pain of seeing the perpetrators walk away free of punishment”³¹⁶. This requirement to respect the rights of victims is gaining traction in the ‘age of accountability’, perhaps best demonstrated by the adoption of the UN Basic Principles and Guidelines on the

³¹² van der Merwe, 2008, pp. 23-24.

³¹³ Phakathi & van der Merwe, 2008; see also Picker, 2005, p. 7.

³¹⁴ Greenawalt, 2000, p. 201.

³¹⁵ van der Merwe, 2008, p. 23.

³¹⁶ Goldstone, 1995-96, p. 493.

Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law.³¹⁷

As has already been mentioned, the normative shift towards a greater recognition of victims' rights in transitional justice is both a causative and reactionary element of the rejection of amnesty. This is acknowledged in the Colombian LFP and well as the negotiating platform between the government and the FARC, which includes provisions for the inclusion and protection of victims and rather than choosing to adopt amnesty, insists on the prosecution of those "most responsible". The insistence on some form of prosecutions in Colombia recognises that criminal prosecutions and mechanisms of retributive justice are perceived as achieving a superior quality of justice in the eyes of victims and the international community. Victims' surveys from Colombia tend to support this contention, with one particular survey finding that 89% of victims thought that the guerrillas should be tried and sentenced.³¹⁸ Following this assumption, the trials process and declaration of guilt comes closer to satisfying demands for criminal and retributive justice; however, the omission of regular penal sanction may be a significant detriment to the realisation of justice in Colombia. The trial process itself is purported to respond to victims' needs and provide psychologically therapeutic benefits, offering victims a sense of justice and catharsis, as well as "a sense that their grievances have been addressed and can hopefully be put to rest, rather than smouldering in anticipation of the next round of conflict".³¹⁹ This theoretically contributes to restoration of equality between the dignity of the victim and the wrongdoer, as well as establishing accountability for the wrongdoer.³²⁰ Importantly, the criminal trial process is also capable of providing some form of restorative justice if trials are structured to include stronger victim participation, perhaps based on the ICC module that claims to provide both restorative and retributive justice.³²¹ Moreover, the

³¹⁷ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.

³¹⁸ Lyons & Reed-Hurtado, 2010, p. 6.

³¹⁹ Thoms, 2010, p. 5.

³²⁰ Boraine., 2000, p. 147.

³²¹ Garbett, 2013, p. 197.

LFP's proposal for a truth commission may also significantly contribute to the realisation of restorative justice goals.

These justice-related advantages to the Colombian proposal are connected to the implicit advantages of conducting criminal trials, but the proposed Colombian framework has still been criticised in part because it does not comply with an ideal standard of justice. According to the Organisation of American States, the Colombian state has explicitly recognised the limitations on justice in the LFP:

“(The LFP) is controversial because it establishes a system of transitional justice that accepts, from the outset, that total and complete criminal punishment of everything that transpired during the armed conflict is not an achievable goal and that that objective, however laudable, will have disastrous consequences for effective protection of Colombian citizens’ human rights.”³²²

This acknowledged inability of the Colombian government to comply with an ideal, retributive conceptualisation of justice echoes the rationalisations used by the architects of the TRC and reveals the potential for the adoption of criminal trials to ultimately result in a justice deficit. Indeed, the Colombian government must have learnt from the JPL process that ambitious goals for justice may end up backfiring when the justice system becomes overloaded with cases and unable to function. It must be acknowledged, however, that this deficit could in part be mitigated by the presence of a truth commission. Moreover, even if few cases even progress to a trial stage, the impact of “show” trials may independently satisfy some of the institutional-level objectives of justice even if the victims’ requirements for justice remain unsatisfied.³²³

However, the adoption of alternative sentences might be construed as subverting the fundamental element of punishment required by ideal varieties of justice. Within the Colombia context, a number of surveys have suggested that a significant majority of the population believes that the guerillas need to be punished and should serve prison sentences.³²⁴ This necessarily entails an examination of the nature of punishment and

³²² Inter-American Commission on Human Rights, *Justice, Truth and Human Rights: fourth report on Human Rights Situation in Colombia*, OEA/Ser.L/V/IL Doc. 49/13, 31 December 2013, para. 351

³²³ Hazan, 2006, p. 32.

³²⁴ Centro de Memoria Histórica, 2012, p. 64; Nussio, Rettberg & Ugarriza, 2015, p. 48.

why it is considered essential to justice. According to Seils, the punishment of wrongdoers is normally administered for the purpose of incapacitation, deterrence, reform, retribution, restitution and communication.³²⁵ Of these objectives, those that most directly serve the interests of justice are communication, retribution and restitution. Retribution and restitution can be seen to contribute to the requirements of justice by restoring dignity to the victims and correct social imbalances. For the alternative sentences suggested in Colombian peace talks to satisfy these objectives, the sentences imposed must be perceived as meaningful for the victims, enough to restore feelings of social equality. If we acknowledge that most victims will have a predetermined “yardstick” for punishment as being equated to prison sentences, it will be difficult to convince these victims that time spent in an alternative facility or performing community service will qualify as sufficient punishment, proportionate to the crimes the wrongdoers have committed.³²⁶ The communicative function of punishment may be associated with the accountability requirement of justice and the idea that ‘justice must be done and be seen to be done’. If the sentences administered to FARC are perceived as too lenient, then it is unlikely that civil society will accept the allocation of accountability, which will compromise the achievement of justice. It could be said, therefore, that whether or not justice is ‘served’ in the alternative sentencing process depends on whether the alternative sentences will be accepted as punitive enough to comply with a standard of retributive justice, as Seils suggests:

“If the penalties are genuinely illusory – and the process leading to them is similarly unconvincing – it is not worth doing; it is an insult to the intelligence of society and the dignity of victims”³²⁷

Alternatively, the actors involved in the process could deter the social call for punishment, and placate victims via the trial process and declaration of criminal guilt. While this may not be as tangible as incarceration in a penal institution, it may be enough to qualify for a procedural interpretation of justice rather than remedial.

³²⁵ Seils, 2015, p. 8.

³²⁶ Guarin, 2013, p. 47.

³²⁷ Seils, 2015, p. 15.

3.2.3. Conclusion on Justice

While the inherent procedural difficulties and diluted retribution involved in criminal trials accompanied by alternative sentences might prevent a perfect achievement of ‘justice’ in Colombia, this comparatively mild limitation on justice seems preferable to the circuitous achievement of justice through conditional amnesty. But if civil society expresses desire for a restorative conception of justice then conditional amnesty might well be capable of achieving some form of ‘justice’. Experience has suggested, however, that victims and civil society tend to prefer a retributive form of justice; or at least that the adoption of the South African conditional amnesty was contrary to popular requirements for justice. Indeed, if restorative justice was in fact preferred, then it would seem strange that in times of stability we choose to revert back to a retributive format of justice.³²⁸ This isn’t to say, however, that the proposal for alternative sentencing will not achieve any *restorative* goals, in fact the lenient sentences and the potential for community service would seem to place it in the unique position of being considered both retributive and restorative. It would seem, therefore, that the alternative sentencing mechanism is more likely to satisfy the requirement for justice than a conditional amnesty.

3.3. REPARATIONS

While truth and justice are notably abstract concepts, reparations represent a comparatively more tangible and accessible objective of transitional justice. Despite this attainability, reparations have historically been the most neglected out of the three goals or rights,³²⁹ a feature that may be perceived as emblematic of the struggle to recognise victims’ rights in transitional justice. The role of victims in transitional justice has often been overlooked, yet victims are those whose rights and lives are most affected by conflict and thus those who conceivably require the most attention during a transitional process. Reparations can be seen as both a mechanism and a goal of

³²⁸ Mallinder, 2009, p. 18.

³²⁹ Adhikari, Powers & Hansen, 2012, p. 83.

transitional justice intended to directly address the needs of victims by attending to the inequalities created by conflict, both on an individual and societal level. The definition of reparations in transitional justice, however, cannot be equated to the definition of reparations under tort law, and like truth or justice a consideration of reparations in this field will require special consideration for the ultimate transitional goals of reconciliation or social transformation.³³⁰ As such, while original modules for reparations such as post-World War II “war-time” reparations may have referred to a financial or material award provided to victims of conflict,³³¹ the concept of reparations has developed in tandem with the evolution of transitional justice, and now refers to a comprehensive scheme that not only addresses individual victims but simultaneously “reflect[s] more precisely the goals of transitional justice or broad justice reforms and initiatives that form part of state and societal movements away from conflict”.³³²

This framework of reparations that addresses both victims and societies more broadly is paradigmatically tendered in the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Guidelines or GRR).³³³ The guidelines followed from the earlier Van Boven Principles³³⁴ which acknowledged that due to the uncommonly abhorrent and consequently irreparable nature of harm caused by conflict, rather than focusing on a proportional, retrospectively material award for victims of conflict, reparation should involve both “removing or redressing consequences” and “redressing or deterring violations”.³³⁵ Thus the UN Guidelines include five categories of comprehensive reparations that go beyond a material, compensatory award for victims: compensation, restitution, satisfaction, rehabilitation and guarantees of non-repetition. These five

³³⁰ Gray, 2009, p. 1099.

³³¹ Torpey, 2005, p. 36.

³³² Firchow & MacGinty, 2013, p. 232

³³³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147.

³³⁴ UN ECOSOC (United Nations Economic & Social Council), *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, 5 March 1993, E/CN.4/RES/1993/107

³³⁵ *Ibidem*, Principle 7; also see Shelton, 2005, p. 15.

categories involve reparations that are both material and symbolic, as well as individual and collective in nature. The inclusion of both material and symbolic reparations is important when trying to understand the connection between reparations and mechanisms of transitional justice. Equally important is the requirement to consider reparations not as simply backward-looking, corrective mechanisms that aim to restore the status quo ante, but as forward-looking, or “multi focal” mechanisms that permit us to “respond to the immediate, middle and distant needs of those denied [their] rights”³³⁶ and restore relationships on a broader level³³⁷. Without considering these features of an archetype for reparations, it becomes exceptionally difficult to find a connection between reparations and conditional amnesties or alternative sentencing. Certainly, the link between reparations and these two processes is far less direct and more difficult to conceptualise than either truth or justice, as the realisation of reparations as a goal of transitional justice necessarily requires a specific, independent mechanism or program that addresses reparations, and as such reparations are comparatively quantitatively and qualitatively dependent on other variables. Even so, the choice to use conditional amnesties or alternative sentencing may have a subtle but distinct impact on the realisation of reparations and requires some discussion.

3.3.1 Reparations and Conditional Amnesty in South Africa

From a broader, theoretical perspective it is not difficult to conceive of a conditional amnesty that requires comprehensive contribution to material and symbolic reparations as a condition for the granting of amnesty. In fact, the Community and Reconciliation Process of the Timor-Leste Commission for Reception, Truth and Reconciliation - where minor offenders were excused from criminal prosecutions if they participated in the truth commission and agreed to undertake certain community sentences or repayment of reparations to the victims -³³⁸ is a good example of how conditional amnesties might be used to incentivise reparations. In reality, however, this is rarely done. Reparations generally require an independent mechanism for effective

³³⁶ Villa-Vicencio, 2014, p. 197.

³³⁷ De Grieff, 2006(a), p. 454.

³³⁸ Mallinder, 2009, p. 38.

realisation that incorporates the satisfaction of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Even so, an idealistic model such as this must be adopted with caution, as the value of material reparations combined with a conditional amnesty and presented without any procedural or symbolic significance can be perceived by victims as the acceptance of “blood money” or an attempt by the wrongdoer to pay for their own immunity.³³⁹ This is perhaps the greatest direct impact that conditional amnesties have so far had on contribution of reparations. More specifically, the use of an amnesty - which necessarily precludes a formal criminal process - has a detrimental effect on the requirement for ‘satisfaction’.

Under the GRR ‘satisfaction’ generally implies the requirement for recognition of responsibility and apology,³⁴⁰ and specifically includes the right to “judicial and administrative sanctions against persons liable for the violations”³⁴¹. The removal of the ability to pursue judicial sanctions against the wrongdoer has a relatively direct impact on the realisation of reparations, especially if we consider the contribution of satisfaction to a broader understanding of reparations as a mechanism for re-establishing equality within society and dignity of the victims. To take away this powerful tool for satisfaction, stakeholders need to consider an alternative method to ensure that satisfaction – recognition of responsibility and apology – is achieved. This was implicitly acknowledged in the South African process, both by the Constitutional Court and the Committee on Reparations and Reconciliation of the TRC. The plaintiffs in the pivotal AZAPO case argued that by denying apartheid survivors the ability to pursue either criminal *or* civil remedies with respect to wrongdoers who participated in the amnesty process, the South African government was denying them the right to due process protected under the South African Constitution.³⁴² The Court found in favour of the State, permitting State and individual immunity on the basis that the Constitution

³³⁹ Hamber, 2005, p. 141.

³⁴⁰ Puente, 2009, p. 77.

³⁴¹ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, art. 22(f).

³⁴² Colvin, 2006, p. 184; *Constitution of the Republic of South Africa*, Act 200 of 1993 (Interim Constitution), s. 22.

simultaneously protected the interests of reconciliation and principles of restorative justice. Since this case, many have perceived the AZAPO decision as clarifying that reparations must be paid by the State: “by immunising itself and others responsible, the State is assuming the burden to compensate victims whose rights to civil and criminal redress was denied”.³⁴³ This seems to imply that the State should acknowledge that it is removing the ability for victims to claim reparation as they are entitled to under the law, and therefore the State must compensate for this limit on their constitutional right to a remedy. Judge Mahomed specifically acknowledged the connection between the amnesty process and the reparation process:

*“[T]he reparations authorised in the Act are not alien to the [amnesty] legislation contemplated by the [Constitution]. Indeed, they are perfectly consistent with and give expression to the extraordinarily generous and imaginative commitment of the Constitution to a philosophy which has brought unprecedented international acclaim for the people of our country”.*³⁴⁴

This passage, along with other statements made by the Court, suggest that the amnesty process and the reparations process together form part of the ‘restorative’ principles of the South African transition. The case is emblematic of the entire TRC approach to reparations, which focused far too heavily on symbolic reparations and seemed to encourage satisfaction in the form of forgiveness rather than actual psychological relief.³⁴⁵ This intangible and complex reparation that was meant to come from amnesty created a distinct air of euphemistic justice for the victims of apartheid. Moreover, the TRC Reparation and Rehabilitation Committee (CRR) made extensive recommendations for reparations, based on the five heads of reparations in the UN Guidelines (compensations, restitution, rehabilitation, satisfaction and guarantees of non-repetition) and explicitly emphasised the importance of reparations to ‘compensate’

³⁴³ *Ibidem*, p. 186.

³⁴⁴ Mahomed, DP in *Azanian People’s Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, Constitutional Court of South Africa, Case No. CCT17/96, July 25 1996, para. 48; cited in Colvin, 2006, p. 186.

³⁴⁵ Gutmann & Thompson, 2000, p. 30.

for the amnesty process;³⁴⁶ however the only reparations that were carried out in full were symbolic reparations such as memorialisation and creation of national holidays.³⁴⁷

The processes of the CRR reveal another number of ways in which the conditional amnesty exacerbated the reparations process rather than facilitating it. First, the quasi-judicial powers given to the Amnesty Committee to award amnesty and benefit wrongdoers was harshly juxtaposed with the relatively weak powers of the CRR to simply make ‘recommendations’, very few of which were later adopted by parliament. This aggravated the sense of injustice felt by victims, rather than contributing to an overall scheme of reparation. Moreover, the wrongdoers who were granted amnesty were not required to make any form of personal contribution to reparations, either symbolic or material. This division of the wrongdoer from the reparations process dilutes the effectiveness of any reparations program, and is not capable of effectively restoring the victim’s sense of dignity and equality.³⁴⁸ Second, the rift between ‘promise and non-delivery’³⁴⁹ of the CRR highlights the importance of an inclusive process – if victims were properly consulted and included in the reparations decision-making process, there is evidence to show that many of them would not have asked for financial reparations.³⁵⁰ However, given that the entire process was carried out without significant input from the victims, and they were subsequently promised material reparations which were never delivered, the procedural aspects of the reparations process most likely accentuated feelings of inequality on behalf of the victims and that the government was ‘ignoring them’.³⁵¹

If we accept that much of the success in transitional justice reparations is embedded in procedural aspects, then there is less reason why a conditional amnesty would be inherently contradictory to complying with the requirement for reparations. Although victims often require punishment as a form of satisfaction, according to

³⁴⁶ *Truth and Reconciliation Commission of South Africa Report*, Vol. 1 Ch. 1, para. 36.

³⁴⁷ Financial reparations were also awarded, but the sum was a one-off sum that was significantly less than what was suggested to the victims by the Commission and the Government

³⁴⁸ Crisis Group, 2013, p. 41.

³⁴⁹ See generally: Villa-Vicencio, 2014.

³⁵⁰ Picker, 2005, p. 6.

³⁵¹ *Ibidem*.

Hamber this requirement for vindication can come via other processes such as sufficient acknowledgement of responsibility, support, guarantees of non-repetition and allowing victims to cathartically tell their stories.³⁵² A reparations scheme that invests adequately in an inclusive and satisfactory process may be unaffected by the adoption of a conditional amnesty³⁵³ if it compensates for the deficit in satisfaction that is inherent in amnesty. In fact, such a framework could potentially be aided by the use of conditional amnesty if the amnesty is capable of contributing to establishing an accurate historical record and ensuring that a broad range of victims are acknowledged and comprehensively provided with reparations. According to Luke Moffett, “conditional amnesties are frequently used by truth commissions to incentivise combatants to engage in telling the truth, making apologies, or returning property”.³⁵⁴ Despite this potential contribution to reparations however, a potential deficit may be caused by the adoption of a conditional amnesty in compliance with the requirement to satisfy guarantees of non-repetition. By permitting wrongdoers to avoid meaningful accountability in the form of punishment, a conditional amnesty process may be construed as condoning past behaviour and allowing perpetrators to continue to contribute to social life and inequality.

In sum, those who are adopting a conditional amnesty must be acutely aware of the pre-emptive disadvantages to feelings of satisfaction that will be felt by victims, and make inclusive, expansive efforts to ensure that satisfaction and guarantees of non-repetition are ensured via alternative mechanisms. They must respond to victim’s express requests for compensation, restitution, rehabilitation and guarantees of non-repetition. If an inclusive and responsive process of reparations is adopted as part of a comprehensive reparations scheme, which compensates for the handicap provided by amnesty, then conditional amnesty does not need to have a negative impact on reparations. In practice, however, the South African example demonstrated how the combination of a procedurally and substantively ineffective reparation scheme combined with an amnesty can make victims feel as though they are being “paid off”

³⁵² Hamber, 2005, p. 139.

³⁵³ Mallinder, 2009, p. 36.

³⁵⁴ Moffett, 2014.

for the abuse they have suffered.³⁵⁵ Unfortunately, the South African example perhaps presents a ‘worst practice’ scenario, demonstrative of what can happen when transitional justice processes fail to properly address the needs of the victims, which not only has a detrimental effect for reparations but also ultimately for a general sense of justice.³⁵⁶

3.3.2 Reparations and Alternative Sentencing in Colombia

The most apparent benefit to reparations inherent in the adoption of alternative sentences as opposed to conditional amnesty is the satisfaction and potential for restitution that comes with a criminal trial process acknowledging suffering and accountability.³⁵⁷ Moreover, the prosecution and accompanying criminal record and imprisonment contribute to the requirements under guarantees of non-repetition by specific and general deterrence. Simply undertaking a criminal trials, however, is unlikely to satisfy victims, an issue that became apparent following local reactions to the ICTY and ICTR. In both of these cases, the prosecutions and convictions of the wrongdoers did not effectively contribute to restoring the sense of equality and dignity that is the ultimate goal of the reparations process.³⁵⁸ This is partly true due to the nature of criminal trials and the focus on the wrongdoer and the state itself rather than the victim,³⁵⁹ as well as the fact that the wrongdoer is not required to admit guilt, show remorse or make restitution to the specific individual.³⁶⁰ In the case of Colombia, a sense of disappointment from a potential trials process might be compounded if the alternative sentences imposed on the FARC are considered as fostering impunity and undermines the sense of satisfaction. If this is the case, then alternative sentences will suffer from the same handicap that conditional amnesties suffer. Moreover, if reparations mechanisms are exclusively attached to a trials process, then reparations

³⁵⁵ Villa-Vicencio, 2014, p. 206.

³⁵⁶ Mallinder, 2009, p. 37.

³⁵⁷ Moffett, 2014.

³⁵⁸ Thoms, Ron & Paris, 2010, p. 10.

³⁵⁹ Bisset, 2012, p. 37.

³⁶⁰ Mani, 2005, pp. 59-60, 62.

will be restricted to the few cases that actually make it to trial,³⁶¹ and risk the danger of being excessively retrospective in nature or too similar to a tort mechanism.³⁶² However, the adoption of alternative sentencing - especially if the sentencing involves community service - may also potentially contribute to victims' restitution and satisfaction due to the direct input from the wrongdoer themselves.³⁶³ By including the offender, a reparations process is capable of achieving forward-looking objectives by re-integrating FARC combatants into the community, teaching them life-skills and ensuring non-repetition.³⁶⁴ Within the Colombian context, however, such an objective must be approached with caution, as surveys have revealed that over 80% of the population has stated that they would not be comfortable with having a member of the FARC as a neighbour.³⁶⁵

Moreover, Colombia has already experienced the dangers of attaching reparations process to a criminal trial with the JPL. Under that system, in order to receive reparations victims had to report the crime, participate in the trial process and establish guilt, a particularly onerous and time consuming process which ultimately meant that between 2005 and 2008 only 24 victims had received damages.³⁶⁶ The failures of the JPL process also demonstrate the danger of linking reparations to notions of guilt, as denial of responsibility can exacerbate social divisions, affecting both material and symbolic, individual and communal reparations.³⁶⁷ Partially In response to the failures of the JPL framework for reparations, the Colombian government has introduced the 2011 Victim's Law,³⁶⁸ which establishes victimhood independently from the establishment of perpetrator liability and includes specific administrative mechanisms for restitution, compensation and more. Many of the potential disadvantages to reparation that could result from exclusively adopting alternative

³⁶¹ Moffett, 2014.

³⁶² Gray, 2009, p. 1096.

³⁶³ Flacks, 2006, p. 4.

³⁶⁴ *Ibidem*.

³⁶⁵ International Centre for Transitional Justice, ICTJ Report: Colombians Want Genuine Peace with Justice, 22 December 2006, p. 2

³⁶⁶ Summers, 2012, p. 224.

³⁶⁷ Torpey, 2005, p. 38.

³⁶⁸ *Ley de Víctimas y Restitución de Tierras* (Victim's and Land Restitution Law) Law 1448 of 2011 (Colombia).

sentences would be mitigated in the Colombian context both by the Victim's Law and the terms of a future agreement between the FARC and the government, who are currently negotiating a framework to specifically address reparations for victims.³⁶⁹ While the Victim's Law predominantly addresses material requirements for reparations, the FARC have recently proposed a framework to address both material and symbolic reparations, such as apologies and memorialisation.³⁷⁰ Generally speaking, the proposals and the inclusion of "victims" as a specific negotiating platform is a promising step forward, but the process may potentially be undermined by the minimal inclusion of the victims themselves in negotiations, as well as the demonstrated reluctance of both FARC and the government to acknowledge responsibility.³⁷¹ This is a particularly important consideration, as the material contributions to reparations provided for under the Victim's Law will be compromised unless victims of both FARC and government forces feel that those bodies are personally accepting accountability for their previous wrongdoing by personally contributing to symbolic and material reparations.³⁷² The inclusion of government responsibility in the reparations process is paramount both for the sake of victims, some of whom might be excluded if reparations are reserved specifically for victims of the FARC;³⁷³ and for the FARC who need acknowledgement of wrongdoing on behalf of the Colombian government in order to preclude the potential for re-armament and re-mobilisation. Providing that the Colombian government and the FARC are capable of accepting dual responsibility and devise a comprehensive framework for reparations, many of the potential difficulties affiliated with criminal trials and alternative sentences could be mitigated.

³⁶⁹ Panam Post, Latest Round of FARC Peace Talks Takes on Reparations, 2015, at <<http://panampost.com/panam-staff/2015/02/03/latest-round-of-farc-peace-talks-takes-on-reparations/>> (consulted on 4 July 2015)

³⁷⁰ Foget, 2014.

³⁷¹ Washington Office on Latin America, Colombia Peace: The FARC, Its Victims, and the Peace Process, 9 Nov 2014, at <<http://colombiapeace.org/2014/11/09/the-farc-its-victims-and-the-peace-process/>> (consulted on 10 July 2015).

³⁷² Crisis Group, 2013, p. 41.

³⁷³ On this point, Pablo de Grieff specifically refers to the requirement for "completeness" in a reparations program, by ensuring that various groups of victims are included and not simply one demographic of sufferers (de Grieff, 2006, p. 6).

3.3.3 Conclusion on Reparations

Given the specificity and significance of reparations as a critical feature for post-conflict societies, the provision of reparations will usually require its own separate and comprehensive framework that acts predominantly individually through mechanisms such as amnesties, criminal trials or truth commission. This does not mean that those processes will have no impact on a successful reparations process, and reparations, truth commissions and criminal trials must work in a complementary fashion to facilitate long-term goals such as peace and reconciliation. The choice to use both alternative sentencing and conditional amnesties creates a form of ‘justice gap’ which may hinder the realisation of certain forms of reparations. This seems to be especially true with conditional amnesties, which deny victims a sense of satisfaction and justice and consequently require exceptional reparations measures to compensate for these deficits. The Colombian proposal to use alternative sentencing might prove to a more beneficial impact on reparations for the victims, especially in light of the 2011 Victim’s Law. It will be crucial, however, for Colombia to pay attention to the demands of the victims and ensure that despite lenient sentences, satisfaction can be achieved through symbolic and material measures that demonstrate accountability.

CONCLUSION

The preceding examination of the effects of conditional amnesties and alternative sentencing suggests that the use of alternative sentencing might be greater than conditional amnesty at realising at least the objectives of justice and reparations. With respect to truth, the ability of a conditional amnesty to achieve a broader, macro-version of truth would potentially be more beneficial for a post-conflict mechanism than the comparatively more micro form of truth that is likely to emerge from a trial accompanied by alternative sentencing. Within the Colombian context, this potential deficit in the achievement of truth could be assuaged by the inclusion of the proposed truth commission.

It is important to understand, however, that while the accomplishment of these goals are in themselves an achievement, the success of each approach will ultimately depend on the ability of either one to sustain long-term goals of transitional justice such as reconciliation and consolidation of the rule of law. In Colombia, the establishment of rule of law is perhaps a lesser concern than reconciliation, given that Colombia is a well-established democracy with functioning institutions and a particularly able judiciary. Reconciliation, on the other hand, is materially less attainable. With respect to the South African conditional amnesty, despite the extensive reconciliatory prose surrounding the amnesty and the TRC, empirical information has suggested that pre-existing spiritual and cultural variables may have been greater contributors to reconciliation and the creation of the 'rainbow nation' than the TRC and the amnesty process itself.³⁷⁴ In fact, there are many who doubt whether South Africa is a genuinely reconciled nation.³⁷⁵ In Colombia, it is clearly difficult to predict the reconciliatory outcome of the hypothetical framework, but perhaps hope can be found in surveys revealing that a great majority of the Colombian society, including victims, are in favour of both a peace process and reconciliation.³⁷⁶ Yet this desire for reconciliation may be undermined in light of the fact that a solid majority of Colombians are not in favour of leniency towards wrongdoers.³⁷⁷ Moreover, the majority of Colombians have also expressed that they would not feel comfortable with an ex-guerilla as a neighbour.³⁷⁸ Given the intense requirement for reconciliation, however, it is not impossible to imagine that an improved reparations program accompanied by prosecutions and an effective truth commission would undoubtedly result in some benefit for reconciliation. Importantly, a reparations program that satisfies the overwhelming numbers of internally-displaced people might mitigate feelings of enmity. Ultimately, however, based on past experiences, it may take generations before the goal of reconciliation is genuinely accomplished.

³⁷⁴ Goldstone, 1996, p. 493.

³⁷⁵ See for example: Chapman, 2008.

³⁷⁶ International Center for Transitional Justice, *ICTJ Report: Colombians Want Genuine Peace with Justice*, 22 December 2006, p. 2

³⁷⁷ *Ibidem*.

³⁷⁸ *Ibidem*.

For the time being, the adoption of alternative sentencing to entice the guerrillas to demobilise may very well be justified in place of amnesty due to its ability to achieve the more immediate requirements of justice and reparations. Yet even if the Colombian solution is a preferable alternative to conditional amnesty, will it be enough to comply with the requirements of the ‘age of accountability’? From a legal perspective, we have seen that global institutions are rapidly mounting a solid legal barricade to prevent the use of amnesty, but this barricade may not extend to guaranteeing specific forms of punishment. Therefore, considering the comments of the ICC and the current jurisprudence that focuses on the duty to prosecute rather than explicitly punish, it would be tempting to answer an experimental ‘yes’ to this question.

But we must consider that the creation of the ‘age of accountability’ itself and the accompanying legal framework protecting the principle was created in response to the dissatisfaction of victims and civil society, and as such perhaps the question should be restructured from a less legal, more ethical perspective: will alternative sentences satisfy Colombian civil society? It cannot and should not be enough for alternative sentences to be simply ‘not-illegal’, they must also contribute in a meaningful way to realising the rights of and restoring the dignity of the Colombian people. The answer to that question may very much depend on whether incarceration is perceived as essential to effective accountability, justice and reparation; which may unfortunately be the case in Colombia. If civil society does respond negatively, then the next logical question is: is it worth it? Considering the exceptional financial cost and structural difficulty involved in implementing an effective post-conflict prosecutions process, and acknowledging the lessons that history have taught us regarding the limitations of criminal processes, then would those resources be better spent in implementing a truth commission and especially a reparations program rather than lengthy and costly prosecutions with unsatisfactory alternative sentences? Again the answer to this question lies within the fundamental nature of human rights themselves, along with the emerging belief that consequentialism is an unwelcome philosophy in this particular field - the ends do not justify the means if the means involve denying even one individual the right to have their dignity restored.

Consequently, if civil society and victims remain unsatisfied with the alternatives sentencing process, yet international law deems it acceptable, certain questions should be asked regarding the authenticity of the 'age of accountability'. If the process is perceived by victims as legitimate, it will be worth the complicated circumvention of conditional amnesty, but if not, then the use of alternative sentencing could be interpreted simply as a political tool to avoid the potential international legal repercussions affiliated with a conditional amnesty without actually addressing the concerns of the victims who historically started the campaign against amnesty in the first place. If this is the case, then it could appear that rather than genuinely responding to the requirements of victims and the advocates of the 'age of accountability', the global political order may simply be creating enough checkpoints to permit impunity to pass under the guise of accountability. This implicitly calls into question whether the furore surrounding conditional amnesty is worth the costs involved in avoiding it. But to do this now would represent a significant step backwards in the fight against impunity, and it is preferable, therefore, to hope that the benefits to reparations and justice in the Colombian proposal for alternative sentencing, combined with an effective and meaningful reparations program and truth commission, will lead the Colombian people to that ideal, elusive meeting-point between peace and justice.

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