The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC

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Abstract 1. Transitional Justice (hereafter: "TJ") has been the object of great attention in conflict and post-conflict societies. The *concept* deals with justice in societies in transition, either post-conflict or during an ongoing conflict; it entails a series of measures which could be judicial and/or non-judicial in nature. Its success depends on to what extent it contributes to true reconciliation and the consolidation of democracy and the domestic judicial system (para. 1). Experience shows that the quest for *justice* often conflicts with the mostly official efforts towards *peace*. Indeed, TJ aims at ensuring justice and peace at the same time but refraining from criminal prosecution and/or punishment seems sometimes necessary to facilitate a peaceful transition (para. 3), the issuing of an *amnesty* being the most important technique of exemption from criminal prosecution (para. 5). In any case, whether the absence of criminal prosecution contributes to *reconciliation* depends on the framing of this concept and the circumstances of each case (para. 4).

2. To develop the legal framework of TJ and, ultimately, to establish some more or less precise *guidelines* for peace negotiations within the framework of transition, necessary to "judicialize" the politics of TJ (para. 6), one must first determine the contents of the *justice element* in TJ. Justice in this sense is to be understood broadly, going beyond mere criminal justice and including certain key elements such as accountability, fairness in the protection and vindication of rights and the prevention and punishment of wrongs (para. 2).

3. The *legal substance* of the justice element or interest has as a starting point the *duty to prosecute* the international core crimes as defined in Art. 6–8 of the ICC Statute (para. 8). While this duty would almost logically lead to a prohibition of amnesties or other exemption measures regarding these crimes (para. 9) the broad concept of justice applicable in TJ calls for a more sophisticated approach. On the one hand, the justice interest is to be complemented by the *rights of victims* of

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international core crimes (para. 10-11); these rights go well beyond criminal prosecution and include, besides a right to justice, the rights to truth and reparation in a broad sense (para. 11). On the other hand, as another consequence of a broad concept of justice, *alternatives to criminal prosecution* must be developed and applied (para. 12 et seq.), in particular (*effective*) Truth Commissions (para. 13 et seq.). In general, though, alternative measures can only complement, not substitute criminal justice (para. 10). To do so, they must offer a serious alternative way of dealing with the past and as such effectively take into account the interest of victims (para. 12). Ultimately, the admissibility of limitations of the justice interest depends on the result of a complex process of *balancing of the conflicting interests* which is carried out by a threefold proportionality test (para. 19 et seq.). This test leads, on the third stage of the *proportionality stricto sensu*, to some important limitations (*ratione materiae* and *personae*) and requirements (esp. some form of accountability) to be taken into account to assess the admissibility of exemption measures (para. 21). From the above analysis follows a *bifurcated approach* as to the admissibility of *amnesties* (para. 23 et seq.): On the one hand, blanket amnesties are generally inadmissible (strict approach) since their primary goal is to completely conceal past crimes by prohibiting any investigation (para. 24 et seq.); on the other, conditional ("accountable") amnesties are, in principle, admissible (flexible approach) since they do not – unlike blanket amnesties – automatically exempt perpetrators from punishment but make the exemption conditional on certain acts or concessions by the benefiting person(s), e.g., unreserved promise to lay down arms, satisfaction of the victim's legitimate demands, in particular by a full disclosure of the facts, acknowledgment of responsibility and repentance (para. 30 et seq.).

4. With the *ICC* a *permanent accountability mechanism* has been established (para. 34). It is part of the TJ project in that it may interfere in processes of transition and thus come into conflict with the parties on the ground. The Ugandan situation where the ICC has issued arrest warrants against leading members of the LRA is a vivid example of such a possible conflict. Yet, it must not be overlooked that the Prosecutor's strategy only to prosecute the most responsible perpetrators and the most serious crimes (para. 36) limits the ICC's "interventionist" or "monitoring" role considerably and leaves the bulk of the prosecutions to the *domestic judicial systems* which therefore still have an important role to play in bringing less important perpetrators and/or crimes to justice (para. 34). In any case, as to the most important cases, the question arises whether and, if so, to what extent national peace deals, including amnesties or other exemptions, may bar the ICC from exercising its jurisdiction. While this issue was not explicitly dealt with in the ICC Statute, the Statute is a *flexible instrument* which enables the Prosecutor and the Court to take transitional situations on the ground into account (para. 35). This follows from the broad discretion of the Prosecutor during the preliminary investigation (para. 35), the ICC's judicial autonomy (para. 34, 36) and in particular three provisions of the ICC Statute, namely Art. 17 on complementarity, Art. 16 on the intervention by the Security Council and Art. 53 (1) (c), (2) (c) on the interest of justice.

5. *Art. 17* tries to strike an adequate balance between the states' sovereign exercise of (criminal) jurisdiction and the international community's interest in preventing impunity for international core crimes by according prevalence to the

State Parties if they are willing and able to investigate and prosecute the international core crimes (para. 37). The detailed analysis of the provision (para. 37 et seq.) shows that a national exemption measure (esp. an amnesty) as such does not make a case inadmissible; rather, the admissibility depends on the *specific content* and *conditions* of the measure (para. 44). If one applies this conclusion to certain scenarios (para. 44 et seq.) it follows that, as to full exemptions, only a *conditional amnesty with a TRC* may render a case inadmissible if an effective TRC grants an amnesty on an individual basis under certain strict conditions (para. 46); other full exemptions (blanket self-amnesty, conditional amnesty *without* a TRC) will not pass the complementarity test (para. 45, 47). In the case of *partial exemptions*, e.g., a considerable mitigation of punishment in exchange of demobilisation and full cooperation, the admissibility in the sense of Art. 17 depends on the extent to which the respective process satisfies the justice interest, e.g., by employing alternative mechanisms of justice, in particular an effective TRC and/or non-punitive sanctions (para. 48). In the case of *ex post exemptions*, the admissibility depends exclusively on the criterion of "genuine" willingness to prosecute in the sense of Art. 17 (1) (a), (b) or/and (2) (para. 49). *Art. 16* gives the Security Council the faculty to suspend proceedings but leaves ICC's competence to indirectly review the Council's decision unaffected (para. 50). The *interests of justice clause* of Art. 53 (para. 51 et seq.) gives the Prosecutor an additional instrument to exercise his discretion going beyond the rather "technical" Art. 17 (para. 51). Yet, this discretion does not convert the clause to a mere policy instrument irrespective of the legal criteria provided by it (gravity of the crime, interests of victims, age or infirmity of the alleged offender and the role of the perpetrator in the alleged crime); rather the Prosecutor has to take a legally substantiated decision in each individual case (para. 52).

1 Introduction

1. In recent years the issue of *Transitional Justice* (hereinafter "TJ") has received increased attention in conflict and post-conflict societies.[1] TJ, as understood in this study, "comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[2] While regime change is not at all a new phenomenon the concept of TJ is recent and innovative in that it recognizes the importance of "justice" in processes of transition; in short, TJ deals with justice in transition.[3] However, TJ is not limited to situations of post-conflict and/or regime change, in particular transition from dictatorship to

[1] See the three volume study of the Institute of Peace (Kritz [ed.], *Transitional justice*, US Institute of Peace Press, Washington D.C., 1995) which is, however, essentially a reprint of articles and materials already published.

[2] Report Secretary General transitional justice, para. 8; for a similar broad definition Bickford in Shelton (ed.) 2005, at 1,045.

[3] See also Uprimny/Saffon in Rettberg (ed.) 2005, 211 at 214 et seq. with a good definition: "forma específica de justicia, caracterizada por aparecer en contextos excepcionales de transición …"

democracy, but also encompasses situations of peace processes within ongoing conflict and/or formal democracy.[4] The measures applied in such situations may be of a judicial and/or non-judicial nature "with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof".[5] The kind of transition and the role of the (former) elite(s) in the process affect the kind of TJ and its success in that the possibilities of TJ increase with the decreasing influence of the (former) elite(s).[6] The success of TJ may be measured by the quality of the political reforms achieved,[7] in particular whether and to what extent TJ contributes to the reconstruction and consolidation of democracy[8] and the domestic judicial system.[9] The period of time over which the transition takes place varies according to the circumstances of each case and may pass through different phases.[10] While TJ structurally faces similar problems as ordinary justice, e.g., the question of selective prosecutions, court congestion and changes in the civil service,[11] it is distinct from the latter in that it has to deal with large-scale and particularly serious abuses committed or tolerated by a past, normally authoritarian regime within the framework of a military or at least violent socio-political conflict.

2. The *justice* element in TJ must be understood broadly. Accordingly, justice is "an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration

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(at 217). Von Braun (2008) at 7 describes TJ as "Mechanismen und Strategien, die die neu etablierte Staatsführung entwickelt, um mit den begangenen Verbrechen umzugehen".

[4] Colombia is maybe the most important case at hand, see for the "Ley de Justicia y Paz" (No. 975) note 203 and corresponding text. While Rettberg in Rettberg (ed.) 2005, 1 at 2 considers that Colombia is not "propiamente un caso de transición" she recognizes that "las preguntas y los debates en torno a la justicia transicional son de gran relevancia para este país". In any case, the attitudes of victims living in a post-conflict or still conflict scenario differ, see Kiza/Rathgeber/Rohne (2006) at 148 et seq., 161.

[5] Report Secretary General transitional justice, para. 8.

[6] Cf. Posner/Vermeule (2004) 117 Harv. L. Rev. 761, at 769–70; see also Sooka (2006) 88 ICRC Int. Rev. 311, 316–7.

[7] Cf. Posner/Vermeule (n 6) at 768; see also Filippini/Magarrell in Rettberg (ed.) 2005, 143, at 149.

[8] Cf. Filippini/Magarrell (n 7) at 158 et seq.; for a "shift to democracy" Sooka (n 6) at 315.

[9] On the desirability of this effect see Kritz in Bassiouni (ed.) 2002, 55, at 84.

[10] See Hazan (2006) 88 ICRC Int. Rev. 11, at 28 distinguishing four phases: armed conflict/repression phase, immediate post-conflict phase (first 5 years), medium term (5–20 years), long term.

[11] See Posner/Vermeule (n 6) at 761 arguing that transitional justice is "continuous with ordinary justice" (at 764) and the respective issues are "at most overblown versions of ordinary legal problems" (at 765). Yet, apart from the difference I see between transitional and ordinary justice (see text), I have a difficulty to share Posner and Vermeule's assumption that "the dominant view in the academic literature is that transitional justice is counterproductive …". The literature I know does not take this view but rather considers transitional justice as a necessary form of exceptional justice for situations of transition. Equally, my reading of the literature does not lead to the conclusion that "writers generally understand transitional justice as backward-looking" (ibid. at 766).

usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant".[12] Thus, justice in TJ reaches well beyond retributive, criminal justice – assuming, in fact, that criminal justice cannot be fully enforced[13] – and encompasses restorative justice in that it aims to restore or even to reconstruct the community (in the sense of "creative" justice).[14] Ultimately, TJ is a justice of exception, which aims to change the conflict and post-conflict situation "from a worse to a better condition".[15]

3. Recent experience shows that the victims' demand for accountability and justice often, if not always, conflicts with the mostly official efforts towards peace and reconciliation. Indeed, refraining from criminal prosecution and/or punishment is sometimes necessary to facilitate peace and reconciliation.[16] To put it bluntly, the price for peace is often justice[17] or a "trade off between peace and justice".[18] A victim-centred definition of TJ does not take this tension sufficiently into account.[19] It is a common argument that a policy of consequent criminal prosecution could trigger more and worse abuses and endanger a peaceful transition from dictatorial to democratic rule or ultimately even destroy an emergent and still fragile democracy. It is said that the dilemma of peace negotiations is that one cannot exclude the most responsible for international crimes without endangering the peace itself; yet, if one includes them one may give them an undeserved legitimacy.[20] The underlying argument may be called "*worse abuses" or "risk transition" argument.* Latin American scholars (based on their experiences in their own painful transitions) have probably articulated it most forcefully.[21] Also, the South African Con-

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[12] Report Secretary General transitional justice, para. 7.

[13] Teitel (2000) at 55; see for the post-dictatorial Argentinean case Malamud-Goti in Kritz (ed.) 1995, 189 at 190.

[14] Cassin (2006) 88 ICRC Int. Rev. 235, at 238; Tutu (2007) 1 IJTJ 7: "reconstruction of our country", "merciful justice", "moral justice". See for the different forms of justice also Opotow, in Bassiouni (n 9) 207 et seq., in particular focusing on the long-term social reconstruction (at 212 et seq.). See also Meintjes, in Joyner (ed.) 1998 at 463 "reforming the law enforcement and judicial system".

[15] Cf. Cassin (n 14) at 238 referring to Protagoras as quoted in Plato, Theaetetus, 167 a.

[16] See Werle (2005) at 66 (mn 190): "As a matter of fact, refraining from punishing crimes under international law can be necessary in individual cases to restore domestic peace and make national reconciliation possible". For a good discussion of the arguments against criminal prosecution see Osiel (2000) 22 HRQ 118, 119 et seq., 128 et seq., 147.

[17] See, e.g., Opotow (n 14) 210; Werle (2007) mn 204.

[18] BBC World News, 27.2.2007, 9 p.m.

[19] See for such a definition, e.g., Durán Puentes, 54 Facetas Penales (Leyer, Colombia) 33. For a victim-centered critique of TJ see Mani in de Feyter/Parmentier et al. (eds.) 2005 at 62 et seq.

[20] Cf. Williams in Bassiouni (n 9) at 117.

[21] See Nino (1999) 100 YLJ 2,619, at 2,620; Zalaquett (1992) 43 Hastings Law Journal 1,425, at 1,425, 1,432; Malamud-Goti (n 13) at 191; Villa-Vicencio (2000) 49 Emory Law Journal 205, at 212; Fuchs (2007) 16 Lateinamerika Analysen 35, at 54 (on the discussion in Uruguay); García Ramírez, separate vote in the *Barrios Altos vs. Perú Case* (n 95) para. 11 (referring to his separate vote in the Castillo Páez Case) recognizing, in principle, "la alta conveniencia de alentar la concordia civil a través de normas de amnistía que contribuyan al restablecimiento de la paz y a la apertura de nuevas etapas constructivas en la vida de una nación". See also Arsanjani (1999)

stitutional Court, in its historic decision on the amnesty provision in the epilogue to the interim Constitution of 1994,[22] recalls that a successful transition does not only require "the agreement of those victimized by abuse but also those threatened by the transition to a democratic society …".[23] The Sierra Leonean TRC acknowledged the credibility of the government's position that without an offer of amnesty and pardon the Lomé Peace Agreement[24] would not have come into existence.[25]

4. Yet, while all these arguments may be correct in the situations they refer to, they do not necessarily apply to other situations, often lack empirical support,[26] may be exaggerated[27] and are rarely accompanied by a precise definition of the decisive concepts – peace, reconciliation and justice – employed. In particular, whether a renunciation of criminal prosecution really contributes to *reconciliation* obviously depends on the meaning of this concept. While a minimalist concept of reconciliation in the sense of "nonlethal coexistence" is less demanding than a more substantive understanding in the sense of "democratic reciprocity" or even social harmony[28] as

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Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law 65, at 66: "sometimes (…) only feasible option for stopping bloodshed". In the same vein Joyner in Joyner (ed.) 1998, 37, at 38; Scharf/Rodley in Bassiouni (n 9) at 89–90; Morris, in ibid, 135, at 135; Goldstone/Fritz (2000) 13 LJIL 655, at 659–60; Seibert-Fohr (2003) 7 Max Planck Yearbook of United Nations Law 553, at 571; Kemp (2004) 15 CLF 67, 69–70; Brubacher (2004) 2 JICJ 71, 82; Seils/Wierda, ICTJ Report 2005 at 12–3; Kreicker in Eser/Sieber/Kreicker (eds.) 2006, at 306; Schabas (2008) 19 CLF, 5 at 22. For the background of the discussion in the 1980s Orentlicher (2007) 1 IJTJ 10, 12–3.

[22] The title of the epilogue is "national unity and reconciliation". The Constitution aims to provide for "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex" (epilogue, para. 1). For that purpose, para. 5 cl. 1 of the epilogue 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". The Constitution of 18 December 1996 omits the epilogue and thus this phrase.

[23] *AZAPO et al. vs. The President et al*. [25 July 1996] Case CCT 17/96 (Constitutional Court of South Africa), para. 19. See also Boraine (2001) at 285 recalling the threat by the security forces.

[24] See n 224.

[25] 3B Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission (GPL Press, Ghana: 2004) ch. 6, p. 365, para. 10 (hereinafter: "Sierra Leone TRC Report").

[26] Hazan (n 10) at 22 correctly criticizes the lack of empirical analysis of the effects of TJ and pretends to fill this gap (at 19, 27 et seq.); yet, he offers only some hypotheses based on a journalistic account of some cases and experiences and concedes that further research would be necessary (e.g., at 35). See also Pham/Vinck (2007) 1 IJTJ 231, at 234 for general challenges and methods of empirical research in Transitional Justice Societies.

[27] See, e.g., as to the apparently exaggerated argument of an institutional crisis in post-dictatorial Uruguay Fuchs (n 21), at 63.

[28] On these forms of reconciliation, see Crocker (2002) 5 Buff. Crim. L. Rev. 509, at 525 et seq.; following Mallinder, published in this volume, para. 56 et seq. See also Méndez (2001) 15 Ethics and International Affairs 25, 28 giving reconciliation also a more substantive meaning ("long-term setting aside of disputes … that have divided a society"); on the different meanings also Sooka (n 6) at 320 et seq. (calling herself for a "holistic set of objectives"); Pfanner (2006) 88 ICRC Int. Rev. 363, 373; Brounéus, published in this volume, at 205.

expressed in the African concept of *Ubuntu*,[29] only the latter would justify measures of clemency. Consequently, if one adopts such a – more meaningful – concept of reconciliation it is by no means certain that the appeasement of the greatest violators through impunity does lead to reconciliation or even a sustainable peace;[30] rather, in many cases, prosecution may be more promising to facilitate reconciliation and nation-building[31] and may even be a prerequisite for true reconciliation.[32] In any case, empirical data shows that the overwhelming majority of victims demand accountability in form of criminal prosecutions, trials and punishment[33] and reject amnesty;[34] the higher the degree of victimization the more criminal prosecution and punishment is demanded.[35] In addition, justice as understood by TJ theory is not necessarily the one experienced by the people on the ground.[36] In light of these findings it is not surprising that in South Africa it was recognized that an "amnesty per se cannot (…) have a reconciliatory effect and could in fact lead to the perpetuation of existing divisions, unless it is granted with due regard to certain requirements and principles".[37] Nor is it surprising that it was found for Uganda that, while the amnesty of 2000 was considered "a vital tool" for reconciliation, at

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[29] On Ubuntu see Boraine (n 23) at 362.

[30] Cf. Schlunck (2000) at 129, 130–31, 262 referring especially to the El Salvadorian peace process; Joyner (n 21) at 40 ("Peace without justice is not durable"); Šimonović (2004) 2 JICJ 701, at 702; Olson (2006) 88 ICRC Int. Rev. 275, at 284. Also recently Ban Ki-moon in a statement concerning the lack of cooperation with the ICC, UN Doc. SG/SM/11617, AFR/1709 (5 June 2008): "The Secretary-General is convinced that there can be no sustainable peace without justice. Peace and justice go hand in hand".

[31] Robinson (2003) 14 EJIL 481, at 489; Olásolo (2003) 3 ICLR 87, at 139.

[32] Uprimny/Saffon (n 3) at 211, 224, 229 (with special reference to Colombia at 227 et seq.).

[33] According to Kiza/Rathgeber/Rohne (n 4) at 97, Table 18, 79% of the victims interviewed in Afghanistan, Bosnia and Herzegovina, Cambodia, Croatia, DRC, Israel, Kosovo, Former Yugoslav Republic of Macedonia, Palestinian Territories, Philippines and Sudan expressed their wish to have the perpetrators prosecuted. 68% of the interviewed wanted that the perpetrators be put on trial with the death penalty (4%), a prison (36%) or monetary sanction (45%) be imposed (at 111 et seq., Table 28); for a summary see ibid. at 121, 156, 158. These findings correspond to the ones regarding the attitude of the Acholi people in Northern Uganda (ICTJ/Human Rights Center, 2005, 28 et seq.). On this and other studies Kiza/Rathgeber/Rohne (n 4) at 50 et seq. Conc. also Orentlicher (n 21) at 22. According to OHCHR, however, especially the people from Acholiland are not in favour of prosecutions, not for reasons of principle but very specific ones (OHCHR, "Making peace our own – Victims' Perception of Accountability, Reconciliation and Transitional Justice in Northern Uganda", at 49 et seq.).

[34] Kiza/Rathgeber/Rohne (n 4) at 112, 114, 121 with Table 28; OHCHR (n 33) at 48 et seq. for a "more varied and complicated than usually portrayed" victims' view in Northern Uganda. Amnesty is not an automatic response to crimes for them, but rather motivated by various pragmatic considerations as to reintegrate rebels quickly into the community.

[35] Kiza/Rathgeber/Rohne (n 4) at 140 (Table 39), 141 (Table 40).

[36] See the very helpful research by Theidon (2007) 1 IJTJ 66, 78–9 finding that justice for demobilised fighters in Colombia is essentially revenge. See also the selective quotes in the Editorial Note (2007) 1 IJTJ 1, indicating that victims' interests range from public trials to jobs and schooling.

[37] Memorandum on the "Promotion of National Unity and Reconciliation Bill" of 1995, http://www.doj.gov.za/ (last visited 23 October 2008), also quoted in Schlunck (n 30) at 230.

the same time the lack of parallel mechanisms for truth-telling and the admission of guilt hindered the process of reconciliation.[38] Thus, it is clear that an amnesty alone does not satisfy the demands of true reconciliation; it must be accompanied by alternative mechanisms allowing for the full and public establishment of the truth and the acknowledgement of those responsible of their criminal acts.[39] This again is confirmed by victims' research according to which the prevalent purpose of taking action against the perpetrators is to reveal the truth about the past.[40] The risk transition argument ultimately blackmails a "new" state and its judiciary[41] and this may be a bad start for the establishment of a true democracy and rule of law.[42] Even the argument of the necessity of an amnesty to end hostilities is disputed.[43] From all this it follows that neither the restorative effect of amnesty and forgiveness should be overestimated nor the reconciling power of (criminal) justice underestimated.[44] The issue of how to come to terms with the crimes and perpetrators of a former regime is too difficult and complex as to lend itself to quick and easy solutions.[45] Every transition is different and requires taking into account the specific circumstances of its context;[46] a purely legal analysis loses sight of these mostly socio-political

[38] Cf. Refugee Law Working Paper 2005: "The findings suggest that, despite a number of challenges in its implementation, the Amnesty Law is perceived as a vital tool for conflict resolution, and for longer-term reconciliation and peace within the specific context in which it is operating. Furthermore, numerous respondents emphasised the fact that it resonates with specific cultural understandings of justice: amnesty is taking place within societies in which the possibility of legal and social pardon is seen to better address the requirements for long-term reconciliation than more tangible forms of punishment meted out within the legal structures. However, the findings also indicate that lack of formal mechanisms for the process of truth-telling, or the admittance of guilt on the part of former combatants, is currently hindering the process of reconciliation. According to Baines (2007) 1 IJTJ 91, 101 the "Acholi are one of the first victim populations in the world to lobby their government for the creation of a blanket amnesty".

[39] Memorandum (n 37); on the necessity of acknowledgement and recognition also Sooka (n 6) 318.

[40] See Kiza/Rathgeber/Rohne (n 4) at 123 (Table 34), 126: 66% of the victims consider "truth-telling" as the most important purpose of taking action, 27% to enable people to live together, 20% revenge, etc.; in the same vein OHCHR (n 33) at 47: "Truth about past atrocities is the most expected result transitional justice mechanisms could provide".

[41] See also Méndez (n 28) at 31; Robinson (n 31) at 497.

[42] See also Méndez (n 28) at 33.

[43] See Méndez (n 28) at 35 "by no means a certainty (…)".

[44] Cf. Crocker (n 28) at 511, 544 critically discussing the arguments in favour of reconciliation put forward by Tutu. In the same vein Blewitt in Blumenthal/McCormack (eds.) 2008, at 39 et seq., highlighting at 46 that the retributive and the restorative approach are complementary. See also Darcy (2007) 20 LJIL 377, at 402 pointing out, that international courts or tribunals are no "panacea" for the complex problems in a transition process. Crit. with regard to reconciliation through international courts, Diggelmann (2007) 45 AVR 382, at 396 et seq., seeing the mischief of a perpetrators interchange of roles with the victim (at 398).

[45] Cf. Frankel (1989) at 103–4: "A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed".

[46] Cf. Méndez (n 28) at 29, 33; Posner/Vermeule (n 6) at 767; see also Cárdenas (2005) at 166, 167; Stahn (2005) 18 LJIL 425, at 428; Seils/Wierda (n 21) at 13, 14; Botero M./Restrepo S., in Rettberg (ed.) 2005, 19, 20; Durán (n 19) at 34; Olson (n 30) at 294; Orentlicher (n 21) at 18.

circumstances[47] and the moral dimension of TJ.[48] It is crucial to strike a right balance between the countervailing values of peace and justice taking into account all the interests at stake[49] (see on this balancing exercise in more detail below para. 19 et seq.).

5. The most important technique to exempt perpetrators from criminal prosecution is the issuing of an *amnesty* in the form of a political or post-conflict amnesty; other, maybe less polemical types of amnesties, such as amnesties favouring ordinary criminals, amnesties at the occasion of certain festivities[50] or so-called corrective amnesties used to reverse an injustice,[51] are not relevant in our context.[52] Interestingly, Immanuel Kant, the great proponent of retribution, wrote in his "Metaphysic of Morals" that "the very concept of peace entails the idea of amnesty".[53] Thus, it is not surprising that in modern peace processes examples of amnesty proposals and the concomitant conflicts with the quest for justice abound. Take for example the case of El Salvador where the peace treaty of 16 January 1992 expressed the parties' compromise decision to end impunity, explicitly stating that the serious crimes "must be the object of exemplary action by the law courts (…)";[54]

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[47] See also Kemp (n 21) at 69: "purely legal analysis (…) unrealistic"; equally as to the fight against impunity Meintjes (n 14) at 459; on the importance of the political context also Filippini/Magarrell (n 7) 149 et seq.; Sriram/Ross (2007) 1 IJTJ 45, at 54 identifying "zones of impunity" especially in African countries.

[48] From a moral or ethical perspective one may dissociate the moral from the legal, i.e., the renunciation of criminal prosecution from moral forgiveness: "That is why pardon and amnesty do not necessarily go together. A crime can be legally amnestied without being morally forgiven. In André Van In's fine film The Truth Commission, the lawyer Bheki's widow testifies to what she saw (pieces of Bheki's body strewn all over the garage). 'How could I ever forgive that cruel murderer?' she asks (or words to that effect). And Yasmin Sooka, who was conducting the proceedings, replies very gently with something like this: 'It is true that these people are requesting amnesty, but you are not obliged to forgive them'. You are not obliged to forgive them, but we are going to grant amnesty. The dissociation of the ethical from the politico-legal was essential to the mechanism" (quoted according to Cassin [n 14] at 239; see also Osiel (n 16) referring to Jaspers).

[49] Cf. Crocker (n 28) at 546, 549; Méndez (n 28) 28 rejecting "extremes in both postures"; Duggan in Rettberg (ed.) 2005, at viii arguing that today "la decisión es entre cuánta justicia y cuánta paz"; Uprimny/Saffon (n 3) at 216 ("resolver la tensión entre los imperativos jurídicos internacionales de castigo […] y las exigencias prácticas de amnistía […]"), 217 ("encontrar un punto medio entre […] justicia retributiva plena […] y de impunidad absoluta […]") and 229.

[50] See ICTJ-guidelines, p. 4.

[51] Cf. Slye (2002) 43 Virgina Journal of International Law 173, at 243–4; on his distinction see n 88.

[52] For an empirical analysis of state motivations for the introduction of amnesties see Mallinder study (n 28) para. 6 et seq. with Fig. 1 finding that the most common reason is internal pressure, followed by peace and reconciliation, cultural or legal traditions, international pressure, favouring the regime itself, reparations and favouring exiles. Mallinder further shows how amnesties are introduced (para. 19 et seq. with Fig. 2: mostly by executive degree or parliamentary laws) and who they benefit (para. 26 et seq. with Fig. 3: mostly political opponents). The other findings will be referred to in the following text.

[53] Kant (1797) § 58.

[54] Quoted in Schlunck (n 30) at 116; Cassel (1996) 59 Law and Contemporary Problems 196, at 224; Popkin (2004) 15 CLF 105, at 108–9.

yet, a few days later the Legislative Assembly approved a "National Reconciliation Law" providing for a delayed amnesty and in March 1993 – after the TRC's report had been published – a blanket amnesty for "political crimes, crimes with political ramifications, or common crimes committed by no less than twenty people, before January 1st 1992" was enacted.[55]

6. Notwithstanding the enormous practical importance of exemptions from criminal prosecution within the framework of TJ, the current practice and debate suffers from a *lack of clear rules and criteria*, which help to reconcile peace and justice in situations of transition. The absence of such rules leaves it completely to the unfettered discretion of the negotiators whether they accept exemptions from criminal prosecution or not.[56] Policy arguments prevail over legal considerations, the outcome mostly depends on the power structure between the negotiating parties. Thus, it is necessary to develop "a common basis in international norms and standards"[57] in order to "judicialize" the politics of TJ.[58] This study attempts to make a modest contribution in this regard by, in the first part (Sect. 2), analysing and identifying the concrete legal substance and contents of the justice interest in TJ. As a result of this analysis one can distinguish between admissible and inadmissible amnesties and other exemption measures. The increasing importance of the ICC makes it then necessary, in the second part (Sect. 3), to examine its law with regard to peace processes.

2 Part I. The Legal Substance of the Justice Interest: Guidelines for Exemptions from Criminal Responsibility, in Particular Amnesties

7. A broad concept of justice, as defined in para. 2, allows for a full range of judicial measures to comply with a minimum standard of justice and is not limited to measures of criminal justice such as criminal investigation, prosecution and eventual punishment.[59] Nevertheless, the criminal prosecution of international crimes has always been and still is at the forefront of the global fight against impunity. It suffices

[55] Quoted according to Cassel (n 54) at 225; see also Popkin (n 54) at 109, 115; Schlunck (n 30) at 116. For a detailed analysis of El Salvador's process see Buergenthal in Kritz (ed.) 1995, 292, at 295 et seq.; Schlunck (n 30) at 87 et seq.; Cassel, op. cit., 224 et seq.

[56] For the standard policy arguments see Scharf (1999) 32 Cornell Int'l. L. J. 507, at 508 et seq.; for a policy-oriented approach also Cassel (n 54) at 228 referring to the New Haven School ("[…] legal criteria serve not as mechanical limits, but as explicitly postulated public order goals […]").

[57] Report Secretary General transitional justice, p. 1; calling for guidelines also Cassel (n 54) at 204 et seq. who, however, softens them considerably by his policy approach (n 56).

[58] The idea of a "judicialización de la política de la justicia transicional" stems from Orozco, in Rettberg (ed.) 2005, 117 at 187 who recognizes such a "judicialización" because of the increasing judicial treatment of TJ situations.

[59] See also Kemp (n 21) at 69. Mani (n 19) at 57 correctly states that prosecutions "may not in themselves provide a comprehensive and adequate response to the needs of victims and survivors for justice in transition". According to Freemann (2006) at 10 "if criminal trials were alone sufficient, the field of transitional justice would never have emerged".

to refer to arguably the most important instrument of this fight, the Rome Statute of the ICC, which in its preamble (para. 4) affirms that the prosecution of "the most serious crimes of concern to the international community" "must not go unpunished" and that the "effective prosecution" of these crimes "must be ensured". Thus, the first element of the justice interest to be defined is a possible legal duty to prosecute international crimes (para. 8–9); such a duty, obviously, may severely limit the discretion of the negotiators with regard to exemptions from criminal prosecution. Thereafter we have to examine and identify the victims' rights derived from the justice interest (para. 10 et seq.) and alternatives to criminal prosecution (para. 12 et seq.) in order to propose, on this basis, a proportionality test for the balancing of the interests involved (para. 19 et seq.). Finally, the appropriate treatment of amnesties can be suggested (para. 23 et seq.).

2.1 The Duty to Prosecute Core Crimes

8. Before the adoption and entry into force of the ICC Statute it was controversial whether and in particular to what extent a duty to prosecute international crimes existed in international law.[60] While such a duty may convincingly be inferred from treaty obligations, e.g., under the Genocide,[61] Geneva[62] or Torture Conventions,[63]

[60] See for a detailed discussion before the ICC Statute Ambos (1999) at 37 AVR 318 et seq. and id, Impunidad (1999) at 66 et seq. with references to the doctrine to this date. The subsequent literature overwhelmingly recognizes a duty to prosecute: Dugard in Cassese/Gaeta/Jones (eds.) 2002, 693, at 696–97; Botero/Restrepo (n 46) at 26 et seq.; HRW, 2005, at 9 et seq.; identifying a "trend" towards such a duty Van der Voort/Zwanenburg (2001) 1 ICLR 315, at 316, 324; for a partial duty depending on the crime Gropengießer/Meißner (2005) 5 ICLR 267, at 272 et seq.; Office of the UN High Commissioner for Human Rights Report, p. 21; crit. on an enforceable right to punishment Teitel (n 13) at 55.

[61] Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. GA, 9.12.1948, <www.preventgenocide.org> (last visited 23 October 2008).

[62] First Geneva Convention "for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (first adopted in 1864, last revision in 1949); Second Geneva Convention "for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" (first adopted in 1949, successor of the 1907 Hague Convention X); Third Geneva Convention "relative to the Treatment of Prisoners of War" (first adopted in 1929, last revision in 1949); Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War" (first adopted in 1949, based on parts of the 1907 Hague Convention IV). See also the three additional protocols, Protocol I (1977): Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the Protection of Victims of International Armed Conflicts; Protocol II (1977): Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the Protection of Victims of Non-International Armed Conflicts; Protocol III (2005): Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the Adoption of an Additional Distinctive Emblem. See <www.icrc.org/web/eng/siteeng0.nsf/htmlall/genevaconventions?opendocument> (last visited 23 October 2008).

[63] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by Resolution 39/46 of the U.N. GA, 10.12.1984, <www2.ohchr.org/english/law/> (last visited 23 October 2008).

for the respective crimes of genocide, grave breaches and torture[64] this duty is limited to the State Parties of these treaties. Beyond that, it is controversial to what extent such a duty may flow from customary international law (Art. 38 [b] ICJ Statute) or general principles of law (Art. 38 [c] ICJ Statute). As to the former, it is difficult to adduce a state practice to that effect,[65] and the latter meets with criticism since it apparently intends to overcome the lacking or even contrary state practice by just ignoring it.[66] On the other hand, the duty to respect and ensure and the right to remedy provisions of general human rights treaties (e.g., Art. 2 [1] and [3] Int. Covenant on Civil and Political Rights) do *not necessarily* – contrary to the dominant opinion in the doctrine[67] and the case law of the Inter-American Court of Human Rights[68] – entail an obligation of *criminal* prosecution since the rights may also be "ensured" through other mechanisms and such mechanisms may constitute "remedies" within the meaning of these provisions.[69] In addition, it is controversial whether the general

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[64] Cf. Scharf (n 54) 526; Dugard (1999) 12 LJIL 1003, at 1004; Schlunck (n 30) at 30 et seq. (32), 33 et seq. (35); Gavron (2002) 51 ICLQ 91, 92; Benzing in König/Stoll/Röben/Matz-Lück (eds.) 2008, 17, 40; Scharf/Rodley (n 21) at 92–3; Robinson (n 31) at 490–1; Van der Voort/Zwanenburg (n 60) at 317–18; Gropengießer/Meißner (n 60) at 273, 274; Stahn (2005) 3 JICJ 695, 703; O'Shea in du Plessis/Peté (eds.) 2008, 179, 195; Clark (2005) 4 Washington University Global Studies Law Review 389, at 399; Office of the UN High Commissioner for Human Rights Report, p. 21; HRW, 2005, at 10; Kreicker (n 21) at 9 et seq.; Principles combating impunity, principle 1 A. As to grave breaches Salomón (2006) 88 ICRC Int. Rev. 327, at 328, 337; for a general duty to exercise jurisdiction for all war crimes Olson (n 30) at 279–80.

[65] See, e.g., Schlunck (n 30) at 49 concluding that such a state practice can only be identified with regard to genocide; for a "developing obligation" to prosecute crimes against humanity Mallinder (2007) 1 IJTJ 208, at 214. For an earlier critique see already Ambos (n 60) at 328 et seq.

[66] Ambos (n 60) at 332 et seq.

[67] See Ambos (n 60) at 319 et seq. with further references. See more recently on Art. 2 (3) ICCPR Bassiouni in Bassiouni (ed.) 2005, 3, at 43 et seq.; Principles combating impunity, principle 1 B; Van der Voort/Zwanenburg (n 60) at 322; Olson (n 30) at 282–3.

[68] From *Velásquez-Rodríguez* [29 July 1988] Judgement, para. 162 et seq., 166, 174 to *Almonacid Arellano et al. vs. Chile* [26 September 2006] Judgement, Series C No. 154, para. 110: "La obligación conforme al derecho internacional de enjuiciar y, si se les declara culpables, castigar a los perpetradores de determinados crímenes internacionales, entre los que se cuentan los crímenes de lesa humanidad, se desprende de la obligación de garantía consagrada en el artículo 1.1 de la Convención Americana. (…) Como consecuencia de esta obligación los Estados deben prevenir, investigar y sancionar toda violación (…)". In the same vein most recently HRC, General Comment 31, identifying "positive obligations" in Art. 2 (1) ICCPR and calling for "appropriate measures or (…) due diligence to prevent, punish, investigate or redress the harm caused" violations of the ICCPR committed by state organs and as well "private persons or entities" (para. 8); as to Art. 2 (3) ICCPR the HRC demands "effective remedies", "judicial and administrative mechanisms for addressing claims of rights violations" thereby giving effect "to the general obligation to investigate allegations of violations promptly" (para. 15); further, "States Parties must ensure that those responsible are brought to justice", notably in case of serious violations such as torture, arbitrary killing and enforced disappearance (para. 18). For an earlier, practically identical position of the HRC with regard to Uruguay see Cassel (n 54) 214. See also Basic Principles Victims, Sect. II and n 103.

[69] As to the argument that an effective remedy need not necessarily be a criminal prosecution see Schlunck (n 30) at 44–45; Gavron (n 64) at 99 with note 42 referring to decisions of the ICPR's Human Rights Committee. Also, the Basic Principles Victims, Sect. VII, para. 11 include in the

obligation to effectively protect human rights entails the active prosecution of the perpetrators given that human rights treaties also pretend to protect these same perpetrators by way of fair trial provisions and other substantive rights.[70] Be that as it may, the ICC Statute advanced the debate considerably because with its entry into force it can now safely be said – on the basis of para. 4-6 of its preamble[71] – that a state party to this treaty is, at least, obliged to prosecute the crimes covered by the Statute.[72] Non State Parties may be bound either by a specific treaty obligation or by the combined effect of the pre-ICC Statute instruments and the ICC Statute. Indeed, the Statute has reinforced the customary law duty in that it expresses – as a kind of "Verbalpraxis"[73] – the general acceptance of such a duty with regard to the ICC crimes (genocide, crimes against humanity and war crimes).[74] This duty will be further strengthened and consolidated with the increasing number of ICC State Parties.

9. If a state has the duty to prosecute certain crimes it follows from sheer logic that it cannot exempt these crimes from punishment, e.g., by granting an amnesty.[75] The same result follows from a rule of law argument: if the law provides for a duty to prosecute then the rule of law entails a prohibition of amnesty[76] and as such constitutes a limit to politics;[77] otherwise the very legal and social order to be protected by the rule of law would be undermined and, instead, a culture of impunity

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right to a remedy the rights to "access justice", "reparation", and "access the factual information concerning the violations".

[70] See on this contradiction also Werle (n 16) mn 187.

[71] On para. 4 of the preamble see already supra para. 7. Para. 5 and 6 read: *Determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, *Recalling* that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes, [. . .].

[72] See also Schlunck (n 30) at 30; in the same vein El Zeidy (2002) 32 Michigan Journal of International Law 869, at 947–8 who even considers these crimes as ius cogens norms. For a general (emerging) duty to prosecute the ICC crimes Robinson (n 31) at 491–3.

[73] See also Kreicker (n 21) at 12–3, 305.

[74] See also Bassiouni (n 67) at 26 and Kritz (n 9) at 56 extending this duty to torture; for a duty to prosecute "crimes under international law" Basic Principles Victims, Sect. III, para. 4 and Principles combating impunity, principle 1; in favour also, albeit imprecise Méndez (n 28) at 26–7, 39; for a "much clearer and stronger presumption in favor of accountability and against impunity" in light of the developments of the last 10 years Seils/Wierda (n 21) at 2; for a customary duty to prosecute crimes committed in non-international conflicts also Salmón (2006) 88 ICRC Int. Rev. 327, at 337; von Braun (n 3) at 12 – With regard to the crime of aggression (Art. 5 [1] [d] ICC Statute) this duty may arise with its final definition and effective incorporation in the Statute.

[75] See for a discussion Ambos (1997) at 209 et seq.; id., Impunidad (n 60) at 126 et seq.; in favour of such an inference argue many writers, e.g., Cassel (n 54) at 210; Kritz (n 9) at 56; Botero/Restrepo (n 46) at 27 et seq. (with special reference to Colombia); Kreicker (n 21) at 305–6; indirectly Principles combating impunity, principle 2; with regard to grave breaches Pfanner (n 28) at 371, see also HRW, 2005, at 11; Cryer/Friman/Robinson/Wilmshurst (2007) at 32.

[76] Generally on the rule of law argument in this context Schlunck (n 30) at 24 et seq., 62; see also the statement of Badinter, rapporteur of the French Senate's Commission on Constitutional Law, stressing that an amnesty for international core crimes could simply not be envisaged in a state that respected the rule of law (quoted in Van der Voort/Zwanenburg [n 60] at 337).

[77] Teitel (n 13) at 21–2, 59; see also Olson (n 30) at 278–9.

created or promoted.[78] In fact, the rule of law argument entails a host of other arguments in favour of prosecution typically known from the debate of the purposes of punishment:[79] non-prosecution would undermine the effectiveness of criminal law deterrence,[80] prosecution reinstates the victims' status as fellow citizens,[81] sends the right message to the perpetrators but also the society in general (negative special and general prevention) and reasserts the values of a given society (positive general prevention).[82] The reinforcement of values such as the right to life, bodily integrity and liberty has a stabilizing effect for the new democratic system[83] and shows the moral dimension of the question.[84] Despite all these forceful arguments in favour of prosecution the duty to prosecute is generally considered a rule or principle[85] and as such permits – strictly defined – exceptions. From a policy perspective, the practical need of a bargaining chip – albeit of last resort[86] – in domestic

[78] See Meintjes (n 14) at 462; Crocker (n 28) at 538 and Slye (n 51) at 197–8 referring to Aryeh Neier (2002); see also Olásolo (n 31) at 144–5.

[79] Cf. Ambos/Steiner (2001) JuS 9, 12–3. See also Crocker (n 28) at 512; Clark (n 64) at 402–3; crit. Zolo (2004) 2 JICJ 727 lamenting (at 728) the "poverty of theoretical reflection on the key issues of the meaning and quality of punishment (…)".

[80] Crocker (n 28) at 536–7; Robinson (n 31) at 489; Uprimny/Saffon (n 3) at 225–6; Olson (n 30) at 291; crit. of this argument Malamud-Goti (n 13) at 196; Méndez (n 28) at 30–1; also Zolo (n 79) at 732: "little or no deterrent power"; Hazan (n 25) at 35 finds that "warring parties take the risk of prosecution into account" but the "deterrent effect soon diminishes without prompt indictments and arrests". Burke-White (2005) 18 LJIL 559, 587–7 affirms that the ICC investigation provides some deterrent effect on rebel leaders in the DRC; similarly Seils/Wierda (n 21) at 19 and Wierda/Unger, published in this volume, at 269 fn 15, explaining, that the ICC has a deterrent effect by the likelihood "that there will be consequences" just like in national criminal law. According to Cryer et al. (n 75) at 30, "deterrence is unlikely to be possible if potential offenders take the view that they may be able to obtain exemption from prosecution". Blewitt (n 44) at 45 et seq. admits, that "the mere existence of courts (…), will never bring a complete end to widespread atrocities" but still believes that courts do act as a deterrent and prevent the commission of crime. On the other hand, Grono/O'Brien in Waddel/Clark (eds.) 2008, 13, at 17 emphasize the negative effects of the deterrent power, i.e., that government officials "cling to power at all costs".

[81] Similarly Malamud-Goti (n 13) at 199 et seq.; Méndez (n 28) at 31; Seils/Wierda (n 21) at 3; on a possible therapeutic effect Hazan (n 25) at 39–40.

[82] See also Scharf/Rodley (n 21) at 90–1; Teitel (n 13) at 28, 67; Méndez (n 28) at 31–2; Kemp (n 21) at 71; Gropengießer/Meißner (n 60) at 279; Uprimny/Saffon (n 3) at 225–6; Orentlicher (n 21) at 15; crit. Zolo (n 79) at 734: "retributive conception of criminal punishment can hardly be reconciled with any project of social peace making".

[83] Teitel (n 13) at 67; Boraine (n 23) at 280–81; Seils/Wierda (n 21) at 3; Uprimny/Saffon (n 3) at 226.

[84] Robinson (n 31) at 489–90.

[85] See also Gropengießer/Meißner (n 60) at 276: "in principle"; Stahn (n 64) at 701, 703: "generally incompatible" (701).

[86] Scharf (n 54) at 512; see also Kemp (n 21) at 71; Clark (n 64) at 404, 409; similarly Arsanjani (n 21) at 67, considering amnesty as a "contract" which is "valid only to the extent that the parties (…) comply with its terms".

peace or reconciliation processes dictates a more flexible approach.[87] With regard to amnesties, a two-pronged or bifurcated approach is called for to distinguish between general, blanket amnesties, on the one hand, and limited, conditional amnesties on the other (see below para. 23 et seq.).[88]

2.2 Victims' Rights

10. Justice in TJ is foremost and predominantly justice for victims. However, victims have not only interests, as part of a broad notion of justice (para. 2); they have also rights, namely a right to justice[89] and other rights directly inferred from the notion of justice as a legal concept. These rights have been elaborated in great detail by the Human Rights case law, especially the Inter-American Court of Human Rights. They are also explicitly recognized in the ICC Statute (cf. Art. 68 (3), 75).[90] While

[87] See, e.g., Sierra Leone TRC Report (n 25) ch. 6, p. 365, para. 11 ("amnesties should not be excluded entirely"), p. 367–8, para. 20 ("trade of peace for amnesty represents the least bad of the available alternatives"). The same position is taken by the ICRC, see Pfanner (n 28) at 372 ("balancing competing interests"). See also Kemp (n 21) at 67 ("automatic assumption that truth-seeking and/or criminal prosecution are necessary […] to be avoided"), 71.

[88] For the same distinction Dugard (n 64) 1005, 1009; id., in Cassese/Gaeta/Jones (n 60), 693 at 699–700; Goldstone/Fritz (n 21) at 663–4; Vandermeersch in Cassese/Delmas-Marty (eds.) 2002, 89, at 108; Office of the UN High Commissioner for Human Rights Report, p. 23; Van der Voort/Zwanenburg (n 60) 325; Cassese (2003) at 316 (regarding Third State jurisdiction); Méndez (n 28) at 39–40; Mallinder (n 65) at 214; Young (2002) 35 U.C. Davis L. Rev. 427, at 456–7; Robinson (n 31) at 484; Seibert-Fohr (n 21) at 588, 590; Salomón (n 64) at 331 et seq.; Slye (n 51) at 240 et seq. further distinguishes between amnesic, compromise, corrective and accountable amnesties. See also Ramirez, separate vote (n 229) para. 10 (distinguishing between "autoamnistías", which are "expedidas a favor de quienes ejercen la autoridad y por éstos mismos", and amnesties "que resultan de un proceso de pacificación con sustento democrático y alcances razonables, que excluyen la persecución de conductas realizadas por miembros de los diversos grupos en contienda, pero dejan abierta la posibilidad de sancionar hechos gravísimos, que ninguno de aquéllos aprueba o reconoce como adecuados").

[89] See Slye (n 51) at 192–3. For the different needs and expectations of victims, see Mallinder (2008) at 356 et seq. and Schotsmans in de Feyter/Parmentier et al. (eds.) 2005, 105, at 107 et seq. naming physical security, recognition of suffering, some kind of justice, truth and some kind of reparation.

[90] According to Stahn/Olásolo/Gibson (2006) 4 JICJ 219 victims have broad rights of participation under the ICC-Statute pursuant to Art. 15 (3), 19 (3), 53 (3), 61, 68 (3) ICC-Statute and Rules 89–93 of the Rules of Procedure and Evidence. See also Calvo-Goller (2006) at 244 et seq.; WCRO, November 2007 at 18 et seq.; Guhr (2008) 8 ICLR 109, 111 et seq.; Goetz in Waddell/Clark (eds.) 2008, 65, at 68 et seq. and Bock (2007) 119 ZStW, 664, 670 et seq. On victims' rights to reparation under the ICC-Statute see most recently O'Shea (n 64) at 186 et seq. and De Brouwer (2007) 20 LJIL 207 et seq. Wierda/Unger (n 80) at 275 et seq. wonder who speaks on behalf of victims and find that victims' perspectives on their rights are diverse, in the same vein Simpson in Waddel/Clark (eds.) 2008, 73, at 76.

these rights are not limited to criminal justice *stricto sensu*, i.e., to criminal prosecution of the perpetrators, available empirical data indicates that victims have strong criminal justice interests with regard to the prosecution and punishment of the perpetrators[91] and their own active participation (*partie civile*) in criminal prosecution and trials.[92] This does not preclude alternative justice mechanisms (para. 12 et seq.) but they can only *complement not substitute* criminal justice.[93]

11. In sum, victims have a right[94] to:

- *Truth*, i.e., "the clarification of the illegal facts and the corresponding responsibilities";[95] this is both "a collective right that ensures society access to information

[91] See Kiza/Rathgeber/Rohne (n 4) and OHCHR (n 33) both as quoted n 33. In the same vein *Prosecutor v. Katanga/Chui*, Decision on the set of procedural rights attached to procedural status of victim at the Pre-Trial Stage of the Case, 13 May 2008 (ICC-01/04–01/07) (ICC), para. 37 with fn 40 quoting additional reports. Otim/Wiedra in Waddell/Clark (eds.) 2008, 21 at 26 point out that victims' views can change over time, as shown by victims studies in Uganda indicating that the number of victims that support options such as forgiveness, reconciliation and reintegration instead of trials and punishment increased dramatically.

[92] Cf. Kiza/Rathgeber/Rohne (n 4) at 102 et seq. with Tables 23, 24 finding that victims have a "dual role" as a witness contributing to judicial fact-finding and a "narrator" contributing to the historical truth (at 104, 157). Diggelmann (n 44) at 393 points out, that justice from a victims perspective means, in the first place, atonement for the crimes, truth and the perpetrators' acknowledgment of guilt. See for the participation of victims in the trial proceedings of the ICC: *Prosecutor v. Thomas Lubanga Dylo*, Decision on victims' participation 18 January 2008 (ICC-01/04-01/06-1119), para. 84 et seq. and Decision on the Defence and Prosecution Requests to Leave to Appeal the Decion on Victims' Participation of 18 January 2008, 26 February 2008 (ICC-01/04-01/06-1191), para. 20 et seq., regarding the participation modalities, recently approved by the Appeals Chamber, Judgment on the appeals of the Prosecutor and the Defence against TC I's Decision on Victims' Participation of 18 January 2008, 11 July 2008 (ICC-01/04-01/06 OA 9 OA 10), para. 17 et seq.

[93] Cf. IACHR, *Rochela Massacre v. Colombia* [11 May 2007] Judgement, Series C No. 163, para. 187 et seq. This is also confirmed by the study of Kiza/Rathgeber/Rohne (n 4), see for example at 139 ("reparative and punitive notions are complementary") and passim. Thus, Clark's view (n 64, at 405) that alternative mechanisms may be preferable since they are more comfortable and comprehensive is not supported by empirical evidence.

[94] See also *Gustavo Gallón y otros* [18 May 2006] Sentencia C-370/2006, Expediente D-6032 (Colombian Constitutional Court) para. 48–9; Méndez in Joyner (ed.) 1998, 255, at 263.

[95] *Bámaca-Velásquez v. Guatemala* [25 November 2000] Judgement, Series C No. 70 (IACHR) para. 201; *Barrios Altos vs. Perú Case* [14 March 2001] Judgment, Series C No. 75 (IACHR) para. 48; *Carpio Nicolle y otros vs. Guatemala Case* [22 November 2004] Judgement, Series C No. 117 (IACHR) para. 128; *Moiwana Community v. Suriname* [15 June 2005] Judgement Series C No. 124 (IACHR) para. 203 et seq.; *"Mapiripán Massacre" v. Colombia* [15 September 2005] Judgement, Series C No. 134 (IACHR), para. 297; *Gómez-Palomino v. Perú* [22 November 2005] Judgement, Series C No. 136 (IACHR) para. 76 et seq.; *Blanco-Romero et al v. Venezuela* [28 November 2005] Judgement, Series C No. 138 (IACHR) para. 95 et seq.; *Pueblo Bello Massacre v. Colombia* [31 January 2006] Judgment, Series C No. 140 (IACHR) para. 219, 266;

that is essential for the workings of democratic systems, and (…) a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted".[96] The right to truth can be traced back to Art. 32, 33 of AP I of 1977 to the GC I-IV of 1949;[97] subsequently, it has been recognized, in particular with regard to the fate of missing or disappeared persons,[98] by (international and national) case law, human rights bodies and state practice,[99] the latter in particular evidenced by the establishment of

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Baldeón-García v. Perú [6 April 2006] Judgement, Series C No. 147 (IACHR) para. 196; *Ituango Massacre v. Colombia* [1 July 2006] Judgement, Series C (IACHR) para. 399; *Ximenes-Lopes v. Brasil* [4 July 2006] Judgment, Series C No. 149 (IACHR) para. 245; *Servellón-García et al. v. Honduras* [21 September 2006] Judgement, Series C No. 152 (IACHR) para. 193; *Almonacid-Arellano et al. v. Chile* (n 68) para. 148 et seq.; *Miguel Castro-Castro Prison v. Perú* [25 November 2006] Judgement, Series C No. 160 (IACHR) para. 440. See also *Hugh Jordan v. UK* [4 May 2001] Judgement, 24746/94 [2001] ECHR 327 (European Court of Human Rights) para. 93 ("the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim"). See also *Gustavo Gallón y otros* (n 94) para. 4.9.11.4. ("la posibilidad de conocer lo que sucedió y de buscar una coincidencia entre la verdad procesal y la verdad real"). For the doctrine see Slye (n 51) at 193-4. Recently approved by the International Criminal Court, *Prosecutor v. Katanga/Chui* (n 91), para. 32 et seq.

[96] *Ignacio Ellacuría et al. case* [22 December 1999] Report 136/99 (Inter-American Commission on Human Rights) para. 224. See also the judgement of the Peruvian Constitutional Court in *Villegas Namuche* [9 December 2004] Expediente 2488-2002-HC/TC, para. 9: "Al lado de la dimensión colectiva, el derecho a la verdad tiene una dimensión individual (…)"; Abrams/Morris in Joyner (ed.) 1998, 345, at 347 ("also a collective right").

[97] Art. 32, 33 pertain to the section referring to "missing and dead persons". Art. 32 provides for "the right of families to know the fate of their relatives", Art. 33 obliges the State Parties to "search for the persons who have been reported missing" (para. 1).

[98] On the national and international mechanisms to clarify the fate of the missing Crettol/La Rosa (2006) 88 ICRC Int. Rev. at 355 et seq.; on the cooperation of the ICRC with a TRC Pfanner (n 28) 368 et seq.

[99] The most explicit recognition can be found in the Joinet report where "the inalienable right to the truth" is defined, as part of a broader right to know (containing as further "general principles" the duty to remember, the victims' right to know and guarantees for the implementation), as follows: "Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future". (Annex 1 principle 1). See also Res. 2005/66 of the Commission on Human Rights (20 April 2005). For a detailed analysis of the applicable (international) law and practice see Naqvi (2006) 88 ICRC Int. Rev. 245, at 254 et seq.; also Botero/Restrepo (n 46) at 40 et seq. On the not fully consistent state practice see Naqvi, see above, at 261–2, 265–6. For an "emerging" right to truth which is part of a "greater right to justice" Méndez (n 94) at 257 et seq. (260, 263); similarly Hayner in Joyner (ed.) 1998, 215; for Abrams/Morris (n 96) at 347 the right to know "stems from the notion that states have a duty to acknowledge and remember human rights abuses". Many writers, however, take the right to truth for granted, see for example Odio Benito in Joyner (ed.) 1998, 149, at 151.

TRCs. Against this background, it can safely be concluded that it is an emerging customary norm and a general principle of law.[100]

- *Justice*,[101] i.e., some form of judicial protection either by access to the legal system of the violator state[102] (which – according to human rights case law[103] – has an obligation to investigate, prosecute and sanction the responsible)[104] or by way of an alternative (public) forum where the victims can confront and challenge the perpetrators.[105]

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[100] See Naqvi (n 99) at 267–8 whose conclusion, however, that it stands "somewhere above a good argument and somewhere below a clear legal rule" (at 273) appears too cautious and contradicts her preceding legal analysis (at 254 et seq.). *Prosecutor v. Katanga/Chui* (n 91) para. 32. Daly (2008) 2 IJTJ 23, at 30 questions whether the truth and truth telling has a measurable benefit for victims.

[101] The Colombian CC in *Gustavo Gallón y otros* (n 94) para. 4.9.11.4., defines the right to justice "como aquel que en cada caso concreto proscribe la impunidad". See also *Prosecutor v. Katanga/Chui* (n 91), para. 39: "(…) identification, prosecution and punishment (…) are at the root of the well-established right to justice".

[102] See Basic Principles Victims, Sect. VIII, para. 12 referring to "all available judicial, administrative, or other public processes under existing domestic laws as well as under international law" (similarly Principles combating impunity, principle 8); see also *Hugh Jordan v. UK* (n 95) para. 16 (family members of the victims "shall be informed of, and have access to, any hearing as well as all information relevant to the investigation and shall be entitled to present other evidence (…)"), para. 23 ("Persons affected by the use of force and firearms (…) shall have access to an independent process, including a judicial process"); see also Chicago Principles at 16, Principle 3: "States shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparations." for the doctrine see Slye (n 51) at 195–6, 197; Young (n 88) at 477, 479; also Arsanjani (n 21) at 66; Robinson (n 31) at 498.

[103] See already n 68 and IACHR: *Carpio Nicolle y otros vs. Guatemala Case* (n 95) at 128; *Moiwana Community v. Suriname* (n 95) para. 204; *"Mapiripán Massacre" v. Colombia* (n 95) para. 295; *Blanco-Romero et al v. Venezuela* (n 95) para. 95; *Pueblo Bello Massacre v. Colombia* (n 95) para. 266; *López-Álvarez v. Honduras* [1 February 2006] Judgment, Series C No. 141, 207; *Baldeón-García v. Perú* (n 95) para. 168, 195; *Ituango Massacre v. Colombia* (n 95) para. 399; *Ximenes-Lopes v. Brasil* (n 95) para. 245; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* [5 July 2006] Judgment, Series C No. 150, para. 137 et seq.; *Servellón-García et al. v. Honduras* (n 95) para. 192 et seq.; *Goiburú et al. v. Paraguay* [22 September 2006] Judgement, Series C No. 153, para. 164; *Vargas-Areco v. Paraguay* [26 September 2006] Judgement, Series C No. 155, para. 153 et seq.; *Almonacid-Arellano et al. vs. Chile* (n 68) para. 148; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 436; *La Cantuta v. Perú* [29 November 2006] Judgment, Series C No. 162, para. 222. See also ECHR: *Aksoy v. Turkey* [18 December 1996] Judgement, 21,987/93 [1996] ECHR 68, para. 98 ("obligation on States to carry out a thorough and effective investigation of incidents of torture (…)", "identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure"); conc. *Aydin v. Turkey* [25 September 1997] Judgment, 23,178/94 [1997] ECHR 75, para. 103; *Selçuk and Asker v. Turkey* [24 April 1998] Judgement, 23,184/94, 23,185/94 [1998] ECHR 36, para. 96; *Kurt v. Turkey* 825 May 1998] Judgement, 24,276/94 [1998] ECHR 44, para. 140; *Selmouni v. France* [28 July 1999] Judgement, 25,803/94 [1999] ECHR 66, para. 79; *Hugh Jordan v. UK* (n 95) para. 157, 160 with further references. For a restrictive interpretation of the ECHR case law Benzing (2003) 7 Max Planck Yearbook of United Nations Law, 591, 608.

[104] See for a discussion already supra para. 8.

[105] See *Hugh Jordan v. UK* (n 95) para. 11 referring to an "independent commission of inquiry or similar procedure"; see also Slye (n 51) at 245; Clark (n 64) at 409.

- *Reparation*, used as an umbrella term[106] and encompassing full restitution (*restitutio in integrum*),[107] compensation[108] (Art. 75 ICC Statute),

[106] For this usage see, e.g., HRC, General Comment 31, para. 16 (defining reparation as "restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations"); in the same vein ICTJ Reparation Report at 9; Peté/du Plessis in du Plessis/Peté (eds.) 2007, 3, at 15; de Greiff, published in this volume, at 338; see also Basic Principles Victims, Sect. X, para. 21 and Principles combating impunity, principle 10 A referring to "restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition" as forms of reparation; see also Chicago Principles at 45 et seq.; Teitel (n 13) at 119; Bassiouni (n 67) at 37 et seq.; Mallinder (2008) at 171 et seq; Botero/Restrepo (n 46) at 44 et seq.; Sooka (n 6) at 319–20; Kiza/Rathgeber/Rohne (n 4) at 118 with Table 32; von Braun (n 3) at 20 et seq.; for a comprehensive historical account Torpey in Bassiouni (ed.) 2002, at 217 et seq. Also Ludi in du Plessis/Peté (eds.) 2007, 119, at 122 et seq.; especially for reparations concerning slavery cf. du Plessis in du Plessis/Peté (eds.) 2007, 147, at 167. For a survey of the Basic Principles Victims see Tomuschat in Kohen (ed.) 2007, at 569 et seq. (at 581 et seq. for the practice of selected international bodies) and Shelton in de Feyter/Parmentier et al. (eds.) 2005, 11, at 19 et seq. For the different meaning of "reparations" see Torpey in de Feyter/Parmentier et al. (eds.) 2005, 35, at 36 et seq.; for general obstacles to reparation see Schotsmans (n 89) at 125 et seq.; for the importance of active involvement of victims in the reparation process Hamber in de Feyter/Parmentier et al. (eds.) 2005, 135, at 141 et seq.; for general recommendations concerning the process and different types of reparation measures Rombouts/Sardaro/Vandeginste in de Feyter/Parmentier et al. (eds.) 2005, 345 at para. 146 et seq. – For a detailed summary of reparations and remedies ordered by the IACHR from 1989–2004 see Cassel in de Feyter/Parmentier et al. (eds.) 2005, 191, at 193 et seq.; for reparations by the Human Rights Chamber for Bosnia and Herzegovina cf. Nowak in de Feyter/Parmentier et al. (eds.) 2005 at 245 et seq. The German reparations for Nazi victims amounted by the end of 2006 to more than 64 billion € (see Bundesfinanzministerium – Referat VB4 "Leistungen der öffentlichen Hand auf dem Gebiet der Wiedergutmachung – Stand 31. Dezember 2006" [2007/0122828] at 1).

[107] See IACHR: *Palamara-Iribarne v. Chile* [22 November 2005] Judgment, Series C No. 135, para. 234; *Gómez Palomino vs. Perú* (n 95) para.113; *García-Asto and Ramírez-Rojas v. Perú* [25 November 2005] Judgment, Series C No. 137, para. 248; *Blanco-Romero et al v. Venezuela* (n 95) para. 69; *Pueblo Bello Massacre v. Colombia* (n 95) para. 228; *López-Álvarez v. Honduras* (n 103) para. 182; *Acevedo-Jaramillo et al. v. Perú* [7 February 2006] Judgment, Series C No. 144, para. 296; *Sawhoyamaxa Indigenous Community v. Paraguay* [29 March 2006] Judgment, Series C No. 146, para. 197; *Baldeón-García v. Perú* (n 95) para. 176; *Ituango Massacre v. Colombia* (n 95) para. 347; *Ximenes-Lopes v. Brasil* (n 95) para. 209; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* (n 103) para. 117; *Servellón-García et al. v. Honduras* (n 95) para. 162; *Goiburú et al. v. Paraguay* (n 103) para. 142; *Vargas-Areco v. Paraguay* (n 103) para. 141; *Almonacid-Arellano et al. vs. Chile* (n 68) para. 136; *Aguado-Alfaro et al. v. Perú (Case of Dismissed Congressional Employees)* [24 November 2006] Judgment (only in Spanish), Series C No. 158, para. 143; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 415; *La Cantuta v. Perú* (n 103) para. 201. See also Basic Principles Victims, Sect. X, para. 22 and Principles combating impunity, principle 10 B ("restore the victim to the original situation before the violations"; "restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property"). Crit. du Plessis (n 106) at 169 and de Greiff, published in this volume, at 340 emphasizing that, "there is no massive reparations program that has even approached the satisfaction of this criterion".

[108] See for "pecuniary damage" IACHR: *Sawhoyamaxa Indigenous Community v. Paraguay* (n 107) para. 216; *Rochela Massacre v. Colombia* (n 93) para. 248; *Baldeón-García v. Perú* (n 95) para. 183; *Pueblo Bello Massacre v. Colombia* (n 95) para. 246; *Ximenes-Lopes v. Brasil* (n 95) para. 220; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* (n 103) para. 126;

rehabilitation,[109] satisfaction and guarantees of non-repetition[110] and other measures,[111] i.e., in sum, measures which aim at a full recognition of the victims'

Servellón-García et al. v. Honduras (n 95) para. 173; *Goiburú et al. v. Paraguay* (n 103) para. 150; *Vargas-Areco v. Paraguay* (n 103) para. 146; *Almonacid-Arellano et al. vs. Chile* (n 68) para. 158; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 423; for "non-pecuniary damage": *Rochela Massacre v. Colombia* (n 93) para. 273; *"Mapiripán Massacre" v. Colombia* (n 95) para. 282; *Palamara-Iribarne v. Chile* (n 107) para. 234; *Gómez Palomino vs. Perú* (n 95) para. 130; *García-Asto and Ramírez-Rojas v. Perú* (n 103) para. 276; *Blanco-Romero et al v. Venezuela* (n 95) para. 86; *Pueblo Bello Massacre v. Colombia* (n 95) para. 254; *López-Álvarez v. Honduras* (n 103) para. 199; *Acevedo-Jaramillo et al. v. Perú* (n 107) para. 308; *Sawhoyamaxa Indigenous Community v. Paraguay* (n 107) para. 219; *Baldeón-García v. Perú* (n 95) para. 188; *Ituango Massacre v. Colombia* (n 95) para. 383; *Ximenes-Lopes v. Brasil* (n 95) para. 227; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* (n 103) para. 130 et seq.; *Servellón-García et al. v. Honduras* (n 95) para. 179 et seq.; *Goiburú et al. v. Paraguay* (n 103) para. 156; *Vargas-Areco v. Paraguay* (n 103) para. 149 et seq.; *Almonacid-Arellano et al. v. Chile* (n 68) para. 158; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 430; *La Cantuta v. Perú* (n 103) para. 201, para. 216. See also ECHR: *Hugh Jordan v. UK* (n 95) para. 166 et seq.; *Aksoy v. Turkey* (n 103) para. 110 et seq.; *Aydin v. Turkey* (n 103) para. 131; *Selçuk and Asker v. Turkey* (n 103) para. 104 et seq.; *Kurt v. Turkey* (n 103) para. 174–5; *Selmouni v. France* (n 103) para. 123. According to Basic Principles Victims, Sect. X, para. 23 and Principles combating impunity, principle 10 C: "[C]ompensation should be provided for any economically assessable damage (…)". For a critical view of victim reparations in Peru see Garcia-Godos (2008) 2 IJTJ 63, at 77 et seq. According to Du Plessis (n 106) at 169 this form of reparation is politically the most controversial and easily approaches excessive amounts; he refers (at 171, fn 98) to a group (called "The African World Reparations and Repatriation Truth Commission") which recently demanded $ 777 billion to be paid within 5 years by western governments as compensation for slavery. Mani (n 19) at 62 et seq. criticizes the failures especially of trials and TRC's to fulfil victims' rights to reparation. She further argues (at 76) that reparations have a bigger deterrent effect than penal sanctions. For advantages and disadvantages of obtaining reparation through either criminal or civil proceedings see Sarkin in de Feyter/Parmentier et al. (eds.) 2005, 151, at 155 et seq. Arsanjani/Reisman in Sadat/Scharf (eds.) 2008, 325, at 344, wonder where the money for the ICC's Trust Fund for Victims should come from "in a world of increasing donor fatigue".

[109] For "medical and psychological assistance" see IACHR: *Rochela Massacre v. Colombia* (n 93) para. 302; *"Mapiripán Massacre" v. Colombia* (n 95) para. 312; *Gómez Palomino v. Perú* (n 95) para.143; *García-Asto and Ramírez-Rojas v. Perú* (n 103) para. 280; *Pueblo Bello Massacre v. Colombia* (n 95) para. 274; *Baldeón-García v. Perú* (n 95) para. 206; *Ituango Massacre v. Colombia* (n 95) para. 403; *Vargas-Areco v. Paraguay* (n 103) para. 159; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 448; *La Cantuta v. Perú* (n 103) para. 238. According to Basic Principles Victims, Sect. X, para. 24 and Principles combating impunity, principle 10 D "[R]ehabilitation should include medical and psychological care as well as legal and social services".

[110] According to Basic Principles Victims, Sect. X, para. 25 and Principles combating impunity, principle 10 E satisfaction and guarantees of non-repetition should include, inter alia, cessation of violations, verification of the facts, search for the bodies of the killed or disappeared, apology, judicial or administrative sanctions against the responsible, commemorations to the victims, prevention of the recurrence of violations. Thus, this right is in part mixed up with the rights to truth and justice. Therto also du Plessis (n 106) at 174 et seq. On public apologies see also Hazan (n 25) at 42–3; IACHR *Rochela Massacre v. Colombia* (n 93) para. 295; Jenkins in du Plessis/Peté (eds.) 2007, 53, at 57 et seq.

[111] For example "search and identification of persons" disappeared or killed, delivery of the body: *Juan Humberto Sánchez v. Honduras* [7 June 2003] Judgment, Series C No. 187 (IACHR), para. 127 et seq.; *19 Tradesmen v. Colombia* [5 July 2004] Judgment, Series C No. 109 (IACHR) para. 265; *"Mapiripán Massacre" v. Colombia* (n 95) para. 305 et seq.; *Pueblo Bello Massacre v. Colom-*

status[112] and, to the extent possible, the re-establishment of their rights.[113] However, a state's duty to provide reparation for violations of international law, especially of human rights obligations, is controversial[114] and the kind of reparation required depends very much on context of the conflict.[115]

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bia (n 95) at 270–273; *Acevedo-Jaramillo et al. v. Perú* (n 107) para. 315; *Baldeón-García v. Perú* (n 95) para. 208; *Goiburú et al. v. Paraguay* (n 103) para. 171; *La Cantuta v. Perú* (n 103) para. 231; or "educational measures": *Rochela Massacre v. Colombia* (n 93) para. 303; *"Mapiripán Massacre" v. Colombia* (n 95) para. 316 et seq.; *Ituango Massacre v. Colombia* (n 95) para. 409; *Vargas-Areco v. Paraguay* (n 103) para. 161; *López-Álvarez v. Honduras* (n 103) para. 210; *Servellón-García et al. v. Honduras* (n 95) para. 200; *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* (n 103) para. 147; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 451; "monuments and other memorial sites": *"Mapiripán Massacre" v. Colombia* (n 95) para. 315; *Pueblo Bello Massacre v. Colombia* (n 95) at 278; Case of *Baldeón-García v. Perú* (n 95) para. 205; *Ituango Massacre v. Colombia* (n 95) para. 408; *Vargas-Areco v. Paraguay* (n 103) para. 158; *Servellón-García et al. v. Honduras* (n 95) para. 199; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 454). On public memorialization with regard to the Cono Sur in South America see Elizabeth Jelin (2007) 1 IJTJ 138 et seq.

[112] Public act of *acknowledgment of responsibility*: IACHR, *Indigenous Community Yakye Axa v. Paraguay* [17 June 2005] Judgment, Series C No. 125, para. 226; *Moiwana Community v. Suriname* (n 95) para. 216; *Jean and Bosico v. República Dominicana* [8 September 2005] Judgment, Series C No. 130, para. 235; *"Mapiripán Massacre" v. Colombia* (n 95) para. 314; *Pueblo Bello Massacre v. Colombia* (n 95) para. 277; *Baldeón-García v. Perú* (n 95) para. 204; *Ituango Massacre v. Colombia* (n 95) para. 406; Case of *Servellón-García et al. v. Honduras* (n 95) para. 198; *Goiburú et al. v. Paraguay* (n 103) para. 173; *Vargas-Areco v. Paraguay* (n 103) para. 158; *Miguel Castro-Castro Prison v. Perú* (n 95) para. 445; *La Cantuta v. Perú* (n 103) para. 235. See also Sooka (n 6) at 318.

[113] The Colombian CC (*Gustavo Gallón y otros* [n 94]), para. 4.9.11.4., defines the right to reparation "como aquel que comprende obtener una compensación económica, pero que no se limita a ello sino que abarca medidas individuales y colectivas tendientes, en su conjunto, a restablecer la situación de las víctimas". See also ICTJ-guidelines, p. 5; see also Schlunck (n 30) at 71–72; Slye (n 51) at 196–7, 245; Young (n 88) at 477, 479; Robinson (n 31) at 498.

[114] See for a critical discussion Tomuschat (2002) 10 Tul. J. Int'l. Comp. L. at 158 et seq. concluding at 184, that "there exist no general rule of customary international law to the effect that any grave violation of human rights creates an individual reparation claim". In favour of such a duty Res. 2002/44 of the Commission on Human Rights (23 April 2002), Basic Principles Victims, Sect. IX (in particular para. 16 referring to the "international legal obligations") and Principles combating impunity, principle 9 B. See also Bassiouni (n 67) at 48 et seq. with further references of the case law. For a detailed study of the relevant international law and practice see Rombouts/Sardaro/Vandeginste (n 106) at para. 36 et seq., concluding (para. 135) that "every human rights violation entails a duty for the responsible state to provide reparation and a correlative right of victims to obtain reparation". As to an inter-state duty of reparation arising out of State responsibility see Bosnia and Herzegovina v. Serbia and Montenegro (Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide) [26 February 2007] Judgement (ICJ) para. 459 et seq. stating at para. 460 (with further references) that where a restitutio in integrum is not possible "an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it" (for the same result with regard to human rights violations Méndez (n 94) at 263).

[115] According to Kiza/Rathgeber/Rohne (n 4) at 118 (Table 32), 122 the majority of the victims (42%) demand monetary compensation, 41% an apology (by the offender or an official), 29% a memorial, etc. On a discussion with regard to international crimes see Teitel (n 13) at 124 et seq. For an overview of symbolic and material reparation policies in Spain, Argentina and Chile see Aguilar, published in this volume, at 510 et seq. For the challenges of designing a reparation

2.3 Alternatives to Criminal Prosecution

12. The renunciation of criminal prosecution in exchange for peace and reconciliation begs the question of adequate alternatives to criminal justice and prosecution. While these alternatives need not be an equivalent to criminal prosecution – they do not substitute but only complement it (para. 10) – they must offer a *serious alternative way of dealing with the past* and as such effectively take into account the interests of victims. This presupposes, firstly, the full participation of victims in the design and execution of these measures.[116] For a *peace process*, especially the negotiations regarding the treatment of the crimes committed, this means that the voice of the victims must be heard. Their participation is indispensable to lend legitimacy to this process and make it socially acceptable.[117] The level and degree of participation is decisive in the contribution that the alternative measure(s) can make to national reconciliation. A real and positive contribution to reconciliation is, in turn, a prerequisite for the democratic and international legitimacy of the measure(s): Did a process of consultation with the society at large take place? Have the measures been discussed publicly and/or in democratic organs, such as a democratically-elected parliament? Is an open and free discussion, including a critique of the measures possible? Did a referendum take place? Did international (UN) negotiators and/or experts take part?[118]

13. The most important alternative to (pure) criminal prosecution is the establishment of a *Truth and Reconciliation Commission* (TRC). According to an authoritative definition TRCs:

> are official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years. These bodies take a victim-centred approach and conclude their work with a final report of findings of fact and recommendations. (…) Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and

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policy especially in Darfur see ICTJ Reparation Report at 26; for Sierra Leone see Schabas in de Feyter/Parmentier et al. (eds.) 2005, 289, at 290 et seq.; for Rwanda see Rombouts/Vandeginste in de Feyter/Parmentier et al. (eds.) 2005, at 309 et seq. For the question of the necessary seriousness of violations to entitle victims to reparations see Peté/du Plessis (n 106) at 17 et seq.; for a possible time limit at 20 et seq. For a special gender reparation program and its benefits Rubio-Marin/de Greiff (2007) 1 IJTJ 318, at 321 et seq.

[116] See UN-ECOSOC, Impunity, 27 February 2004, para. 11; Report Secretary General transitional justice, para. 18; see also Duggan (n 49) xi referring to the (official) recognition of the suffering of the victims. For a "central role" also Mallinder (n 65) at 220.

[117] See UN-ECOSOC, Impunity, 27 February 2004, para. 11; Report Secretary General transitional justice, para. 18.

[118] Cf. Slye (n 51) at 245; Robinson (n 31) at 497; Seibert-Fohr (n 21) at 571–2; Gropengießer/Meißner (n 60) at 278; Clark (n 64) at 409–10; Duggan (n 49) xi; also Arsanjani (n 21) at 66. In Sudan, the UN Security Council encourages the creation of institutions such as truth and/or reconciliation commissions, cf. S/RES1593 (2005), adopted 31 March 2005, para. 5.

> institutional reforms. They can also provide a public platform for victims to address the nation directly with their personal stories and can facilitate public debate about how to come to terms with the past.[119]

Thus, TRCs try to cope with the past by establishing a truth which, on the one hand, goes far beyond the judicial, narrative truth of the courtroom (whose limitations are most clearly manifested by the use of guilty pleas and other bargaining mechanisms)[120] but, on the other hand, always remains incomplete in that it only opens the door to further inquiry and truth establishment.[121] TRCs may establish what some have termed a "global truth",[122] "macro-truth",[123] "moral truth",[124] "overall truth",[125] "objective truth"[126] or "historical truth"[127] – as opposed to mere judicial or factual truth[128] – i.e., a truth taking into account all facets of past crimes and

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[119] Report Secretary General transitional justice, para. 50. See generally also Bassiouni (n 67) at 32; from a practical perspective Sooka (n 6) at 315 et seq. See for a positive assessment of the Latin American TRCs Salmón (n 74) at 352: "(…) the work of the truth commissions in the region has had the irreversible effect of bringing victims of violence into the spotlight and ensuring that their voices are heard. (…) the reports document a conscious state policy of using human rights violations to achieve governmental objectives".

[120] See Damaška (2004) 2 JICJ 1018; see also Naqvi (n 99) at 271–2 and Bell, published in this volume, at 112 et seq.; crit. also Pastor (2007) 59 Jueces para la democracia at 106 et seq.

[121] Cf. Imbleau (2004) 15 CLF 159, at 188 ("opening […] for further truth establishment"); see also the interview with Salomón Lerner (2006) 88 ICRC Int. Rev. 225, at 227. ("The truth thus exposed is open and susceptible to later enrichment […] we are not making an incontrovertible, dogmatic statement […] It starts from an open reading of scientifically established facts and interpretations that can complement this sort of endless search for a truth, which, as we know, will never be complete".) On different memories see also Jelin (n 111) at 141 et seq.

[122] Hayner (2001) at 85.

[123] Imbleau (n 121) 177.

[124] Hunt (2004) 15 CLF 193, at 195.

[125] Mattarollo in Bassiouni (ed.) 2002, 295, at 300.

[126] Boraine (n 23) at 287.

[127] González (2004) 15 CLF 55, at 61; von Braun (n 3) at 22; see also Zalaquett in Aspen Institute (ed.) 1989, 3, at 31: "The important thing is that the truth is established in an officially sanctioned way, in a manner that allows the findings to form part of the historical record (…) and that establishes an authoritative version of the events, over and above partisan considerations". Crit. Hunt (n 124) at 198 asking for caution as to the truth value of TRCs and regarding them as "historical events" rather than "sources"; on this point see also Cole (2007) 1 IJTJ 115, at 119–20 who herself calls for a linking of TRCs to history education; on the educational effect also Boraine (n 23) at 294. According to Elberling (2008) 21 LJIL at 529 et seq., international tribunals engage in the process of writing history and therefore have been accused of being "partial in their coverage of the conflict and of writing the history that some other party wanted them to write" (at 530). Diggelmann (n 44) at 394 argues that for most victims, the historical truth is more important than the mere factual truth.

[128] For Diggelmann (n 44) at 394 the judicial truth often ignores emotions, general impressions and atmosphere and focuses on the external, visible facts; further (at 395) the logic of due process is often opposed to victims justice. On the different objectives of criminal trials and TRCs see also *Prosecutor v. Norman*, Decision on the request by the TRC of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman [29 October 2003] Case No. SCSL-2003–08-PT (Special Court for Sierra Leone) para. 12. See also Boraine (n 23) at 292 et seq.; Cárdenas (n 46) at 172–3.

conflicts;[129] however, this is not necessarily the case.[130] Thus, TRCs are the expression of the integrated approach necessary to face the multiple problems in post-conflict societies.[131] However, TRCs may also examine individual cases[132] and may operate with different concepts of truth.[133]

14. With the increasing importance of TRCs,[134] especially the relatively successful South African model,[135] the research has also increased considerably.[136]

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[129] See on this complex concept of truth in more detail Imbleau (n 121) 160, 162, 167 (truth "in the context of transition"), 177–8, 187 et seq.; see also the interview with Lerner (n 121) at 225–6 ("[…] phenomenological concept of truth, if that is how we understand a process of discovery, of drawing aside a veil and therefore of exploring the sense, the meanings of human actions"); Chaparro in Rettberg (ed.) 2005, 233, at 246 et seq. refers to "memoria"; Orentlicher (n 21) at 16. See also Daly (n 100) at 26: "(…) it is impossible to say which is the 'truest' truth".

[130] On partial truth see Osiel (n 16) at 134; see also the crit. discussion by Teitel (n 13) at 81 et seq.; according to Daly (n 100) at 23 "the problem is that the truth neither *is* or *does* all that we expect of it".

[131] Calling for such an approach, e.g., Kritz (n 9) at 58–9, 66; Roht-Arriaza in Bassiouni (ed.) 2002, at 97; id. in Joyner (ed.) 1998, at 279; for a holistic approach Stahn (n 46) at 458; Sooka (n 6) at 320; for "multiple instruments" Kiza/Rathgeber/Rohne (n 4) at 111, 162; Orentlicher (n 21) 16; Jelin (n 111) at 156.

[132] See Mattarollo (n 125) at 300 ("individual truth").

[133] See Cassin (n 14) at 240 referring to the South African TRC ("According to the report itself, the TRC did in fact work with four intermeshed, explicitly rhetorical concepts of truth, each defined by the situation in which it was voiced. The first was 'factual' or 'forensic' truth, a court truth, referring to the reasoned decisions of the Amnesty Committee. The second was 'personal and narrative' truth, the truth expressed in practical terms by each person during the hearings and individual testimony. The third was referred to as 'social' truth, a truth of dialogue obtained through the process of confrontation or verbal exchange between victims and tormentors. And finally, the fourth truth was 'healing' and 'restorative' truth, the truth where it was decided to draw the line, the truth that was enough to bring about a consensus upon what and with what the rainbow nation could be built. These were the stages in the discursive construction that put in place an effective truth by suspending the difference between the real truth, which is objective, and false truths, which are subjective"); on these kinds of truth see also Boraine (n 23) at 288 et seq. On the concepts of truth from a philosophical perspective Naqvi (n 99) at 249 et seq. Daly (n 100) at 27 argues that, "the biggest problem with the truth is not that there are too many truths but rather that there is not enough truth. Often the truth that victims and others most want to hear is not the forensic truth, nor the historical or dialogic truth, but the psychological truth. Why did the perpetrator do this? Why did the government try to erase my people? How could the world stand by and let it happen? To these questions there are no answers".

[134] Cf. Mallinder study (n 28) para. 51 with Fig. 6 showing the increase from 1985 to 2005.

[135] Cf. Boraine (n 23) at 258 et seq. indicating as reasons for the "degree of success" (258) of the South African TRC six: support from the ruling party (ANC) and the government (espec. President Nelson Mandela), the successful political negotiations preceding the TRC, a very strong civil society, interest of the international community, the religious character of the TRC, the personality of its chairman Desmond Tutu; on the benefits of a TRC compared to criminal prosecutions ibid., at 286 et seq.

[136] See for the most detailed study Hayner (n 122) Chart 1, Appendix 1, p. 291 et seq., analyzing 21 truth commissions since 1974; for an update see id. (2006) 88 ICRC Int. Rev. 295 et seq. An overview over Latin American TRC provides Salmón (n 74) at 344 et seq. referring to Argentina, Chile, Ecuador, El Salvador, Guatemala, Panama and Peru. See also Schlunck (n 30) at 64 et seq., 260–61 focusing on El Salvador and South Africa. On the Peruvian TRC see González (n 127)

It shows that one must analyse each and every TRC on its own merits since their competences and powers as well as the socio-political framework of their functioning vary widely.[137] From a simplified structural perspective one may distinguish between TRCs with a limited mandate and no judicial powers which therefore tend to primarily legitimize and/or prepare the impunity of the most responsible (here so-called "impunity TRCs") and others which possess a broad mandate with quasi judicial powers,[138] sufficient resources and the necessary independence to decide on the basis of rationale criteria ("effective TRCs").[139] TRCs ideally complement or prepare criminal prosecution.[140] In this case, complex issues of delimitation between the (national or international) court(s) and the respective TRCs arise,[141] especially whether and to what extent confessions or testimonies before a TRC can be used in subsequent criminal trials.[142] If a TRC is thought to be a substitute for criminal

at 55 et seq. and the interview with its president, Salomón Lerner (n 121) at 225 et seq.; also Garcia-Godos (n 118) at 77 et seq.; on the Guatemalan "Commission for Historical Clarification" see Seils in Bassiouni (ed.) 2002, 775, at 785 et seq.; on the El Salvadorean TRC ibid., at 779 et seq.; Buergenthal (n 55) at 292 et seq.; Kemp (n 21) at 77 et seq.; Popkin (n 54) at 107 et seq.; on the Sierra Leone TRC see Shaw (2007) 1 IJTJ 183 et seq.; Schabas (2004) 15 CLF 3 et seq.; Kritz (n 9) at 66 et seq. and Poole in Bassiouni (ed.) 2002, 563, at 577 et seq.; on Ghana's "National Reconciliation Commission" Agyemang (2004) 15 CLF 125 et seq.; on East Timor's "Commission for Reception, Truth and Reconciliation" (the respective Regulation 2001/10 of UNTAET is reprinted in Bassiouni [n 9] at 546 et seq.) Burgess (2004) 15 CLF 135 et seq.; Devereux/Kent in Blumenthal/McCormack (eds.) 2008, 171, at 172 et seq.; Kritz (n 9) at 78–9; on the TRCs in Bosnia-Hercegovina, Kritz (n 9) at 60 et seq.; for the Nigerian "Human Rights Violations Investigation Commission, called "Oputa Panel" see Yusuf (2007) 1 IJTJ 268 et seq., for the TRC in Burundi cf. Vandeginste, published in this volume, at 406 et seq. The Colombian "Ley de Justicia y Paz" (n 203) provides for a "Comisión Nacional de Reparación y Reconciliación" (Art. 50–52) but its competences are very limited, in particular it is not authorized to recommend criminal prosecutions (crit. also Durán [n 19] at 34–5).

[137] Hayner (n 99) at 216; Abrams/Hayner in Bassiouni (ed.) 2002, 283, at 284; Werle (n 17) mn 205; von Braun (n 3) at 22.

[138] Normally not judicial powers stricto sensu, i.e., the powers of a criminal court, see Mattarollo (n 125) at 295–6; exceptionally the South African TRC possessed even search and seizure as well as subpoena powers, see Boraine (n 23) at 272–3.

[139] See for a comparison of the Chilean and South African Truth commissions in this sense Dugard (n 64) at 1,009 et seq.; see also Dugard (n 60) at 703; for a comparison of the Chilean and South African amnesty processes see Gavron (n 64) at 112 et seq. For a structural comparison along the lines of international vs. domestic, selective vs. general inquiry, quasi-judicial vs. fact-finding, enquiry vs. reintegration see Stahn (n 46) at 428 et seq.

[140] Hayner (n 99) at 215; Abrams/Hayner (n 137) at 286; see also Méndez (n 28) 29–30, 33; Crocker (n 28) at 546–7 et seq.; Robinson (n 31) 484; Cárdenas (n 46) at 172; Naqvi (n 99) at 270; Kiza/Rathgeber/Rohne (n 4) at 106; von Braun (n 3) at 24. Similarly, restorative justice cannot substitute but only complement criminal prosecutions, see Uprimny/Saffon (n 3) at 219, 220 et seq.

[141] In general on this issue Abrams/Hayner (n 137) at 287; Kemp (n 21) at 74 et seq.; on the relationship between the ICTY and the TRC in Bosnia-Hercegovina Kritz (n 9) at 62 et seq.; on the relationship between the SCSL and the Sierra Leone TRC Schabas (n 136) 25 et seq.; Kritz (n 9) at 68 et seq. and Poole (n 136) at 589 et seq.; on the relationship between the East Timorese TRC and the UN Serious Crimes Investigation Unit Burgess (n 136) 144 et seq.

[142] On the "immunity for testimony" mechanism see Naqvi (n 99) at 270–1. According to Mallinder (n 65) at 226 this could prevent perpetrators from participating in a TRC for fear of having to incriminate themselves.

prosecutions, the ability of the respective criminal justice system to deal with the crimes of the past must be questioned. Given the fact that a TRC cannot be considered an equivalent to criminal prosecution[143] the renunciation of the latter in favour of the former smacks of a political deal, which does not strengthen the rule of law and separation of powers but indicates inability within the meaning of Art. 17 (3) ICC Statute (see para. 42) on the part of the criminal justice system concerned.[144] In any event, if a TRC operates as a (partial) substitute for justice the truth to be discovered by this TRC must, in qualitative and quantitative terms, compensate for the loss or deficit of justice.

15. TRCs are as effective as the main political actors are prepared to make them; they depend on their willingness and cooperation.[145] If the most responsible perpetrators do not come forward to tell the truth without certain guarantees, e.g., that their declarations may not be used against them in a subsequent criminal trial, these guarantees may have to be given.[146] An effective TRC may certainly constitute a serious alternative way of dealing with the past in that it establishes a "global truth" going beyond the mere judicial truth (para. 13);[147] thereby it may contribute to national reconciliation[148] and constitute an integral part of a society's restora-

[143] IACHR, *Almonacid-Arellano et al. vs. Chile* (n 68) para. 150 ("'verdad histórica' contenida en los informes de las citadas Comisiones no puede sustituir la obligación del Estado de lograr la verdad a través de los procesos judiciales"); *La Cantuta v. Perú* (n 103) para. 224; *Rochela Massacre v. Colombia* (n 93) para. 187 et seq. see also IAComHR, *Chanfeau et al. v. Chile* [7 April 1998] Report No. 25/98, para. 68 ("No puede considerarse a la Comisión de verdad como un sustituto adecuado de un proceso judicial". Similarly *Ellacuría et al. v. El Salvador* [22 December 1999] Report No. 136/99 (IAComHR) para. 229 et seq.; *Romero y Galdámez v. El Salvador* [13 April 2000] Report No. 37/00 (IAComHR) para. 149–50; HRW Memorandum 2007 at 6 et seq; see also Freemann (n 120) at 83 ("never […] adequate substitute").

[144] For this reason against a substitution of criminal prosecution by a TRC Principles combating impunity, principle 12 A; similarly Joyner (n 21) at 39 criticizing that TRCs "cannot (…) call a specific criminal to account for his crimes"; it is too simplistic and polemical, however, to characterize TRCs as "modern-day Spanish Inquisitions" (ibid. at 37); also Kiza/Rathgeber/Rohne (n 4) at 107 referring to the risk of a trade-off implying a non-prosecution for political reasons. Crit. also Méndez (n 94) at 275; Seils (n 136) at 794; Cárdenas (n 46) at 180. A good summary of the pros and cons is offered by Kiza/Rathgeber/Rohne (n 4) at 107.

[145] Cf. Seils (n 136) at 793. See for a positive example the support of the South African TRC by the ANC and President Nelson Mandela (Boraine, as quoted in n 135).

[146] For a discussion with regard to Sierra Leone see Schabas (n 136) at 29–30, 41–2 for whom the willingness to cooperate with a TRC "may have far less to do with promises of amnesty or threats of prosecution than many may think" (at 42). See generally Cárdenas (n 46) at 174.

[147] For the better "truth effect" see also Dugard (n 64) 1,006 quoting the decision of the South African CC's decision in *AZAPO et al. vs. The President et al.* (n 23); see also Dugard (n 60) at 695; Havel in Bassiouni (ed.) 2002, 383, at 389 et seq.

[148] Hayner (n 99) at 216; Abrams/Hayner (n 137) at 290. Apart from contributing to reconciliation the establishment of the truth may contribute to restoring and maintaining peace, erradicating impunity, reconstruction national identities, setting straight the historial record (cf. Naqvi [n 99] at 247) and bring about institutional change (Šimonović [n 30] at 703). See also Pfanner (n 28) at 363–4.

tion process[149] containing an important transformative potential.[150] In this sense, a TRC may claim international recognition, especially *vis-à-vis* the international criminal justice system.[151] This recognition, however, depends on the treatment of exemptions from punishment by a TRC, especially amnesties. Mallinder finds that amnesties have been introduced independently of a TRC, before or after its establishment (e.g., in Chile and El Salvador respectively), or in conjunction with a TRC,[152] the most direct relationship being the South African case where the TRC had the power to grant the amnesty individually.[153] Clearly, if the amnesty decision is taken by the government without considering the findings of the TRC, its credibility is severely weakened. On the other hand, the faculty to grant an amnesty begs the question whether any limitations *ratione materiae* or *personae* (below para. 21) have been respected. Thus, for example, the South African TRC's amnesty faculty even extended to the most serious (political) crimes, while this possibility was ruled out in the case of the East Timorese Commission for Reception, Truth and Reconciliation (CAVR).[154] In any event, in most cases amnesty for war crimes, crimes against humanity, and genocide has been excluded.[155]

16. Taking into account the experiences from various TRCs certain best practices can be deduced and guidelines developed.[156] If they are followed we may speak of an *effective TRC* in the sense mentioned above (para. 14) and the ultimate goals of peace, justice (in the broad sense) and reconciliation will most probably be achieved. The relevant criteria can be summarized as follows:

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[149] Boraine (n 23) at 295–6; Meintjes (n 14) at 460. According to Kiza/Rathgeber/Rohne (n 4) at 143, Table 42 the usefulness of a TRC increases, from a victims' perspective, with the degree of victimization.

[150] Kiza/Rathgeber/Rohne (n 4) at 126.

[151] See in this regard the legitimate claim made by the South African TRC with regard to the international criminal responsibility for the crime of apartheid: "The Commission believes that international recognition should be given to the fact that the Promotion of National Unity and Reconciliation Act, and the processes of this Commission itself, have sought to deal appropriately with the matter of responsibility for such policies" (TRC Report, vol. 5, at. 349 [1998], quoted according to Dugard [n 64] at 1,009.)

[152] Mallinder study (n 28) para. 46.

[153] This was one of the unique features of the South African TRC (cf. Boraine [n 23] at 269), see more detailed below para. 31 with n 272 et seq.

[154] Cf. UN-Ecosoc, Impunity, 27 February 2004, para. 12.

[155] See, e.g., the Guatemalan Law of National Reconciliation, excluding an amnesty for genocide, torture, forced disappearance or crimes without a statute of limitations (Méndez [n 28] at 36; Kemp [n 21] at 82; see generally ICTJ-guidelines, p. 5).

[156] See in particular UN-ECOSOC, Impunity, 27 February 2004, para. 19; Abrams/Hayner (n 137) at 283 et seq. (293); Mattarollo (n 125) at 295 et seq.; Cassese (n 88) at 451–2; Mallinder (n 65) at 224 et seq.; see also ICTJ-guidelines, p. 5; Principles combating impunity, principles 11, 13; Joyner (n 21) at 40; Roht-Arriaza (n 131) at 281 et seq.; Dugard (n 64) at 1012; Schiff in Bassiouni (ed.) 2002, at 325 et seq.; Robinson (n 31) at 497; Cárdenas in Kleffner/Kor (eds.) 2006, 115, at 135; Salmón (n 74) at 343; Sooka (n 6) at 317 et seq.; on the quite unique features of the relatively successful South African TRC Boraine (n 23) at 269 et seq. See also the accountability principles proposed by Bassiouni (n 67) at 40. Mani (n 19) at 61 argues that "a truth commission badly done can be worse than none at all".

- A TRC should be composed of recognized and independent *personalities* from all relevant social groups and sectors to be selected in a consultative and representative process.
- On the operational level, a publicly identified contact point for victims and witnesses should be set up.
- A TRC must dispose of adequate *resources* and have sufficient *independence* from the state and other interested groups;[157] it must possess sufficient investigative powers and receive national and international support.
- The *mandate* of a TRC should not be limited to the establishment of individual responsibilities but also shed light on the *causes of the conflict* in order to prevent the recurrence of future violations. At a minimum, the crimes codified in the ICC Statute (genocide, crimes against humanity and war crimes)[158] should be within the mandate. Representative cases illustrating patterns of criminality should be investigated and special attention should be given to gender-related violence.[159]
- The mandate should be time-bound,[160] but there should be a *follow-up* process eventually allowing for a continuation of the investigation if clarification of past atrocities has not been satisfactorily achieved by the first TRC.
- A TRC should identify the *victims* and recommend reparations to the competent state organs.[161]
- There should be full *cooperation* with other state organs involved in TJ, including providing information to the prosecution authorities.
- The suspected *perpetrators*[162] should be brought before the TRC to publicly confess their crimes and give evidence on other crimes; victims should be present;[163]

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[157] See ECHR, *Hugh Jordan v. UK* (n 95) para. 11. ("Members of such a commission [of inquiry] shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry".)

[158] For Cassese (n 88) at 451 genocide must be dealt with exclusively by the criminal justice system.

[159] See for example on this issue Roht-Arriaza (n 131) at 284; Sooka (n 6) at 322–3.

[160] According to UN-ECOSOC, Impunity, 27 February 2004, para. 19 (h) it should generally last no more than two fully-operational years; according to Abrams/Hayner (n 137) at 288 the Commissions have mostly operated for less than 2 years; according to Hayner (n 136) at 295 "one to three years on average", see also the examples given by Mattarollo (n 125) at 313; for a limited mandate also Roht-Arriaza (n 131) at 283.

[161] According to UN-ECOSOC, Impunity, 27 February 2004, para. 19 (b) a TRC should not directly grant reparations since this would skew their truth seeking role; according to Cassese (n 88) at 451 a TRC may determine reparations; Boraine (n 23) at 294–5 sees this even as a an important function. Devereux/Kent (n 136) at 195 et seq., point to the possible disparity between victims and perpetrators and argue (at 201), that "in the absence of attention to issues of reparations, truth and reconciliation commissions may risk having little impact on the everyday lives and attitudes". For Daly (n 100) at 33 at least the findings of a report should be directed to the courts.

[162] For Cassese (n 88) at 451 the top-level perpetrators should be prosecuted either by the national or international criminal justice system.

[163] Cf. Cassese (n 88) at 451; more restrictive UN-ECOSOC, Impunity, 27 February 2004, para. 19 (d) ("If a truth commission has authority to identify suspected perpetrators […]").

in case of the identification of the perpetrators ("name names") their due process rights must be respected.[164]

- The possible granting of *amnesties* or pardons should be conditional, i.e., depend on the nature and gravity of the crimes and the extent to which the suspects have cooperated in the discovery of the truth and the compensation of the victims; if these conditions are not fulfilled the TRC must have the authority to reject the application and turn the case over to the criminal justice system.
- There should be *broad participation* of the society concerned in the design and operation of the TRC, in particular of the victims and/or their representatives.[165] The final *report* should be published and made *widely available* to the general public through media that are technically and culturally accessible. "The closer a commission's work can be brought physically and psychologically to the victims and the public at large, the more potent the commission's cathartic and educational effects will be".[166]
- All state organs are required to consider in good faith the *recommendations* of a TRC and implement them to the greatest extent possible; a *monitoring* body should be established for that purpose.[167]

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[164] The naming of the perpetrators is for the due process issue controversial, the Orentlicher impunity principles provide some guidance in principle 9: "Before a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission's file". For a discussion see Osiel (n 16); Hayner (n 122) at 114–5 et seq.; Hayner (n 136) at 296; Naqvi (n 99) at 272; in favour Abrams/Hayner (n 137) at 286, but recalling due process rights of the suspects; in the same vein Freemann (n 120) at 268 et seq.; Mallinder (n 65) at 225; Imbleau (121) at 186–7; in favour only if no prosecution will follow Méndez (n 94) at 267–8; recalling due process rights also Pfanner (n 28) at 370. This competence had, for example, the South African TRC (Boraine [n 23] at 275) and the Salvadorean TRC (cf. Popkin [n 54] at 109, 111). The problem is apparently ignored by Posner/Vermeule (n 6) at 767 if they argue, without more, that the purpose of TRCs "is to reveal the identities of perpetrators".

[165] On the importance of public participation and the civil society's integration in accountability processes see Meintjes (n 14) at 460; Roht-Arriaza (n 131) at 98 et seq.; Mattarollo (n 125) at 306–7; Filippini/Magarrell (n 7) at 160 et seq.; Chaparro (n 129) at 234; Sooka (n 6) at 314; on the South African experience Boraine (n 23) at 270 et seq.; Bell (n 120) at 119; Chicago Principles at 38; on participation in East Timor see Devereux/Kent (n 136) at 182 et seq., 190 et seq.

[166] Abrams/Hayner (n 137) at 288; Hazan (n 25) at 37. Generally crit. of TRC Reports Daly (n 100) at 28 et seq.; with regard to South Africa Mamdani in du Plessis/Peté (eds.) 2007, 83, at 85 et seq.

[167] Article 18 of the Sierra Leonian TRC Act 2000 stipulates that the Government must establish a body to monitor implementation of the Commission's recommendations and facilitate their implementation. The Government must provide to this body quarterly reports which will be published and assessed by it (UN-ECOSOC, Impunity, 27 February 2004, para. 19 [e]). According to Abrams/Hayner (n 137) at 286 and Mattarollo (n 125) at 322 greater attention should be given to the implementation of the recommendations. For Sooka (n 6) at 324 the often lacking implementation of the recommendations leads to a crisis of the legitimacy of TRCs. Generally on the reform impact Daly (n 100) at 33 et seq.

17. Apart from a TRC there are *other alternative justice mechanisms*,[168] which may be organized in four groups:

- Restitution, reparation/compensation, rehabilitation and non-repetition are all aimed at victims and as such a direct consequence of victims' rights.[169]
- Lustration,[170] vetting and purges are screening and administrative procedures aimed at the exclusion of a certain group of persons linked to the former regime from public office and/or other socially important posts in order to facilitate institutional reform.[171] Examples include the de-nazification by the Allies after WW II, the inquiry into former informers with the State Security policy ("Stasi") in the Ex-GDR, the exclusion of Baath party members from the army and other public offices by the U.S. occupation authority in Iraq and a new, very controversial Polish Law.[172]
- Disarmament, demobilization, reintegration (DDR) is a collective process aimed at the reintegration of the former armed groups into the (new) society.[173]
- Forms of traditional (non-western) justice, e.g., *Gacaca* in Rwanda, *Ubuntu* in South Africa or the Acholi rites of reconciliation (especially *mato oput*) in Uganda, are often a reaction to the western inspired systems of national or international criminal justice and may appear to offer a more promising approach since they take into account the local traditions and culture.[174] Indeed, the imposition of western style criminal justice may impede victims from asserting control

[168] See ICTJ-guidelines, p. 5.

[169] See supra para. 10 with n 113.

[170] From latin *lustratio*: "purification by sacrifice", see definition in Smith (1875) at 719.

[171] See for a critical study Boed in Bassiouni (ed.) 2002, at 345 et seq. concluding that (at 379 et seq.) lustration may lead to unjust discriminations, not target the most responsible and not further reconciliation; in a similar vein Posner/Vermeule (n 6) 802 et seq.; crit. on the lack of procedural guarantees also Joyner (n 21) at 37; Williams in Joyner (ed.) 1998, 287, at 289–90; Šimonović (n 30) at 704; see also Schwartz in Kritz (ed.) 1995, at 461 et seq.; Schlunck (n 30) at 70–1; ICTJ-guidelines, p. 5; Teitel (n 13) at 163 et seq.; Bassiouni (n 67) at 34–5; Kritz (n 9) at 80 et seq.; Durán (n 19) at 37; Cryer et al. (n 75) at 35. Daly (n 100) considers lustration as a form of "administrative accountability". According to von Braun (n 3) at 20 the restructuring of the political system takes centre state in the case of lustration. See also Principles combating impunity, principles 14, 15 and 17–19.

[172] The new Law of 15 March 2007 obliges individuals born before 1 August 1972 to submit so-called "Lustration statements" to the authorities regarding their relationship with the Polish security services during the period of communist rule. It has received strong criticism and was declared unconstitutional by the Polish Constitutional Court on 12 May 2007 (see BBC News, "Polish court strikes down spy law" 11 may 2007, <news.bbc.co.uk/2/hi/europe/6648435.stm> last visited 23 October 2008).

[173] ICTJ-guidelines, p. 5; UN Department of Peace Keeping Operations, 1999; Debiel/Terlinden, GTZ Discussion Paper 2005, at 10 et seq.; for a concrete GTZ project in the Ivory Coast, see: <www.gtz.de/de/weltweit/afrika/cote-d-ivoire/16849.htm> (last visited 23 October 2008); for a critical evaluation of DDR in Colombia Theidon (n 36) at 66 et seq. finding, inter alia, that DDR traditionally focused too much on military and security objectives and ignored the TJ aspects of historical clarification, justice, reparation and reconciliation. See de Greiff, published in this volume, at 324 et seq. for a comparison of DDR and reparation programs.

[174] Chicago Principles at 17, Principle 6: "States should support and respect traditional, indigenous, and religious approaches regarding past violations." See for example with regard to Gacaca

over their own victimization and lead to an "externalization of justice".[175] Traditional processes may, however, conflict with the – admittedly: western – concept of due process.[176]

18. The measures included in the first two groups constitute predominantly non-criminal or non-punitive sanctions,[177] while the third group entails benefits for the individuals concerned and the fourth group may consist of both criminal and non-criminal sanctions. Non-criminal sanctions should, in principle, not substitute but rather complement criminal sanctions.[178] The applicability of the individual measures depends on the circumstances of each case. A system of variables referring to the characteristics of the conflict, the players (structure and context variables), the intervention process (process variables) and the possible results (outcome variables) helps to select the adequate measures.[179] The most probable scenario is a combined application given the fact that the measures are "complementary, each playing a distinctly important role".[180] The application of alternative forms of justice may be considered as a mitigating factor in normal criminal proceedings.[181]

2.4 Balancing of Interests by Way of a Proportionality Test

19. Ultimately, the admissibility of limitations of the justice interest, in particular by refraining from criminal prosecution, depends on the result of a sophisticated balancing of the conflicting interests – peace and justice – at stake. This bal-

Uvin/Mirenko (2003) 9 Global Governance 219, at 228 et seq. arguing that the western inspired systems of justice (ICTR, domestic prosecution) have failed and Gacaca offers a promising alternative; on Ubuntu see Boraine (n 23) at 362; on the Acholi rites see Baines (n 38) at 103 et seq. finding, however, that "there are many outstanding questions that would need to be answered" (114). See also Kritz (n 9) at 77–8; Simon in Albrecht/Simon/Rezaei/Rohne/Kiza (eds.) 2006, 99, at 104 et seq.; Schilling (2005) at 270 et seq.; Wierda/Unger (n 80) at 288 et seq.; Ssenyonjo (2007) 7 ICLR 361, at 373 et seq.; Allen in Waddell/Clark (eds.) 2008 at 47 et seq. For the different views of victims about the possible use of Acholi practices see OHCHR (n 33) at 52 et seq. For the *Magamba* spirits practices in Mozambique see Igreja, published in this volume, at 423 et seq. For *Bashingantahe* in Burundi cf. Vandeginste, published in this volume, at 423.

[175] Cf. Kiza/Rathgeber/Rohne (n 4) at 95; in a similar vein Darcy (n 44) at 394: "international courts and trials involve a typically Western concept of retributive justice that may have little resonance with many of the communities in whose favour they are supposed to operate(…)".

[176] Stahn (n 64) at 713; id., (n 46) at 454; Baines (n 38) at 108 and HRW Memorandum 2007 at 7, insisting on "internationally recognized fair trials standards (…) in any national alternative to ICC prosecutions"; see as well the case example by Clark (n 64) at 411–2. This also generates problems with regard to Art. 17 (2) ICC Statute, see para. 42 with n 377.

[177] On the use and meaning of this term see also Williams (n 171) at 287; Kritz (n 9) at 80 et seq.; Meyer (2006) 6 ICLR 549, at 552.

[178] See also Principles combating impunity, principle 16 A and HRW Memorandum 2007 at 6 et seq.

[179] See for more details Schlunck (n 30) at 79 et seq.

[180] UN-ECOSOC, Impunity, 27 February 2004, para. 10.

[181] Cf. Stahn (n 64) at 704.

ancing exercise consists methodologically of a threefold *proportionality test*[182] as developed by the German Constitutional Court[183] and theoretically further elaborated by the German scholar Robert Alexy with his famous "Rule of Balancing" (*Abwägungsgesetz*).[184] Applying this threefold test to our case goes as follows: First, the respective measure, for example, an amnesty, must be examined to determine whether it is *appropriate* to achieve the alleged objective, i.e., a peaceful transition or peace for the society concerned.[185] This implies an analysis of the seriousness and legitimacy of the alleged objective, i.e., if the respective authority (normally the government) which offers the exemption measure, really and seriously pursues this objective and not other political plans, for example, the legalization of an armed group sympathetic to it. The criterion of appropriateness particularly begs the question whether the measure is part of an overall scheme to break with the former regime or, on the contrary, rather guarantees continuity.[186] In addition, it is essential whether the new system created on the basis of the amnesty supports human rights and respects the rule of law.[187]

20. Secondly, the measure must also be *necessary* or *indispensable* to achieve the said objective,[188] i.e., there must not exist other measures, which would be less intrusive with regard to the justice interest. For example, amnesty offers for irregular armed groups raise the question whether the peace or peaceful transition could not be achieved by less, i.e., either by a less comprehensive amnesty (e.g., excluding the most serious crimes and the most responsible perpetrators) or by a different measure, e.g., a substantial mitigation of punishment. In the sense of a necessity exception or principle, as proposed by Robinson,[189] one may ask whether the measure is due to the political, social and economic realities.

21. Last but not least the *proportionality stricto sensu* must be examined. At this stage, all the different elements and criteria favouring either the peace or justice interest come into play. In sum, a balancing of the quantity and quality (gravity)

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[182] See also Gropengießer/Meißner (n 60) at 278–9; Uprimny/Saffon (n 3) at 229–30.

[183] See the fundamental decision in *Erdölbevorratung* [16 March 1971] BVerfGE 30, 292 (German Constitutional Court) at 316.

[184] See Alexy's fundamental work *Theorie der Grundrechte* (1985) at 146 where he explains this Rule in the following words: "Nach dem Abwägungsgesetz hängt das zulässige Maß der Nichterfüllung oder Beeinträchtigung des einen Prinzips vom Wichtigkeitsgrad der Erfüllung des anderen ab. Bereits in der Definition des Begriffs des Prinzips wurde mit der Klausel 'relativ auf die rechtlichen Möglichkeiten' das, was durch das jeweilige Prinzip geboten wird, in eine Relation zu dem, was durch gegenläufige Prinzipien geboten wird, gesetzt. Das Abwägungsgesetz sagt, worin diese Relation besteht. Es macht deutlich, dass das Gewicht von Prinzipien nicht an sich oder absolut bestimmbar ist, sondern daß stets nur von relativen Gewichten die Rede sein kann." (see also Brenner/Klein/v.Mangoldt/Starck (2005) Band 2, Art. 20 bis 82, mn 314).

[185] Slye (n 51) 246; Gropengießer/Meißner (n 60) at 278–9.

[186] See also Clark (n 64) at 409.

[187] See also Arsanjani (n 21) at 66–7.

[188] Gropengießer/Meißner (n 60) at 279.

[189] Robinson (n 31) at 497. For a similar limitation taking into account a state's real possibilities to investigate and prosecute international crimes and calling for a "good faith" prosecution Méndez (n 94) at 264, 270.

of the acts to be covered by the measure (justice aspect) and the objective(s) to be achieved (peace aspect) must be undertaken;[190] in other words, a "balance between the extent of the departure from full prosecution, i.e., the quality of the measures taken, and the severity of the factors necessitating a deviation".[191] There are some particularly important criteria, which follow from the above discussion and tend to limit the scope of the measures that may be offered for the sake of peace:

- *Limitation ratione materiae* with regard to international core crimes:[192] given the general duty to prosecute the ICC crimes (para. 8) it is, in principle, inadmissible to exempt these crimes from criminal prosecution and punishment.
- *Limitation ratione personae* with regard to the most responsible:[193] given the particular and decisive responsibility of political and military leaders, they must not benefit from an exemption, especially if they granted it themselves (the most practical case being the so-called self-amnesty).[194] Indeed, victims research shows that the political and military elite are identified as the most responsible and therefore should be held responsible.[195] Further, the exclusion and/or separation of those criminal elites from the victimized community benefits this community directly and the political system as a whole and thus holds positive transformative potential.[196]
- Importance of the *procedural stage* at which the exemption takes effect:[197] the more advanced an investigation or criminal proceedings, the more acceptable it becomes to exempt the responsible from punishment given that with the advancement of the investigation at least a part of the truth has been established and full impunity has been avoided.

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[190] Gropengießer/Meißner (n 60) at 279; Uprimny/Saffon (n 3) at 229–30.

[191] Robinson (n 31) at 497.

[192] See already Ambos (n 75) at 210 et seq.; id., Impunidad (n 60), at 126 et seq.; Cassel (n 54) at 219, 220, 228–9; Joyner (n 21) at 40, 42–3; Méndez (n 94) at 274; more recently Young (n 88) at 476, 477–8; Bassiouni (n 67) at 41, 42; Stahn (n 46) at 458; Clark (n 64) at 408–9; Seils/Wierda (n 21) at 19; Uprimny/Saffon (n 3) at 230; Meyer (n 177) at 576–8; Olson (n 30) at 284; Werle (n 17) mn 212. See also Joinet report, principle 25; Orentlicher impunity principles, principle 24 (a) and Expert paper complementarity, para. 73; on the international criminal tribunals in this regard see n 335 and main text. An example for such a limited amnesty is the Ugandan 2003 amnesty law, exempting the former warlord Mathieu Ngudjolo Chui from internal prosecution from crimes committed in Ituri but excluding crimes against humanity and war crimes (on his subsequent arrest see Hemedi (2008) Issue No. 36 ICC Monitor at 10).

[193] Slye (n 51) at 245, 246; Bassiouni (n 67) at 41; Scharf/Rodley (n 21) at 95–6; Robinson (n 31) at 493 et seq.; Stahn (n 46) at 458; Clark (n 64) at 409; Meyer (n 177) at 577; Murphy (2006) 3 Eyes on the ICC 33, at 52. See also Expert paper complementarity, para. 73; on the international criminal tribunals in this regard see n 336 and main text.

[194] See already Ambos (n 75) at 213 et seq.; id., Impunidad (n 60) at 129 et seq.; Cassel (n 54) at 219, 228; more recently Young (n 88) at 477; Clark (n 64) at 409, 410. See also Expert paper complementarity, para. 73.

[195] See Kiza/Rathgeber/Rohne (n 4) at 115 (Table 30), 122, 158, 161 demonstrating that 71% of the victims considered "political leaders" and 42 "military leaders" responsible (Table 30).

[196] Ibid. at 127. See also HRW, 2005, at 15: "The stigmatizing effect of criminal prosecutions helps isolate disruptive actors from the political scene and strengthen political stability".

[197] Gropengießer/Meißner (n 60) at 279.

- Some form of *accountability*[198] and/or a public procedure (where the victims can confront the suspected perpetrators), which results in the disclosure of the facts (right to truth)[199] and identifies the responsible, i.e., eventual benefits for the responsible (partial pardons, mitigation of punishment, etc.) presuppose their effective cooperation (benefits for cooperation);[200] otherwise the measure constitutes an autonomous violation of the right to a remedy (para. 8).[201] To assess the quality of the alternative form of justice the victims' rights (para. 10–11) and the criteria developed for an effective TRC must be taken into account (para. 16).
- The *overall* political, social and economic *effects* of the measure(s) must be assessed.[202] Do they contribute to a lasting and stable peace, to a true reconciliation? Do they contribute to the consolidation of democracy and rule of law?

22. In practice, the balancing exercise has been applied by the Colombian Constitutional Court with regard to the compatibility of the Colombian Justice and Peace Act (*Ley de Justicia y Paz*)[203] with the Constitution.[204] In the Court's view, to achieve a stable and lasting peace the legislator may, on the one hand, transcend certain restrictions derived from the justice interest since otherwise peace may be unattainable; on the other hand, the peace interest is not absolute, it cannot be converted into a kind of "reason of State" ("*razón del Estado*") and the justice interest and the victims' rights must also be respected. It is the Court's task to determine, by balancing the interests involved ("*método de ponderación*"), whether the challenged Act respects the minimum standards protected by the Constitution.[205] Distinguishing between three possible options of balancing the Court applies the most comprehensive one requiring a balancing between the peace, on the one hand, and the justice, on the other, including in the latter not only justice as an abstract and objective value but also the particular victims' rights.[206] In practice, the limitations imposed by the Act on the right to justice must be balanced against the right to peace.[207] Yet, as the limitations on the right to justice do not only constitute limitations of a

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[198] Accountability in this sense is to be understood broadly; it is not limited, as suggested by Joyner (n 21) at 37, to a criminal process, i.e., denunciation, accusation and punishment. Daly (n 100) at 34 convincingly argues that "without accountability, truth produces only injustice". Similarly Grono/O'Brien (n 80) at 18 et seq. argue, while recognizing that past amnesties (in Liberia, Mozambique, South Africa) helped to bring about peace, that, "peace deals that sacrifice justice often fail to produce peace".

[199] Cassel (n 54) at 219, 228; Slye (n 51) at 239, 245; Robinson (n 31) at 498; Kemp (n 21) at 69.

[200] Uprimny/Saffon (n 3) at 211, 229–30 speak of pardons "responsabilizantes", i.e., the granting of pardons presupposes the recognition of responsibilities and effective cooperation by the responsible.

[201] Cf. Ambos (n 75) at 218 et seq.; id., Impunidad (n 60) at 135 et seq.

[202] Expert paper complementarity, para. 73.

[203] Ley 975 de 2005.

[204] Gustavo Gallón y otros (n 94); see also on the Colombian process Diaz, published in this volume, at 469 et seq.

[205] Ibid. para. 5.5., 5.9., 5.10. and passim.

[206] Ibid. para. 5.6.

[207] Ibid. para. 5.7.

right but, at the same time, an instrument to achieve the peace they also contribute to the realization of the victims' rights of non-repetition, truth and reparation. On the one hand, peace is a fundamental prerequisite to satisfy these rights, on the other hand, the specific measures provided for in the Act, e.g., to confess the crimes and compensate the victims, contribute to the realization of the said victims' rights.[208] Given this ambivalence and complex interdependence of the measures provided for in the Act, the Court opts for an integral approach ("vision integral"), i.e., it analyses each measure in the context of the other and with regard to all its effects.[209] As to the considerable mitigation of punishment ("*pena alternativa*") for the persons covered by the Act, the Court affirms that this "alternative" sanction does not affect the original sanction to be imposed according to the Penal Code; rather, the original sanction can always be applied if the person concerned does not comply with the conditions linked to the alternative sanction. Given the existence of the original sanction and its possible application, the possible mitigation is, in the view of the Court, not (reversed) disproportionate.[210] Equally, the right to truth is not unduly restricted since the benefits of the Act, especially the alternative sanction, only apply if the person concerned provides a full and true confession.[211] In the result the Court considers the Act as compatible with the Constitution but demands some specific improvements with regard to the victims' rights.[212] This is not the place to critically assess the Colombian process of demobilization[213] and the Constitutional Court's decision, but it is clear that the Colombian legislator could have given more legitimacy to the process if the available alternative mechanisms to criminal prosecution (para. 12 et seq.), in particular an effective TRC[214] and measure of lustration,[215] were used in a more extensive way.

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[208] Ibid, para. 5.12.

[209] Ibid. para. 5.15.

[210] Ibid. para. 6.2.1.4. Anyway, there are good reasons to contend that there can be proportional sentences for mass atrocities, see the discussion of Arendt's position by Osiel (n 16) at 128–9; see also Osiel (1997) at 118 with fn 122.

[211] Ibid. para. 6.2.2., esp. 6.2.2.1.7.29–30.

[212] Ibid. part. VII (decisión). The changes have been made by way of Executive Decree 3391 of 29 September 2006 but subsequent legislation and practice indicates a roll back of the CC's decision.

[213] For a crit. account of the negotiations with the paramilitary groups see Orozco (n 58) at 195 et seq.; Chaparro (n 129) at 233 et seq.; for a crit. account on the basis of empirical research in Bogotá, Medellín and Turbo-Apartadó see Theidon (n 36) at 70 et seq. finding, inter alia, that paramilitary groups continue to exist and reintegration has not been sufficiently addressed.

[214] See for a crit. assessment of the "Comisión Nacional de Reparación y Reconciliación" already n 136.

[215] To the contrary, with the recognition of the persons object of the "Ley 975" as political offenders they are fully entitled to political activity (crit. also Durán [n 19] at 37). In the meantime, however, the Colombian Supreme Court has declared that acts committed by paramilitary groups cannot be considered as "delitos políticos" (Proceso No. 26945, c/Orlando César Caballero Montalvo, Judgement of 11 July 2007).

2.5 Consequences for Amnesties: Two Approaches

23. Given the particular importance of amnesties as a bargaining chip in peace processes, the question arises whether and, if so, under which conditions, amnesties can be offered to combatant groups within conflicts. At the outset it is clear from the above that "[J]ustice and peace are not contradictory forces"[216] if, on the one hand, justice is understood broadly, i.e., not limited to criminal justice (para. 2), and, on the other, criminal prosecutions are carried out in a fair and complementary (not exclusive) manner to reinforce peace.[217] Indeed, a broad concept of justice reveals that the slogan "no peace without justice" must be read – overcoming a too narrow concept of justice – as referring to "global truth" (para. 13) as a (minimum) prerequisite for real reconciliation and peace.[218] The UN itself refers to cases where "a failure to address justice through *formal prosecution* has not undermined long term peace".[219] Yet, clearly, some form of accountability must be offered in exchange. Thus, while it is clear that respect for the justice interest is indispensable to achieve a lasting peace, the hard question is how much justice can be sacrificed on the altar of peace negotiations without unduly restricting a state's duty *vis-à-vis* international crimes (para. 8) and demolishing the foundations of true reconciliation. As for amnesties, it has already been pointed out that a bifurcated approach is called for to distinguish between blanket and conditional amnesties,[220] the former ones being generally inadmissible and the latter ones admissible in principle.

2.5.1 Blanket Amnesties are Generally Inadmissible (Strict Approach)

24. This type of amnesties may in their most extreme form be characterized as "amnesic amnesties" (from amnesia, Greek, referring to an act of oblivion) since their primary goal is to completely conceal past crimes by prohibiting any investigation.[221] If these amnesties are the result of a political compromise to end a violent conflict or facilitate a process of transition they may be called "compromise amnesties"; yet, the underlying compromise does not change their substantive deficiency in terms of international obligations and victims' rights.[222] A classical example of such an amnesty is the Chilean decree 2.191 of April 1978 which extended the amnesty to "perpetrators, accomplices or beneficiaries" (*autores, complices o*

[216] Report Secretary General transitional justice, para. 21; see also *Gustavo Gallón y otros* (n 94) para. 5.10. ("[…] la justicia no se opone necesariamente a la paz"); Joyner (n 21) at 42. This also follows from Art. 1 (1) of the Statute of the UN Charta according to which the purpose of the UN is to achieve peace "in conformity with the principles of justice".

[217] Cf. Crocker (n 28) at 533, 543, 545–6; on the importance of fairness see also Méndez (n 28) at 33.

[218] For a similar reading Bassiouni (n 67) at 41.

[219] ICTJ-guidelines, p. 4 (emphasis added).

[220] Supra para. 8 with n 88.

[221] Cf. Slye (n 51) at 240–1.

[222] Cf. Slye (n 51) 241 et seq.

encubridores) regarding all crimes committed between 11 September 1973 (the day of the *coup d'état* by General Augusto Pinochet) and 10 March 1978.[223] A more recent example is Art. IX (2) of the Lomé peace agreement of 7 July 1999 between the Sierra Leonean government and the Revolutionary United Front (RUF) which provides that the government "shall (…) grant *absolute* and free pardon and reprieve to all combatants and collaborators in respect of *anything* done by them in pursuit of their objectives (…)".[224]

25. International law quite unequivocally prohibits this type of amnesty. There are various recent *instruments* taking this position, most notably – and contrary to the just mentioned Lomé Agreement – the Statute of the Special Court of Sierra Leone (SCSL).[225] *International* criminal and human rights *courts* have commented on amnesties at various times. The ICTY has prohibited an amnesty for torture,[226] the SCSL has considered the Lomé amnesty as without effect since it is, inter alia, "contrary to the direction in which customary international law is developing and (…) to the obligations in certain treaties and conventions the purpose of which is to protect humanity".[227] On a regional level, the case law of the Inter-American Court of Human Rights (IACHR) is of particular importance since the Court had to examine the compatibility of a classical blanket amnesty, namely the Peruvian amnesty Act No. 26.479 (and its interpretative Act No. 26.492),[228] with

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[223] Decreto Ley no. 2,191, published in Diario Oficial no. 30.042 of 19 April 1978. For an analysis of these and other Latin American impunity norms see Ambos (n 75) at 83 et seq. (101–2), 227 et seq.; id., Impunidad (n 60) at 147 et seq.

[224] See <www.sc-sl.org/documents.html> (last visited 23 October 2008); reprinted in Bassiouni (n 9) at 593 et seq. (emphasis added).

[225] Its Art. 10 reads: "An amnesty(…) shall not be a bar to prosecution"; see also S/RES/1315 (2000) of 14 August 2000 stating that "the amnesty provisions of the Agreement [Lome Agreement] shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law"; Art. 40 of the Law of the Cambodian Extraordinary Chambers (reprinted in Ambos/Othman (eds.) 2003 at 267): "Government of Cambodia shall not request an amnesty or pardon (…)".

[226] *Prosecutor v. Furundzija* [10 December 1998] Judgement, IT-95–17/1-T (ICTY) para. 155 (n. omitted): "The fact that torture is prohibited by a peremptory norm of international law (…) serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It 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".

[227] *Prosecutor v. Kallon and Kamara* [13 March 2004) App. Decision, SCSL-2004–15AR72(E) and CSCSL-2004 – 16 AR72(E) (SCSL) para. 84 and para. 71, 73, 88; conc. *Prosecutor v. Kondewa* [25 May 2004] App. Decision, SCSL – 2004 – 14 AR72 (E) (SCSL) with separate opinion by Judge *Robinson*; for a commentary see Ambos in Klip/Sluiter (eds.) 2006, at 103 et seq.

[228] The Law 26.479 of 14 June 1995 (reprinted in Normas Legales No. 229, at 143–4) was a blanket amnesty in favour of military, police and civilian personnel for crimes committed in the fight against terrorism between may 1980 and the promulgation of this law; Law 26.492 was a law to "interpret" the scope of that amnesty law (see Ambos [n 75] at 95–6; id., Impunidad [n 60] at 140–1).

the American Convention on Human Rights (ACHR).[229] The Court considered that all amnesty provisions, statutes of limitation and measures designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary executions and forced disappearances; acts which all violate non-derogable rights recognized by international human rights law.[230] In adopting self-amnesty laws Peru failed to comply with the obligation to implement internal legislation to make the Convention rights effective as provided for in Art. 2 ACHR.[231] Such laws violate Art. 8 and 25, in relation to Art. 1 (1) and 2 ACHR.[232] Self-amnesty laws lead to the defencelessness of victims and perpetuate impunity; they preclude the identification of the perpetrators by obstructing the investigation and access to justice; they prevent the victims and their relatives from knowing the truth and receiving the corresponding reparation. Consequently, such laws are manifestly incompatible with the aims and spirit of the Convention.[233] These considerations have been confirmed by a subsequent judgement against Peru.[234] In another judgement against Chile, referring to the infamous *Decreto Ley* 2.191 of 1978 (para. 24), the Court affirmed the *Barrios Altos* judgement and held that crimes against humanity cannot be amnestied[235] and therefore the said amnesty must remain without legal effect.[236] The European Court of Human

[229] *Barrios Altos vs. Perú Case* (n 95) para. 41 et seq. For the similar earlier position of the Inter-American Commission with regard to the amnesties in Argentina, Chile, El Salvador and Uruguay see Cassel (n 54) 208 et seq. with further references. In *Velásquez-Rodríguez* (n 68) the Court did not refer to the amnesty issue although Honduras passed an amnesty during the proceedings (cf. Cassel, op. cit., at 210). See generally on the IACHR's case law Kourabas (n 243) 86–90, concluding (at 89) that the "jurisprudence on the issue has become more concrete and potentially more expansive".

[230] *Barrios Altos vs. Perú Case* (n 95) para. 41.

[231] Ibid. para. 42. Art. 2 ACHR ("Domestic legal effects") reads: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms".

[232] Art. 8 (1) ACHR contains the right to a hearing before and independent and impartial tribunal; Art. 25 (1) provides for "a right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention (…)"; Art. 1 (1) establishes the States' obligation to respect the rights and freedoms of the ACHR.

[233] *Barrios Altos vs. Perú Case* (n 95) para. 43 (where the Court even helds that such laws are incompatible with the letter of the Convention).

[234] *La Cantuta v. Perú* (n 103) para. 62, 80, 174.

[235] *Almonacid-Arellano et al. vs. Chile* (n 68) para. 114. See also the separate opinion by Judge Cançado Trindade where he affirms, inter alia, that self-amnesties "no son verdaderas leyes, por cuanto desprovistas del necesario carácter genérico de éstas, de la *idea del Derecho* que las inspira (esencial inclusive para la seguridad jurídica), y de su búsqueda del bien común". (para. 7, n. omitted). Rather they are "la propia negación del Derecho" and violate ius cogens (para. 10, n. omitted; see also para. 17 et seq.).

[236] *Almonacid-Arellano et al. vs. Chile* (n 68) para. 118: "(…) el Decreto Ley n. 2191 carece de efectos jurídicos y no puede seguir representando un obstáculo para la investigación de los hechos

Rights (ECHR) affirmed in a case against Turkey that for "crimes involving torture or ill-treatment" criminal proceedings must neither be time-barred nor impeded by an amnesty or pardon.[237]

26. While *UN human rights bodies* had previously rejected amnesties for serious human rights violations,[238] in particular torture, in their case law, the position of the *UNO* itself is not free from doubt. To be sure, the organization, while "recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict", has several times made clear that it does not accept amnesty clauses in peace treaties for international core crimes "such as genocide, crimes against humanity or other serious violations of international humanitarian law".[239] Yet, the UNO has taken part in peace negotiations with an amnesty on the table (e.g., El Salvador, Guatemala, Haiti, Sierra Leone)[240]

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que constituyen este caso, ni para la identificación y el castigo de los responsables, ni puede tener igual o similar impacto respecto de otros casos de violación de los derechos consagrados en la Convención Americana acontecidos en Chile." Highly crit. also Cançado Trindade, (n 235) para. 11 et seq.

[237] *Abdülsamet Yaman v. Turkey* [2 November 2004] Judgement, Application No. 32446/96 [2004] ECHR 572, para. 55.

[238] Cf. Commission of Human Rights, Question of enforced disappearance, E/CN.4/RES/1994/39, 4 March 1994, stating that individuals "should not benefit from any special amnesty law or other similar measures having the effect of exonerating them from any prosecution or penal sanction". More recently, any impediments to the establishment of legal responsibility have been considered incompatible with Art. 2 (3) ICCPR (HRC, General Comment 31, para. 18: "[…] where public officials or State agents have committed violations of the Covenant rights […], the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties […] and prior legal immunities and indemnities. […]. Other impediments to the establishment of legal responsibility should also be removed […]"). As to torture, the HRC already stated earlier the following: "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible". (HRC General Comment 20, para. 15). See also Joinet report, para. 32 affirming that "amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy". Against a statute of limitations for "crimes under international law" Basic Principles Victims, Sect. IV and Principles combating impunity, principle 3.

[239] Report of the Secretary General on the Establishment of the Special Court for Sierra Leone, S/2000/915, 4 October 2000, p. 22 (n. omitted). In the same vein, in a later report it was recognized that "carefully crafted amnesties can help in the return and reintegration" of armed groups (Report Secretary General transitional justice, para. 32) but at the same time confirmed that the UN "can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights (…)" (Ibid. para. 10, 32, 64). See also ICTJ-guidelines, p. 1, 2 ("prohibition on UN personnel approving an amnesty for grave human rights violations") and Guidelines Negotiations, para. 13 ("necessary and proper for immunity from prosecution to be granted (…); however, the UN cannot condone amnesties regarding war crimes, crimes against humanity and genocide or foster those that violate relevant treaty obligations of the parties in this field").

[240] Crit. on the UN-involvement in El Salvador, Guatemala and Haiti Cassel (n 54) 221 et seq.; crit. on the changing position towards an amnesty in Sierra Leone the Sierra Leone TRC Report (n 25) ch. 6, at 365, para. 10 ("inconsistency in UN practice") and at 369, para. 25 ("By repudiating the amnesty in the Lomé Peace Agreement, the United Nations and the Government of Sierra Leone

and thus given such amnesties a kind of international legitimacy.[241] In probably the most dramatic case, the Lomé Agreement, this tightrope walk forced the Special Representative to attach an "interpretative declaration" to the Agreement stating that "[T]he UN interprets that the amnesty and pardons in Art. 9 of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law".[242] In the Ugandan process (former) UN humanitarian coordinator Jan Egeland was in the difficult situation where he, on the one hand, had to mediate between the government and the Lord's Resistance Army (LRA), and on the other hand, refuse to talk with the rebel leaders about lifting the ICC arrest warrants against them and/or a possible amnesty blocking the ICC investigation.[243] To avoid these problems the UN should make clear at the outset that a blanket amnesty is not on the negotiating table.[244]

27. The *national practice* on blanket amnesties is, on a worldwide scale, quite rare since most countries do not issue such amnesties and therefore do not have to legally deal with them. The Mallinder study finds that while "international crimes" are covered by amnesties these amnesties are not necessarily blanket amnesties and, in any case, "political crimes" and "crimes against individuals" are more often covered than international crimes.[245] According to a recent study on the national

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have inadvertently undermined future peace negotiations where amnesty is contemplated"); on Haiti see Gavron (n 64) 106-7 and Mattarollo in Bassiouni (ed.) 2002, at 763 et seq. In Guatemala, the U.N. deserves credit for the ratione materiae limitation already mentioned, n 155.

[241] On this risk see also Scharf/Rodley (n 21) at 91.

[242] Quoted according to Cassese (n 88) at 315; see also UN-Ecosoc, Impunity, 27 February 2004, para. 31; Van der Voort/Zwanenburg (n 60) at 321 referring to the 7th Progress Report of the Secretary General of the UN Observer Mission in Sierra Leone of 30 July 1999, UN Doc. S/1999/836, para. 7.

[243] See Reuters, "UN humanitarian chief willing to meet Uganda's LRA", 10 November 2006 <www.alertnet.org/thenews/newsdesk/L10722529.htm> (last visited 23 October 2008). On the conflict between the ICC and some local Acholi leaders see Baines (n 38) at 102–3 and Ssenyonjo (n 174) at 365 et seq. The Ugandan government recently argued that its referral of the LRA situation to the ICC was due to the inability to arrest the LRA's leadership but not to the inability of its judicial system; thus, the ICC indictees can be prosecuted in Uganda after signing a peace deal with the LRA (see Ministry of Justice and constitutional affairs of Uganda, Answer to "Request for information from the Republic of Uganda on the status of execution of the warrants of arrest", 23 March 2008, ICC-02/04-01/05-286-Anx2, at 3; see also Otim/Wierda in Waddell/Clark [eds.] 2008 at 25 and Allen [n 174] at 51 et seq.). However, Uganda has not yet incorporated the ICC core crimes into its domestic law and this will make it difficult to prosecute suspects of these crimes (cf. Nakayi [2008] Issue No. 36 ICC Monitor at 4). On the conflict and negotiations in Uganda see Kourabas (2007) 14 Davis J. Int'l L. & Pol'y 60, at 62 et seq. and Otim/Wierda in Waddell/Clark (eds.) 2008 at 21 et seq.

[244] See also Méndez (n 28) 37. The documents, quoted above supra note 239, are not clear in this respect. In particular the Guidelines Negotiations only call for "[E]arly commitments to respect human rights and humanitarian principles (…)" (para. 7). For obstacles in regional conflict mediation with regard to the ICC see Sriram, published in this volume, at 311 et seq.

[245] Mallinder study (n 28) para. 34 et seq. with Fig. 4 (but recognizing the "elastic" definition of political crimes, para. 36, and that crimes against individuals may also be international crimes, para. 39).

prosecution of international crimes, covering 33 countries,[246] only the Venezuelan (written) law[247] contains an amnesty prohibition for international crimes while the law of the other (32) countries is silent on the matter.[248] While this may be true for the law of other countries too, one certainly finds judicial pronouncements in countries where the courts have been confronted with amnesties and similar exemptions in the course of the prosecution of crimes committed during a totalitarian past. The recent case law of some Latin American courts is of particular importance in this regard.[249] Probably the most explicit judgement against (procedural) exemptions was delivered by the Argentinean Supreme Court in *Simon* where the Court, on the basis of the ICHR's affirmation of a duty to prosecute and a prohibition of amnesties (*Barrios Altos*, para. 25), held that the "Full Stop" (*Punto Final*) and "Due Obedience" (*Obediencia Debida*) Laws[250] are null and void.[251] The situ-

[246] Eser/Sieber/Kreicker, *Nationale Strafverfolgung völkerrechtlicher Verbrechen/National Prosecution of International Crimes, vol. I–VII* (Max Planck Institute for Foreign and International Criminal Law, Freiburg 2003–2006).

[247] Art. 29 of the Constitution provides for a duty to prosecute "crimes against human rights" and prohibits a statute of limitations and any exemption, in particular amnesties and pardons, for "crimes against humanity, grave human rights violations and war crimes". But see also the *ratione materiae* limitation in the Guatemalan Law of National Reconciliation, supra note 155.

[248] Kreicker (n 21) at 306–7. But see the recent Algerian amnesty of February 2006 by a Presidential decree (Ordonnance n 06-01 du 28 Moharran 1,427 correspondant au 27 février 2006 portant mise en oeuvre de la Charte pour la paix et la réconciliation nationale, in Journal Officiel de la Republique Algerienne Democratique et Populaire, n 11, http://www.joradp.dz/JO2000/2006/011/F_Pag.htm last visited 23 October 2008); see Olson (n 30) at 288 and the amnesty discussions in Somalia and Afghanistan (on Afghanistan see especially the not yet implemented "Action Plan of the Islamic Republic of Afghanistan for peace, justice and reconciliation adopted December 2005" and Nader Nadery [2007] 1 IJTJ 173 et seq.) – There are also historical examples, e.g., the Italian "Amnistia Togliatti" from 22 June 1946 (reprinted in Mimmo Franzinelli, Amnistia Togliatti (2006) at 313 et seq.) which covered political offences (Art. 2, 3) and excluded certain especially serious crimes, for example torture (Art. 3).

[249] For a recent analysis of this case law Ambos/Malarino, (eds.) 2008; for an overview of Latin American amnesties (in eleven countries) see Cassel (n 54) 200–1.

[250] On these laws (Ley 23.492 of 29 December 1986 and Ley 23.521 of 9 June 1987) see Ambos (n 75) at 109 et seq.; id., Impunidad (n 60) at 158 et seq. A Chilean-like earlier blanket amnesty law (DL 22.924 of 22 September 1983) has been derogated by Congress three months after its entry into force (see Ambos, Impunidad [n 60], at 107–8 and 156).

[251] Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor s/privación ilegítima de la libertad, etc., causa N 17.768 [14 June 2005] Judgment of 14 June 2005 (Argentinean Supreme Court) reprinted in Fallos de la Corte Suprema de Justicia de la Nación, vol. 328, pp. 2056 et seq. The judgement consists of the individual votes of the seven judges which, taken together, show a clear tendency in favour of a duty to prosecute and a prohibition of amnesties and similar norms (see inter alia, the Votes of Judge Petracchi, para. 19, 20 et seq., 31; Judge Maqueda, para. 19, 21, 76, 81, 82; Judge Zaffaroni, para. 14–16, 26 and Judge Argibay, para. 14). However, Judge Fayt dissents in the characterization of the two laws as amnesties and considers that they are not prohibited. In two earlier judgements the Supreme Court hold that crimes against humanity, e.g., a qualified murder (homicidio calificado) committed in the course of the military dictatorship's fight against the "subversions", have no statute of limitations (Recurso de hecho deducido por el Estado y el Gobierno de Chile en la causa Arancibia Clavel, Enrique Lautaro s/homicidio calificado y asociación ilícita y otros causa N 259 [24 August 2004] Judgment (Argentinean Supreme Court) reprinted in Fallos de la Corte Suprema de Justicia de la

ation is much more complex in Chile where the Supreme Court for a long time took the view that the amnesty decree 2.191 (para. 24) impeded any investigation of the crimes covered;[252] only after two judgements by the Santiago Appeals Court did the position of the Supreme Court become a little bit more flexible and finally in 1998 it held that the amnesty is "inapplicable" – not "invalid" – as long as the perpetrator(s) or the victim(s) have not been identified;[253] later this position was confirmed but also rejected[254] so that it is fair to say that the Court is ambiguous at least. Last but not least, in Uruguay the "Law on the Extinction of Public Penal Action" (*Ley de Caducidad de la Pretension Punitiva del Estado*)[255] was upheld by the Supreme Court treating this law as an amnesty.[256]

28. On the other hand, the courts of *third states* had to deal, on the basis of universal jurisdiction or other extraterritorial links, with amnesties or similar exemptions issued in the territorial states, and normally declared these measures invalid or irrelevant for the national prosecutions. Thus, the Spanish *Audiencia Nacional* held that the Argentinean *Punto Final* and *Obediencia Debida* Laws are – notwithstanding their violation of international law – irrelevant for the Spanish prosecution of these cases since these laws do not establish pardons but only decriminalize the respective

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Nación, vol. 327, pp. 3312 et seq.). This has also been affirmed with regard to mere violations of the ACHR (Espósito, Miguel Angel s/incidente de prescripción de la acción penal promovido por la defensa [23 December 2004] Judgement (Argentinean Supreme Court) reprinted in Fallos de la Corte Suprema de Justicia de la Nación, vol. 327, pp. 5668 et seq.). See also Malarino in Ambos/Malarino (eds.) 2003, at 69–70; Parenti in Ambos/Malarino/Woischnik (eds.) 2006, at 77–8, 84; Parenti in Ambos/Malarino (eds.) 2008, at 22 et seq. Recently, the Cámara Federal of Buenos Aires declared the pardons decreed in favour of the (convicted) Generals Videla and Admiral Massera invalid (causa 13/84 "Incidente de inconstitucionalidad de los indultos dictados por el decreto 2,741/90 del Poder Ejecutivo Nacional". Registro de la Secretaría General n°02/07/P, Sentencia del 25 de abril de 2007); the decision of the Supreme Court is pending.

[252] See on this case law Ambos (n 75) at 239 et seq.; id., Impunidad (n 60) at 163 et seq.

[253] *Pedro Enrique Poblete Córdova* [9 September 1998] Judgement, rol no. 895–96 del Segundo Juzgado Militar de Santiago (Chilean Supreme Court), reprinted in Gaceta Jurídica 219, pp. 122 et seq. The Court invoked the Geneva Conventions (which earlier had been considered inapplicable) and some procedural provisions (see Ambos, Impunidad [n 60] at 165 et seq.; Guzmán Dalbora in Ambos/Malarino (eds.) 2003, at 175, 187).

[254] See on the one hand *Miguel Ángel Cotreras Sandoval* [17 November 2004] Judgement (Chilean Supreme Court) where the Court held that an amnesty for war crimes is prohibited (para. 34 and 35), and, on the other, *Secuestro de Ricardo Rioseco Montoya y Luis Cotal Älvarez* [4 August 2005] Judgement (Chilean Supreme Court) where the Court (again) rejects the application of the Geneva Conventions and applies the amnesty. On the recent Chilean case law Guzmán Dalbora in Ambos/Malarino (eds.) 2008, at 131 et seq.

[255] Ley No. 15.848 del 22 December 1986. This law was a consequence of earlier blanket amnesties (see González in Ambos/Malarino (eds.) 2003, at 519–20; on the *genesis* of the law see Fuchs [n 21] at 48 et seq.).

[256] *Detta Josefina/Menotti Noris/Martínez Federico/Muso Osiris/Burgell Jorge – Denuncia – Inconstitucionalidad de la Ley 15.848, art. 1,2,3 y 4* (Ficha 112/87) [2 Mayo 1988] Sentencia No. 184 (Uruguayan Supreme Court) and *González José Luis en Representación de Juan Gelman – Inconstitucionalidad* (Ficha 90-10462/2002) [15 Noviember 2004] Sentencia No 332 (Uruguayan Supreme Court). On the recent Uruguayan case law see González/Galain in Ambos/Malarino (eds.) 2008, at 307 et seq.

acts.[257] This practice is supported by the general consideration that the prosecuting third state is exercising its own jurisdiction and therefore is not bound by procedural obstacles existing in another jurisdiction.[258] The underlying substantive or normative argument is that a third state cannot breach international law, especially the sovereignty of the accused's state, if it does what international law requires, i.e., to prosecute international core crimes while the territorial state – contrary to this duty – amnesties these crimes instead of prosecuting them.[259]

29. The vast *literature* on amnesties overwhelmingly adopts the position described in the preceding para. 25–28 and normally refers to the same normative sources.[260] Often it is argued, from a *ratione materiae* perspective, that amnesties for international core crimes are inadmissible.[261] The same argument is made invoking the duty to prosecute these crimes.[262] The ICC Statute's clear commitment against impunity (para. 4–6 of the preamble) is considered an expression of *opinio iuris* that amnesties for the ICC crimes are prohibited.[263] Even more pragmatic and policy oriented scholars do not accept amnesties which would be an equivalent of

[257] Auto AN (Sala de lo Penal, Sección 3ª), 4 noviembre 1998, Recurso de Apelación núm. 84/1998 (ARP 1998\5943). Fundamento jurídico "OCTAVO". Cosa juzgada. See also Gil Gil in Ambos/Malarino (eds.) 2003, at 357; id., in Ambos/Malarino (eds.), 2008, at 471 et seq. See also the German prosecution of the disappearances of German nationals during the Argentinean military regime which was not barred by the Argentinean punto final and obediencia debida laws (cf. Ambos/Ruegenberg/Woischnik [1998] 25 EuGRZ 468, at 474 et seq.).

[258] Cf. Cryer et al. (n 75) at 33. See for a discussion Ambos (2008) § 3 mn 53 et seq.

[259] Cf. Cassese (n 88) at 316; similarly Pfanner (n 28) at 371–2; Werle (n 17) mn 212.

[260] See Ambos (n 75) at 209 et seq. with further references in n. 214; id. (n 258) § 7 mn. 114; see also Teitel (n 13) at 58; Bassiouni (1999) at 10–14, 22; Goldstone/Fritz (n 21) at 663; Méndez (n 28) at 33; O'Shea (2002) 195–6; Möller (2003) at 614–5, 619; Cassese (2004) 2 JICJ 1130 et seq.; Sánchez (2004) at 372 et seq.; Behrendt (2005) at 308; Menzel/Pierlings/Hoffmann (2005) at 795; Stahn (n 64) at 704; id. (n 46) at 461; Bell (n 120) at 106 et seq.; Burke-White (n 80) at 582; Seils/Wierda (n 21) at 14; Olson (n 30) at 283–4; Salmón (n 74) at 332 et seq. (339–40); Sriram, published in this volume, at 315; Chicago Principles at 35; HRW, 2005, at 12 et seq. does not distinguish between blanket and conditional amnesties but generally holds that an amnesty for the "most serious crimes" is inadmissible. For a philosophical position see Matwijkiw in Bassiouni (n 9) 155, at 193 et seq.

[261] Werle (n 16) at 65: "across-the-board exemption (…) unacceptable", "general amnesties for crimes under international law are impermissible under customary international law"; Meyer (n 177) at 556–7: "The prevailing school of thought (…) excludes at least general amnesties as legitimate accountability mechanisms for crimes against international law"; Kourabas (n 243) at 91: "crystallizing norm of international law prohibiting amnesties", "domestic amnesty laws (…) are *ipso facto* illegal"; Simpson in Waddell/Clark (eds.) 2008 at 75: "global consensus that blanket amnesties are both unacceptable and unenforceable"; Olson (n 30) at 284; Boraine (n 23) at 278; Wouters et al. (2008) 8 ICLR at 293 (refering to the original www version of this study); Kirchhoff, published in this volume, at 255.

[262] See *Princeton Principles,* Principle 7: "Amnesties are generally inconsistent with the obligation of states to provide accountability (…)" <www1.umn.edu/humanrts/instree/princeton.html> (last visited 23 October 2008) and Werle (n 17) mn 212; Ssenyonjo (n 174) at 386.

[263] Gropengießer/Meißner (n 60) at 300; see also Scharf (n 54) at 522; Stahn (n 64) at 702.

impunity.[264] The sovereignty argument brought forward by the French *Conseil Constitutionnel*,[265] i.e., that the effective exercise of sovereignty entails the right to take a sovereign decision on amnesty, is not convincing since it is based on a Grotian concept of sovereignty irrespective of international obligations, i.e., the duty to prosecute international core crimes.[266]

2.5.2 A Conditional Amnesty May Be Admissible Under Certain Circumstances (Flexible Approach)

30. A conditional amnesty is an amnesty which – unlike a blanket amnesty – does not automatically exempt from punishment for acts committed during a certain period of time but makes the benefit of an amnesty conditional on certain acts or concessions by the benefited person(s). The first and minimum condition is the armed groups' unreserved promise to lay down their arms and thus facilitate the end of hostilities. This condition is the consequence of the worse abuses or risk transition arguments mentioned above (para. 3). More concretely, the (former) perpetrators must undertake certain acts with a view to comply with the core of the justice element, i.e., especially satisfy the legitimate victims' demands (para. 10–11), in particular a full disclosure of the facts, acknowledgement of responsibility, repentance, etc.[267] As an important side effect, this process of coming to terms with their own past will help the former perpetrators in their own rehabilitation and reintegration into the new society. Given that a conditional amnesty is normally accompanied by a TRC, the criteria developed for an effective TRC (para. 16) also apply. As in the case of a TRC the legitimacy of an amnesty depends on the procedure employed in its creation:[268] The broader the participation, the more democratic and transparent this process has been, the more legitimacy will the amnesty enjoy. Equally important is the democratic quality of the procedure by which the beneficiaries of the amnesty were selected. Having said all this, it is clear that from the victims' perspective the gist of a conditional amnesty is that it provides for *some form of accountability*, if

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[264] See Scharf (n 54) at 512 arguing that amnesties are not an equivalent to impunity but rather often tied to accountability mechanisms; against amnesties for "true" international crimes also Joyner (n 21) at 40, 42–3.

[265] Décision 98–408, 22 January 1999, Journal officiel de la République Francaise du 24 Janvier 1999, 1317, at 1320. See also Young (n 88) at 479 et seq.

[266] See also Van der Voort/Zwanenburg (n 60) at 333–34.

[267] Cf. Cryer et al. (n 75) at 33, affirming, that "an amnesty is less likely to be unlawful if other mechanisms are put in place for victim compensation and the like". For possible conditions attached to amnesties see Mallinder study (n 28) para. 42 et seq. with Fig. 5 finding that in most cases reparation measures have been provided for, followed by surrender/disarm, time limits for application, repentance and cooperation, TRCs, lustration and community based justice.

[268] See also IACHR, Annual Report, 192–3 (1986); Slye (n 51) at 239, 245, 246; see also Young (n 88) at 476; on the democratic procedure see also Teitel (n 13) at 58; Goldstone/Fritz (n 21) at 664; Mallinder (n 65) at 226–27 and 228–29 ("democratic legitimacy"); as further criteria she proposes: genuine desire to promote peace and reconciliation, limited scope, conditional and accompanied by reparations.

not within the framework of a criminal trial then through an alternative mechanism, especially a TRC. Only this type of amnesty, which could be called "accountable amnesty",[269] may, depending on the conditions and circumstances of the concrete case, contribute to true reconciliation.[270] The enforcement of all the conditions may be facilitated by an *amnesty revocation clause* as part of a peace treaty establishing that the amnesty will be revoked if the parties to the treaty violate the agreed conditions.[271]

31. The most famous example of such an accountable amnesty is the South African one[272] provided for in the epilogue to the Constitution[273] and regulated in detail in the Truth and Reconciliation Act.[274] Accordingly, an individual amnesty could be granted upon application to a specific Amnesty Committee[275] within the framework of a trial-like procedure that exposed the applicant to public scrutiny. In South Africa, the conditions were, inter alia, that the applicant fully disclosed all committed acts ("acknowledgment-for-amnesty-scheme",[276] "amnesty in exchange for truth"[277]) and that these acts could be considered political offences.[278] Of the

[269] Slye (n 51) at 245–6.

[270] For a similar conclusion and a helpful, albeit not completely satisfactory intent to develop criteria for assessing the possible contribution of an amnesty to reconciliation Mallinder study (n 28) para. 54 et seq. stating in para. 66 that the effect on reconciliation "is dependent upon the wider political conditions with a state (…)".

[271] Cf. Sierra Leone TRC Report (n 25) ch. 6, p. 369, para. 26; Bell (n 120) at 119 et seq.

[272] See the fundamental study of Sarkin (2004); an insider's perspective provides Boraine (n 23); see also Dugard (n 64) at 1,011–12; Schlunck (n 30) at 186 et seq., 226 et seq.; Gavron (n 64) at 113 et seq.; Schiff (n 156) at 328 et seq.; van Zyl in Bassiouni (n 9) 745 et seq.; Cassin (n 14) esp. 238 et seq.; Sarkin in Werle (ed.) 2006, 43 et seq.; Nerlich in ibid. 55 et seq.; for post-TRC prosecutions see Fernandez in ibid. at 65 et seq.

[273] See supra para. 3 with n 22.

[274] Its full name is "Promotion of National Unity and Reconciliation Act 34 of 1995". See also Sarkin (n 272) at 234 et seq.

[275] The TRC Act (sect. 3 [3]) establishes three committees (Committee on Human Rights Violations, Committee on Reparation and Rehabilitation, Amnesty Committee). The Amnesty Committee has the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past (sect. 20 [1], [2], [3] TRC Act).

[276] Abrams/Hayner (n 137) at 287.

[277] Boraine (n 23) at 275 et seq. (276: "full disclosure").

[278] See sect. 3 (1) of the TRC Act according to which the TRC is required to facilitate "(…) the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective(…)". Sect. 20 (3) defines an act "associated with a political objective" by taking recourse to the following criteria:

(a) The motive of the person who committed the act, omission or offence.
(b) The context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto.
(c) The legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence.

7,116 individual applications, 1,167 were granted amnesty and in 145 cases the applicant was partially successful.[279] Given these conditions the South African amnesty must be clearly distinguished from a blanket amnesty as defined above (para. 24).[280] Thus, it is not surprising, that it has been approved by the Constitutional Court, basically arguing that it was necessary in order to cross the "historic bridge" on the way to national reconciliation and unity.[281] Yet, it has been criticized that the South African amnesty, apart from the political offence requirement, had no *ratione materiae* or *personae* limitations[282] and it is indeed questionable whether

(d) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.
(e) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter.
(f) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted:
  (i) For personal gain Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information.
  (ii) Out of personal malice, ill-will or spite, directed against the victim of the acts committed.

For a critical analysis of the disclosure and political offence requirements see Sarkin (n 272) at 249 et seq., 278 et seq.; on the political nature of the acts see also Boraine (n 23) at 276–7.

[279] See for a detailed analysis Sarkin (n 272) at 107 et seq.

[280] See also Constitutional Court, n 23, para. 32: "The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past". For a defence in this regard also Boraine (n 23) at 297–8.

[281] The Constitutional Court, n 23, basically approved the epilogue to the Constitution (n 22) which uses the metaphor of a "historic bridge". Mahomed DP concluded, followed by all other nine judges (Didcott J. dissenting only as to the reasoning with regard to the exclusion of civil liability): "In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an 'amnesty' in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future" (Constitutional Court, n 23, para. 50).

[282] For a general account of the criticism see Sarkin (n 272) at 6 et seq.; crit. also Imbleau (n 121) at 170; Hunt (n 124) at 196; Orozco (n 58) at 186–7; Sooka (n 6) at 316–7. According to Schiff (n 156) at 331, 339, 341 the widespread impunity in South Africa is rather due to the weaknesses of the domestic judicial system than to the work of the TRC. Similarly, van Zyl (n 272) at 745 et seq., argues that the TRC had no authority over prosecutions and reparations (at 760); in any case, it was "extraordinarily successful as a *process of truth-telling*" (at 759); for a positive evaluation also Boraine (n 23) at 258 et seq. (see already n 135 and 280), 340 et seq. (with regard to reconciliation). According to Fernandez (n 272) there is little doubt that "the choice of granting amnesties to persons who have committed gross human rights violations is not in accordance with international law" (at 79). For a recent defence, Tutu (2007) 1 IJTJ 6–7.

these generally recognized limitations (para. 15, 21, 25 et seq.) may be ignored without a second thought. While it follows, on an abstract level, from the proportionality test (para. 19 et seq.) that international core crimes must not be the object of an exemption and less so if the exemption also extends – for lack of a *ratione personae* limitations – to the most responsible (para. 21), this rule is a principle and as such is not written in stone but open to – albeit very strict – exceptions. While the admissibility of these exceptions depends on the circumstance of the concrete case – as in South Africa where it is important to take into account that most amnesty applications have been dismissed – it is clear that such exceptions may, on an abstract level, only be justified by extreme circumstances which leave virtually, with a view to a peaceful transition, no other option than to ultimately accept impunity for international core crimes (on this "worse abuses argument" see already para. 3). To be sure, to accept this argument means to give in to the power of the arms – "*auctoritas, non veritas facit legem*" – and it is hardly possible to prove in a given situation that the concessions were really necessary since the alternative – sticking to the *ratione materiae* and *personae* limitations – has not been put to practice.

32. Probably the most forceful legal argument for a flexible approach is provided for in *Art. 6 (5) Additional Protocol II* (AP II) to the Four Geneva Conventions.[283] The provision has always been interpreted – in accordance with the travaux based view of the ICRC[284] – as only referring to legal acts in combat and to those mutual breaches of IHL which have been committed as a necessary consequence of the armed conflict, i.e., as not covering violations of IHL.[285] Indeed, the provision applies only to non-international armed conflicts and thus cannot undermine the duty to prosecute grave breaches. As for amnesties for crimes committed in non-international conflicts the recent criminalization of these acts by the *Tadić* case law[286] and Art. 8 (2) (c) and (e) of the ICC Statute makes it necessary to either follow the restrictive ICRC interpretation or reject amnesties for war crimes from the perspective of the principle of the unity of the (international) legal order: If this order establishes a duty to prosecute war crimes (in particular the grave breaches of the Geneva Conventions, para. 7) it cannot at the same time (and even by an instrument of the same legal area, namely IHL) allow that these crimes be exempted from

[283] The provision reads: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained".

[284] Cf. Sandoz/Swinarski/Zimmermann (1987) mn. 4618: "L'objet de cet alinéa est d'encourager un geste de réconciliation qui contribue à rétablir le cours normal de la vie dans un peuple qui a été divisé." See also Pfanner (n 28) at 371.

[285] Conc. Inter-American Commission on Human Rights, case 10.480, report no. 1/99, para. 116; UN-ECOSOC, Impunity, 27 February 2004, para. 27. See also Cassel (n 54) at 218; Méndez (n 28) at 35; Gavron (n 64) at 101–2 and Slye (n 51) at 178 all referring to the ICRC position; also Young (n 88) at 446–7; Seils/Wierda (n 21) at 14; Olson (n 30) at 286; Salmón (n 74) at 338; ICRC 2007, at 61.

[286] *Prosecutor v. Tadic* [2 October 1995] App. Decision, IT-94–1-AR 72 (ICTY) para. 71 et seq.

punishment.[287] Be that as it may, the mere existence of Art. 6 (5) AP II with its explicit reference to an amnesty calls for a certain flexibility; consequently, an amnesty after an armed conflict within the meaning of Art. 6 (5) AP II must remain possible if it is an appropriate and necessary tool to achieve national reconciliation[288] and if it does not undermine the respective state's duty to prosecute.

33. The overwhelming *doctrine* follows the two-pronged approach to distinguishing between blanket and conditional amnesties[289] and, consequently, allows for the latter under certain, exceptional circumstances. Some scholars argue that, from a legal perspective, a general prohibition does not yet exist,[290] others that, for policy reasons, it cannot exist.[291] Still others emphasize the criteria for allowing conditional or limited amnesties, for example, that the whole truth be told and that the amnesty be necessary for the peaceful transition[292] or that it only be applied to collective crimes.[293] In some cases, the argumentative dilemma becomes manifest in the attempt to reconcile both – the prohibitive and permissive – views. The studies carried out by Orentlicher[294] and Dugard[295] serve as good examples in this regard. The former proposes, on the one hand, a principle (no. 22) according to which states "should adopt safeguards against any abuse of rules such as those pertaining to prescription, amnesty (…)", and, on the other, a specific principle (no. 24) according to which amnesties and other measures of clemency shall be, in general, possible but be kept within certain bounds, namely, that either an independent and impartial investigation was undertaken by the state concerned[296] or the person concerned was prosecuted by national or international courts[297] and that the amnesty has no effect on the victim's right to reparation.[298] In interpreting these contradictory principles (22 and 24) in this way, she states that she sought:

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[287] See already Ambos (n 75) at 210–11; see also Tomuschat in Cremer (ed.) 2002, 315; Werle (n 16) mn 191 with n. 366; Sánchez (n 260) at 371; Gropengießer/Meißner (n 60) at 272; Hafner/Boon/Rubesame/Huston (1999) 10 EJIL 108, 111; Gavron (n 64) at 103.

[288] See also Arsanjani (n 21) at 65 and Bell (n 120) at 110 et seq.

[289] See the references in supra n 88.

[290] See, e.g., Cassese (n 88) at 315: "There is not yet any general obligation to refrain from enacting amnesty laws on these crimes". For a stricter view apparently Olson (n 30) at 289 et seq. generally against amnesty for international core crimes.

[291] See, e.g., Werle (n 16) at 66 (mn 190): "(…) international (criminal) law cannot completely block an amnesty that is necessary to restore peace"; Gropengießer/Meißner (n 60) at 278–79: "relative ban"; Ferdinandusse (2006) at 205 et seq. (207: "presumption" for prohibition); Kreicker (n 21) at 17–8, 306. See also the crit. analysis of the justice element in the Dayton Peace Process by Williams (n 20) at 115, concluding, at 133, that "the current prevailing perspective appears to be that it is better to negotiate a peace deal with those responsible for atrocities than to insist on the inclusion of norms of justice which may derail the peace process (…)".

[292] Van der Voort/Zwanenburg (n 60) at 324 et seq. (326).

[293] May (2005) at 243 et seq., 251–2.

[294] Orentlicher impunity principles.

[295] Dugard (n 60) at 693 et seq.

[296] Orentlicher impunity principles, Principle 24 (a) with reference to Principle 19.

[297] Ibid., Principle 24 (a).

[298] Ibid., Principle 24 (b).

> to avoid any possible implication that a perpetrator of serious crimes under international law may be exempted from criminal punishment *altogether* by disclosing his or her violations during a period of persecution.[299]

Dugard derives, on the one hand, a prohibition of amnesty for international crimes from the duty to prosecute these crimes,[300] but on the other, rejects, in the light of state practice, the existence of such a duty and, consequently, an amnesty prohibition[301] leaving it ultimately to the discretion of the states concerned to grant amnesties as long as they do not cover genocide, grave breaches and torture.[302] In fact, while Dugard does not clearly distinguish between the duty to prosecute and the granting of amnesties, he does distinguish between blanket and conditional amnesties, concretely the Chilean and South African ones.[303] For the latter one he requires a judicial approval or a quasi-judicial inquiry[304] and accepts them – following the South African example – if they have "been granted as part of a truth and reconciliation inquiry and each person (…) has been obliged to make full disclosure of his or her criminal acts as a precondition for amnesty and the acts were politically motivated".[305]

3 Part II. Peace Processes and the ICC

3.1 Preliminary Remarks

34. While peace processes have not been under scrutiny by a *permanent accountability mechanism* for a long time – at best ad hoc mechanisms like international and internationalized courts have been established *ex post facto*[306] – the situation has radically changed with the establishment of the ICC.[307] Indeed, the ICC is "part of

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[299] Orentlicher Impunity principles commentary, para. 56 (emphasis added). More recently Orentlicher confirmed her support for criminal accountability, but stresses the importance of local agency which may make a temporal suspension of criminal prosecution necessary (Orentlicher [n 21] 21–2).

[300] Dugard (n 60) at 697.

[301] Ibid. at 698.

[302] Ibid. at 699. Similarly already Dugard (n 64) 1,003-1,004 expressing doubts whether international law – given the opposite state practice – prohibits amnesties albeit recognizing that it is "moving in this direction". As to the crimes in particular he argues that genocide and war crimes ("grave breaches") cannot be covered by an amnesty the law being unclear for the other international crimes (at 1,015).

[303] Dugard (n 60) at 699-700.

[304] Dugard (n 60) at 703.

[305] Dugard (n 60) at 700. Similarly already Dugard (n 64) at 1,005, 1,015 considering that a blanket, unconditional amnesty without a truth commission "is no longer an acceptable option".

[306] On "hybrid" courts in this context see Kritz (n 9) at 70 et seq.

[307] Schlunck (n 30) at 251-52, 254; Goldstone/Fritz (n 21) at 665-6; for a positive assessment Seils/Wierda (n 21) at 18.

the transitional justice project"[308] and the parties to conflicts may take the "threat" by the ICC seriously well before the actual negotiations start, and some most responsible may even be excluded from these negotiations.[309] This effect is not limited to the State Parties since, as the Sudanese situation shows, even a Non State Party can be made the object of ICC investigations by a Security Council referral (Art. 13 [b] ICC Statute).[310] Interestingly, empirical research shows that the majority of victims support the idea of an universalized and international criminal justice.[311] In addition, as the ICC is an independent treaty body (Art. 1, 4 ICC Statute) other actors, especially the UNO, cannot, with the exception of the Security Council (on Art. 16 ICC Statute see para. 50), interfere with its investigations. As the situation in Northern Uganda shows, the UN as a peace broker is not in a position to decide on the continuation of an investigation or the lifting of arrest warrants.[312] The ICC has judicial autonomy *vis-à-vis* other international organizations and courts as well as *vis-à-vis* the parties to a conflict. This follows from its organizational position just described and various provisions of its Statute.[313] At the same time, in situations of ongoing conflict the ICC, especially the OTP, must keep the parties to the conflict at equal distance in order to preserve its impartiality and neutrality.[314] On the other hand, the Court's decisions have no limiting effect on third states, i.e., they decide autonomously on their jurisdiction and interest to prosecute international crimes.[315] On the contrary, the Court's *ratione personae* and *materiae* limitations (see below para. 36) mean that domestic jurisdictions still have an important role to play in bringing less important perpetrators for less serious crimes to justice.[316] In turn, the ICC Statute may have a limiting effect on national amnesties insofar as the State

[308] Moreno-Ocampo (2007) 1 IJTJ 8.

[309] Seils/Wierda (n 21) at 19. On the exclusionary effect of criminal prosecution see already supra para. 21 with n 196.

[310] This jurisdictional expansion has been called the "sledgehammer" of the ICC by Cassese (1999) 10 EJIL 144, at 161.

[311] According to Kiza/Rathgeber/Rohne (n 4) at 100 et seq. (Table 21), 110, 156 53% of the victims interviewed wanted to have an international court to prosecute the perpetrators. Cf. for a non-uniform Ugandan victims' view OHCHR (n 33) at 50 et seq.

[312] See supra para. 25 with n 243.

[313] See for example Art. 19 (1) according to which the ICC shall "satisfy itself" and determine the admissibility "on its own motion" (cf. Stahn [n 64] 700).

[314] See OTP Activities Report, p. 16-17 where it is stated, referring to peace initiatives in Northern Uganda, that "(…) in order to preserve its impartiality, the Office cannot be a component of these initiatives. The Office policy is to maintain its own independence and pursue its mandate to investigate and prosecute, and do so in a manner that respects the mandates of others and attempts to maximise the positive impact of the joint efforts to all actors. (…) the Office maintained a low public profile during the investigation (…). At no time, however, did the Office stop its investigation". Crit. about the situation in Uganda and the one-sided prosecution strategy Schabas (n 21) at 18 et seq.

[315] Cf. Robinson (n 31) at 503-4; Seibert-Fohr (n 21) at 576 et seq. See also supra para. 25.

[316] See also OTP Policy Paper, p. 3 and 7 calling for a two-tiered approach leaving the prosecution of "lower-ranking perpetrators" to domestic jurisdictions.

Parties are obliged to cooperate, e.g., by surrendering a person who is protected by a national (unconditional) amnesty.[317]

35. The *amnesty* issue was raised during the Preparatory Committee but not seriously considered[318] and deliberately evaded during the Rome conference.[319] In fact, a general agreement on the issue was not feasible and therefore it was left, as many other issues, to the Court.[320] Equally, the issue of alternative accountability mechanisms was not specifically addressed.[321] In any case, the ICC Statute is a flexible instrument and the ICC a flexible accountability mechanism.[322] From a legal perspective, this follows, on the one hand, from the Prosecutor's relatively broad discretion with regard to the preliminary investigation and the taking of certain investigative measures[323] and, on the other, from Art. 16, 17 and 53 of the ICC Statute, to be analysed in more detail below (para. 37 et seq.). One may even interpret the said provisions as an indirect recognition of measures refraining from criminal prosecution for the sake of a peaceful transition or the achievement of peace.[324]

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[317] In more detail Seibert-Fohr (n 21) at 584 et seq.

[318] Report of the PrepCom on the Establishment of the ICC (1996), UN-GAOR, 51st session, suppl. No. 22 (A/51/22), vol. I., p. 40 (para. 174): "The view was also expressed that the 'exception' to the principle *non bis in idem* as set out in article 42 (b) should extend beyond the trial proceedings to embrace parole, pardon, amnesty, etc." Scharf (n 54) 507, 508; Gavron (n 64) at 108 and Seibert-Fohr (n 21) at 562 refer to an U.S. "non-paper"; in addition, Seibert-Fohr (n 21) at 556 suggests that one of the reasons of the Bush administration to "unsign" the ICC Statute was the absence of a provision on amnesties. See also Arsanjani (n 21) at 67: "never seriously discussed"; Robinson (n 31) at 483; Cárdenas (n 46) at 155–6.

[319] Hafner/Boon/Rübesame/Huston (n 287) at 109–113; see also Dugard (n 64) 1013; Dugard (n 60) at 700–01 with further references.

[320] The history of the negotiations is misread by Young (n 88) at 459 et seq. who criticizes the absence of an explicit provision and precise guidelines on amnesty in the Statute and the RPE (470–1, 475–6, 482). He does not only ignore that the question was deliberately left open by the drafters since an agreement was just impossible (see also Robinson [n 31] 483; Seibert-Fohr [n 21] at 561, 589; Cárdenas [n 46] at 156) but also – on a more general level – erroneously converts the ILC into the drafters of the Statute (at 459: "[…] the ILC simply drafted provisions […]") and the Statute into an UN-treaty (at 464: "The UN adopted the Rome Statute …]"). These are grave errors and one wonders how the paper could have been published without correcting them.

[321] Cf. Bassiouni (2005) at 133–4.

[322] Cf. Ntanda Nsereko (1999) 10 CLF 87, at 120; Arsanjani (n 21) at 65, at 66, 68; Robinson (n 31) at 483–4, 502, 505; Seibert-Fohr (n 21) at 557–8, 573–4; Clark (n 64) at 407, 414; Meyer (n 177) at 564 et seq., at 576 stating "as long as national decisions (…) comport with complexity of societal convictions and dynamics the ICC should be deferential". Schlunck (n 30) at 259 argues that it would be short-sighted to put the ICC above the political will of national decision makers, this would go against flexible conflict management.

[323] The "reasonable basis" standard in Art. 15 (3) and Art. 53 as such leaves a broad discretion; the application for an arrest warrant according to Art. 58 may be delayed if the suspect participates in peace negotiations (see also Seils/Wierda [n 21] at 2, 7). Even HRW, 2005, at 21 admits that there is some prosecutorial discretion regarding "timing", e.g., with regard to the application of an arrest warrant; yet, the prosecutor should not publicly acknowledge that the delay is due to a peace process and the delay should not be indefinite (ibid. at 22). On the "extremely complex and daunting task" of prosecutorial discretion see also Ralston/Finnin (n 333) at 49 et seq.

[324] See also Scharf (n 54) at 508 even arguing that the formally rejected U.S. "nonpaper" (n 318) was indirectly codified; crit. Cárdenas (n 46) at 156.

In practice, the Prosecutor takes the risk transition argument (para. 3) into account and seeks to evaluate the real and concrete risk through detailed discussions with sources on the ground.[325] As a result, the ICC Statute leaves room for amnesties or other exemptions if they are conditional and accompanied by alternative forms of justice, which ultimately may lead to prosecution and criminal sanction.[326] Indeed, it is inconceivable that the ICC pretends to substitute a policy judgement of a whole nation that seeks peace and justice by alternative means.[327] It goes too far, however, to justify this flexibility with the ICC's "overall goal (…) to protect peace and security".[328] On the one hand, this is an overstatement: Although the Preamble (para. 3) refers to peace and security in connection with the ICC crimes, as a *criminal* court concerned with individual responsibility the ICC has a much more concrete and modest objective, namely to prosecute and punish the perpetrators of international crimes (Preamble, para. 4) and thereby "put an end to impunity" of these crimes (Preamble, para. 5). If, as a side effect, this also contributes to peace and security it is to be welcomed[329] but cannot be construed as the main or "overall" goal of the ICC. On the other hand, if the continuing impunity of these crimes really threatens international peace and security, as suggested by para. 3 of the Preamble, it is contradictory to justify exemptions from punishment, i.e., the impunity of these crimes, with the protection of these very same values. At best, the non-prosecution facilitates the achievement of peace and security but it does not protect or consolidate it. In fact, it is difficult to explain that an institution created to avoid impunity, should promote it by accepting amnesty;[330] indeed, this would go against the *telos* of the ICC.[331]

36. The ICC's judicial autonomy (para. 34) means that it has broad discretion on deciding how to deal with amnesties. It could even reject amnesties covering crimes for which no clear-cut duty to prosecute exists.[332] On the other hand, the *ratione materiae* and *personae* limitations mentioned above (para. 21) operate for the ICC in the opposite direction: As the ICC – as well as the Ad Hoc Tribunals[333] – pursues

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[325] Seils/Wierda (n 21) at 13.

[326] Goldstone/Fritz (n 21) at 656, 667; Stahn (n 64) at 719.

[327] Goldstone/Fritz (n 21) at 667.

[328] Seibert-Fohr (n 21) at 574.

[329] See, e.g., OTP Activities Report, p. 18 (referring to the importance of justice and accountability for peace in Darfur): "This clear acknowledgement of the important links between justice, peace and security (…) is a great achievement in the evolution of the role of international justice".

[330] The issue came up before the ICTY in *Prosecutor v. Deronic* [30 March 2004] Sentencing Judgement, Case No. IT-02-61-S (ICTY), dissenting opinion Judge Schomburg, para. 11: "a) Promises (…) cannot result in de facto granting partial amnesty/impunity by the Prosecutor, particularly not in an institution established to avoid impunity".

[331] Young (n 88) at 471; Robinson (n 31) at 497; Stahn (n 64) at 703; Ssenyonjo (n 174) at 377.

[332] Stahn (n 64) at 705.

[333] See, e.g., UN SC Res. 1534 (26 March 2004) para. 5 calling on the ICTY and ICTR to ensure that the indictments concentrate on the most senior leaders and Rule 28 (A) ICTY RPE providing that the Bureau shall determine whether the indictment "concentrates on one or more of the most senior leaders suspected of being the most responsible"; otherwise and if the crimes are not of sufficient gravity the case should be referred to the local courts (Rule *11bis* (C)); see also Art.

a prosecutorial strategy[334] focusing on the most serious crimes[335] and the most responsible perpetrators[336] amnesties or other exemptions for mid- or low-level perpetrators and/or for less serious crimes are of no concern to it.[337] For the crimes, the Court may pursue a crime-specific approach, i.e., decide on a case by case basis with regard to each crime concerned if it is barred by an amnesty; for forced disappearance, for example, it could opt for a retroactive rejection of an earlier amnesty since it is a continuous crime.[338] In any event, given the exclusion of large groups of minor perpetrators and less serious crimes by the current prosecutorial strategy, targeted prosecutions by a national judiciary focusing on the most serious crimes and the most responsible perpetrators would generally pass the complementarity test and therefore render the ICC's intervention inadmissible.[339]

3.2 Analysis of Relevant Provisions

3.2.1 Complementarity (Art. 17 ICC Statute)

Analysis of the Provision

37. Art. 17, for some the "most delicate" provision in the context of TJ,[340] concerns the relationship between the ICC and domestic jurisdictions and as such consti-

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1 SCSL Statute ("persons who bear the greatest responsibility […]"). For the prosecution strategies of ICTY, ICTR, SCSL, the courts in East Timor and Kosovo see Ralston/Finnin in Blumenthal/McCormack (eds.) 2008, 47, at 52 et seq.

334 The Chief Prosecutor, Luis Moreno-Ocampo distinguishes in this regard – taking into account the budget concerns of the Donor countries – between a very limited "resource driven approach" and a less selective "case driven approach" (Moreno-Ocampo Statement 2005, p. 8–9).

335 This already follows from the Preamble (e.g., para. 4: "most serious crimes") and Art. 17 (1) (d) referring to "sufficient gravity", on this requirement see below para. 38 with n 353 et seq. See also OTP Activities Report, p. 7–8, 23; OTP Report on Prosecutorial Strategy, 14.9.2006, p. 5; OTP Fourth Report, p. 4; Moreno-Ocampo Statement 2006b, p. 2.

336 Cf. OTP Policy Paper, p. 3, 7 ("focus […] on those who bear the greatest responsibility […]); conc. OTP Activities Report, p. 7–8, 16, 23; OTP Report on Prosecutorial Strategy, 14.9.2006, p. 5; OTP Fourth Report, p. 4; Moreno-Ocampo Statement 2006b, p. 2. See also Schlunck (n 30) at 260; El Zeidy (n 72) at 905; Olásolo (n 31) at 146; Stahn (n 64) at 707–8; Ralston/Finnin (n 333) at 65, 68; Meyer (n 177) at 577 arguing that for low-level perpetrators non-criminal sanctions suffice. For PTC I, Situation in the DRC in the case of *Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning PTC I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006 (ICC-01/04–01/06) (ICC) para. 50, this is also ensured by the gravity threshold of Art. 17 (1) (d). This ratione personae limitation is confirmed by research on victims' attitudes, see supra notes 195, 196.

337 On this "impunity gap" Seils/Wierda (n 21) at 14; see also Mallinder (n 65) at 223.

338 Cf. Stahn (n 64) at 706.

339 For the same result Robinson (n 31) at 500–1.

340 Stahn (n 64) at 719; for the historical development see Williams/Schabas in Triffterer (ed.) 2008, Art. 17 mn 3–20.

tutes the most fundamental provision of the ICC Statute with regard to the State Parties.[341] The provision tries to strike an adequate balance between the states' sovereign exercise of (criminal) jurisdiction and the international community's interest in preventing impunity for international core crimes[342] by according prevalence to the State Parties if they are willing and able to investigate and prosecute the international core crimes. Art. 17 provides rules on the *admissibility* of ICC proceedings *vis-à-vis* domestic jurisdictions. Thus, it is not a jurisdictional provision *stricto sensu* but *presupposes* the existence of jurisdiction (as provided for in Art. 11, 12 ICC Statute) which may be *exercised* when the case is admissible.[343] The determination of inadmissibility by the ICC according to para. 1 of Art. 17 presupposes that national proceedings with regard to the same incidents and conduct[344] – Art. 17 refers to the specific case, not the overall situation[345] – take place at all; if this is not the case, i.e., if the national system is absolutely inactive, the case is to be considered admissible without more.[346] In this sense, state sovereignty is restricted since State Parties are not allowed to remain inactive in the face of international core crimes.[347] It is important to note, though, that a state's duty to act in the face of these crimes, in particular to prosecute them (para. 8), did not come only into existence with the establishment of the ICC but existed already before it. While the question of inactivity is of an *empirical* nature, the actual examination of Art. 17 – in case of the existence of national proceedings – is essentially *normative* focusing on the quality of the proceedings and – intimately linked to this – the unwillingness and inability of the domestic system concerned.[348] Thus, summarizing, one

[341] Cf. Benzing (n 103) at 593; Williams/Schabas in Triffterer (ed.) 2008, Art. 17 mn 1 ("cornerstone"); on "positive" complementarity, i.e., the ICC's contribution to the effective functioning of national justice systems see Burke-White (2008) 19 CLF 59, at 61 et seq.; Stahn (2008) CLF 87, at 100 et seq.; with regard to DRC Mattioli/van Woudenberg in Waddell/Clark (eds.) 2008, 55, at 57 et seq.

[342] Cf. Benzing (n 103) at 595 et seq., 600; Pichon (2008) 8 ICLR 185, at 187; according to Stahn (n 341) at 88, complementarity must be "primarily viewed as an instrument to overcome sovereignty fears".

[343] See also Benzing (n 103) at 594; unclear Seibert-Fohr (n 21) 561 dealing with the issue as a jurisdictional one.

[344] See the recent Art. 58 (7) application of the ICC Prosecutor in the Darfur case: "Although investigations in the Sudan do involve Ali Kushayb, they are not in respect of the *same incidents or conduct* that are the subject of the case now before the Court. Therefore, the case is admissible." (ICC Prosecutor Presents Evidence on Darfur Crimes, The Hague, 27 February 2007, ICC-OTP-20070227-206-En, emphasis added).

[345] See also Benzing (n 103) at 603. Yet, a situation, consisting of various cases, is referred to the Court (Art. 13); also, in the case of "inability" (Art. 17 [3]) the effect of a collapse of the national justice system may go well beyond the specific case and extend to the situation as a whole (cf. Bergsmo [1998] 6 Eur. J. Cr., Cr. L. & Cr. J. 29, at 43; Cárdenas [n 46] at 130–1).

[346] Benzing (n 103) 601; contrary to Benzing, this also applies for inactivity due to a procedural obstacle since then an investigation does not take place at all, see also below n 371 and text. See also Seils/Wierda (n 21) at 6.

[347] Benzing (n 103) at 600.

[348] For the same empirical and normative distinction Robinson in Kleffner/Kor (eds.) 2006, 141, at 142.

can say that the "ICC only acts when States do not undertake proceedings or do not do it properly".[349] Procedurally, claims of inadmissibility may be brought by the State concerned (Art. 18 [2], 19 [2] [b], [c] ICC Statute) or the accused (Art. 19 [2] [a]).[350]

38. A closer look at Art. 17 reveals various distinguishing features. On the one hand, the provision distinguishes between investigation and prosecution (Art. 17 [1] [a] and [b]) and a trial by a court (Art. 17 [1] [c] referring to Art. 20 [3]). On the other hand, there is a temporal distinction as to the *procedural stage* of the investigation: Either the investigation (or the prosecution) is currently taking place (Art. 17 [1] [a]) or it is already completed and the corresponding decision not to prosecute has been taken (Art. 17 [1] [b]). If, in turn, a decision to prosecute has been taken and the person has already been tried the procedural stage is even more advanced and Art. 17 (1) (c) applicable. Independent of these temporal criteria, the crimes concerned must be of sufficient *gravity* "to justify further action by the Court" (Art. 17 [1] [d]),[351] i.e., notwithstanding the gravity of ICC crimes as such, Art. 17 (1) (d) establishes an *additional* gravity threshold.[352] In any case, the gravity in the sense of Art. 17 (1) (d) is relevant at two different stages of the proceedings[353] and must be determined on a case by case basis[354] invoking as criteria the nature and social impact ("social alarm") of the crimes (systematic or large-scale?), the manner of commission (e.g., particular brutality or cruelty) and the status and role of the suspected perpetrators (are they the most responsible as mentioned above?).[355] Given

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[349] Ibid. at 142; Cárdenas (n 156) at 115.

[350] See also Stahn (n 64) 698; for a detailed analysis El Zeidy (n 72) at 906 et seq.

[351] See also Art. 53 (1) (b) and (2) (b).

[352] Cf. PTC I (n 336), para. 41: "(…) this gravity threshold is in addition to (…) the crimes included in articles 6 to 8 of the Statute (…)." See also OTP Activities Report, p. 6: "Although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute (…) clearly foresees and requires an additional consideration of 'gravity' (…)"; Moreno-Ocampo Statement 2005, p. 8–9: "(…) gravity in our Statute is not only a characteristic of the crime, but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world". See also Benzing (n 103) at 619–20; Cárdenas (n 46) at 90 et seq.; id., (n 156) at 119–20; El Zeidy (2008) 19 CLF 35, at 39; Williams/Schabas in Triffterer (ed.) 2008, Art. 17 mn 28; for a narrow interpretation Seibert-Fohr (n 21) at 565 et seq.; for a more detailed approach see WCRO (March 2008) at 12 et seq., El Zeidy at 36 et seq.

[353] Regarding the initiation of the investigation of a situation and of the case(s) arising from this situation (PTC I, n 336, para. 44). See also WCRO (n 352) at 21, 25 et seq.; at 29 et seq.; El Zeidy (n 352) at 39.

[354] Cf. Cárdenas (n 46) at 158, 176. For the selection criteria in the first individual cases see WCRO (n 352) at 25 et seq., 29 et seq.

[355] PTC I, n 336, para. 42 et seq. (46, 50–4, 63). See also OTP Activities Report, p. 6 and OTP Report on Prosecutorial Strategy, 14.9.2006, p. 5, referring to the scale and nature of the crimes, the manner of commission and the impact of the crimes. Crit. On the "social alarm" criterion El Zeidy (n 352) at 45 ("weird novelty"), in addition pointing out (at 44) that these factors are illustrative and not exclusive. Crit. as to the quantitative approach Schabas (n 21) at 28 et seq.; Williams/Schabas in Triffterer (ed.) 2008, Art. 17 mn 28. See also El Zeidy (n 72) 905; Cárdenas (n 46) at 93 et seq. focusing on the international concern ("internationaler Belang", at 98, 100) of the matter. For the gravity analysis of the ad-hoc Tribunals see WCRO (n 352) at 37 et seq., recommending a "sufficiently flexible" analysis (at 42) taking into account exceptional circumstances as "the impact

the particular gravity of the genocide offence and its specific *mens rea* requirement one may argue that a genocide case always fullfills the gravity threshold of Art. 17 (1) (d).[356]

39. Regarding the precise application of Art. 17 to exemptions from criminal prosecution one may draw a distinction as to the procedural stage affected by these exemptions. If one takes for example an *amnesty* as the most important exemption subparas. (a) and (b) of Art. 17 (1) seem to be the only applicable provisions. As an amnesty either impedes a (criminal) investigation or a criminal prosecution,[357] subpara. (c) of Art. 17 (1) is not applicable since it presupposes more, namely that a trial by a Court has taken place.[358] In fact, subpara. (c) is only applicable to exemptions or suspensions of punishment after conviction, in particular pardons.[359] Then the (empirical) question arises whether the earlier proceedings "were for the purpose of shielding the person concerned from criminal responsibility" (Art. 17 [1] [c] with Art. 20 [3] [a]).[360] Art. 17 (1) (a) presupposes that the case is "being investigated or prosecuted", i.e., for the inadmissibility it is sufficient that either an investigation or prosecution is taking place. While these requirements are in the alternative, it does not make much sense to separate the investigation from the prosecution, i.e., to examine an investigation in isolation, since, in any case, once an investigation is finished a decision to prosecute or not to prosecute must be taken. In other words, while an investigation in the sense of subpara. (a) may block the intervention of the ICC for a certain period of time (namely, as long as the case is "being investigated"), afterwards a prosecution decision must be taken and in this precise moment Art. 17 (1) (b) becomes applicable.[361] In any case, in both subpara. (a) and (b) the decisive criteria are unwillingness and inability as defined in Art. 17 (2) and (3). Therefore, for the investigation and prosecution requirements the distinction between subpara. (a) and (b) is merely of temporal nature. In sum, in practice, if a state "in its sovereign wisdom"[362] decides not to investigate and/or

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on victims, the manner in which the crimes were carried out, and the vulnerability of the victim population". On the difficult relation between OTP and Chambers in this matter see El Zeidy (n 352) at 51 et seq.

[356] Cf. Cárdenas (n 46) at 99; id., in Werle (ed.) 2006, 239, at 244; id., in Hankel (ed.) 2008, 127, at 138. For higher gravity of genocide and crimes against humanity vis á vis war crimes Schabas (n 21) at 25 et seq. In this respect crit. with regard to the selection of the DRC situation and rejection of the Iraqi communication El Zeidy (n 352) at 40.

[357] Garner (2004) at 93 on "amnesty".

[358] Cf. Robinson (n 31) 499; Cárdenas (n 46) at 160.

[359] Garner (n 357) "pardon", at 1144. While an "amnesty after a conviction" (Van den Wyngaert/Ongena in Cassese/Gaeta/Jones [n 60] 705, at 726–7; Seibert-Fohr [n 21] at 565; Cárdenas [n 46] at 162) may be possible in practice, conceptually it mixes up amnesties and pardons and is therefore to be avoided.

[360] Cf. Cárdenas (n 46) at 162–3; on Art. 20 (3) generally see also Cárdenas (n 46) at 134 et seq.; Scharf (n 54) at 525; Gavron (n 64) at 109; Benzing (n 103) at 616 et seq.

[361] This temporal aspect has apparently been overlooked by Cárdenas (n 46) at 159 et seq. who distinguishes too artificially between investigation and prosecution and therefore applies Art. 17 (1) (a) too formalistic to an amnesty.

[362] Nsereko (n 322) at 119; crit. El Zeidy (n 72) at 942–3.

prosecute by granting an amnesty, Art. 17 (1) (b) applies and three conditions must be fulfilled to make the ICC's intervention inadmissible:

- The respective state must have "investigated" the case.
- It must have taken the decision "not to prosecute".
- This decision must not result from unwillingness or inability.[363]

40. For the *investigation requirement*, the core issue is whether a criminal investigation by the respective criminal justice organs is necessary or alternative, even non-judicial forms of investigation mentioned above (para. 12 et seq.), in particular a (effective) TRC, would suffice.[364] Clearly, as a minimum, a systematic inquiry into the facts and circumstances of the case is required.[365] This investigation must be carried out by state organs, i.e., non judicial organs like a TRC must be set up and supported by the state,[366] since the duty to investigate and prosecute rests upon the state (see para. 7). Apart from that, the wording and *telos* of Art. 17 indicate that the *objective* of any "investigation" is criminal prosecution or adjudication, namely "to bring the person concerned to justice" (Art. 17 [2] [b] and [c]).[367] While this does not exclude a *preliminary* investigation by a TRC with respective powers and indeed the wording of Art. 17 (1) (a) ("being investigated") leaves room for such alternative investigations,[368] their ultimate objective must always be a criminal prosecution *stricto sensu*[369] where the legal and factual prerequisites of such a prosecution are fulfilled.[370] In turn, this means that investigations of a general nature about past events which do not individualize responsibility and therefore can not serve as basis for a criminal prosecution or adjudication do not satisfy the investigation requirement of Art. 17. Equally, if a subsequent prosecution is blocked *a limine* by a (blanket) amnesty – unacceptable anyway (para. 24 et seq.) – the investigation

[363] Robinson (n 31) at 499; Stahn (n 64) at 710. See also Gropengießer/Meißner (n 60) at 283–284.

[364] The question is left open by Robinson (n 31) at 499–500 but his general flexible approach indicates that he takes the "slightly broader approach" discussed by himself; undecided also Benzing (n 103) at 602.

[365] Cárdenas (n 46) at 58; id. (n 156) at 117, 119; Murphy (n 193), 44.

[366] See also Cárdenas (n 46) at 177, 183.

[367] In this sense also Gavron (n 64) 111 arguing that "to bring someone to justice" is to be interpreted in the legal, not wider moral sense. Stricter even Holmes in Lee (ed.) 1999. 41, at 77: "Statute's provisions on complementarity are intended to refer to criminal investigations".

[368] See also Seibert-Fohr (n 21) at 569 and Stahn (n 64) at 697, 711 arguing against the requirement of a criminal investigation since it is not expressly contained in Art. 17. For the same result Cárdenas (n 46) at 58–9, 101; id. (n 156) at 129. Too restrictive Meißner (2003) at 76 requiring investigations within the framework of criminal proceedings; also Schomburg/Nemitz in Schomburg/Lagodny/Gleß/Hackner (eds.) 2006 at 1,730 against an upward *ne bis in idem* effect (towards international courts).

[369] In this sense also Seibert-Fohr (n 21) at 569 linking the investigation to the prosecution requirement; also Gropengießer/Meißner (n 60) at 287 arguing that "proceedings which do not have the *quality of a criminal proceeding* cannot rule out prosecution by the Court" (emphasis added); similarly Cárdenas (n 156) 137 stressing the need of criminal prosecutions after the TRC's work has been finished; conc. (modifying his earlier position) Robinson (n 348) at 144–5 (possibility of a criminal prosecution after investigation).

[370] See also Stahn (n 64) at 711–2.

requirement is not fulfilled and thus it would not make sense to hold the ICC at bay under complementarity.[371]

41. This interpretation is confirmed by the second requirement, the *decision to prosecute*. Such a decision can only be taken if a substantial investigation of concrete acts and individual suspects has been carried out. In other words, a decision to prosecute presupposes a criminal or at least individualized investigation, which precedes and prepares it.[372] Clearly, prosecution refers to criminal prosecution[373] but not the prosecution itself, only the "decision" to prosecute is required. This presupposes that the organ that takes this decision must at least have two options, namely either to prosecute or not to prosecute.[374]

42. As to the third requirement – no *unwillingness* or *inability* to *genuinely* prosecute – the criteria are laid down in Art. 17 (2) and (3). From a policy perspective, these concepts are intended, in the words of former UN Secretary General Kofi Annan, "to ensure that mass-murderers and other archcriminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order".[375] While this may provide general guidance as to the overall goal of this requirement, a more precise and technical analysis begs some intricate questions. According to Art. 17 (2) the Court "shall consider" whether "one or more" of the "following" criteria exist; a literal and teleological interpretation indicates that this is a closed list.[376] While these criteria must be interpreted strictly, taking into account "the principles of due process",[377] they are highly normative and as such open to value judgment. In any event, the structural distinction between unwillingness and inability consists of the following: While in the former case, in principle a functioning judicial system is politically manipulated to generate impunity for powerful and influential perpetrators, in the latter case such a system does not exist, is substantially collapsed or unavailable.[378] Consequently, exemption provisions

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[371] Cf. Robinson (n 348) at 145; Cárdenas (n 46) at 159; apparently overlooked by Benzing, as quoted in n 346; Mallinder (n 65) at 212.

[372] See also Stahn (n 64) at 712.

[373] Cf. Cárdenas (n 46) at 58, 101.

[374] Robinson (n 31) at 500; see also Stahn (n 46) at 463.

[375] Speech at the University of Witwatersrand (South Africa), as quoted in Villa-Vicencio (n 21) at 222.

[376] Holmes in Cassese/Gaeta/Jones (n 60) 667, 675; Meißner (n 368) at 72–3; Benzing (n 103) at 606; Cárdenas (n 46) at 133; Cárdenas (n 356) at 139; diss. Robinson (n 31) at 500 arguing that the term "consider" implies that the Court may take into account other factors; this is not convincing since the drafters employed an unambigous wording when they wanted to leave the criteria open, e.g., "in addition to other grounds" (Art. 31 ICC Statute), "inter alia" (Art. 97) or "including but not limited to" (Art. 90 [6]). In the same vein Pichon (n 342) at 191; Williams/Schabas in Triffterer (ed.) 2008, Art. 17 mn 29.

[377] These principles cannot be interpreted, *in the context of Art. 17*, as to refer to the rights of the accused or the victim since the rationale of Art. 17, as explained above (para. 37), is not to protect these rights but to avoid that impunity is created by reason of unwillingness or inability (for a good discussion see Benzing [n 103] at 606 et seq.).

[378] For a general analysis see Benzing (n 103) at 613 et seq.; for a similar distinction Seils/Wierda (n 21) at 6; see also Cárdenas (n 365) at 138 et seq.; for a concrete proposal and analysis of

conceded in processes of transition are more a problem of unwillingness than inability,[379] at least if one construes "inability" strictly in the sense of a lack of the physical or substantial capacity.[380]

43. *Unwillingness* is demonstrated, for example, if the proceedings are undertaken "for the purpose of shielding the person concerned from criminal responsibility" (para. 2 [a]). The notion "purpose" suggests a subjective interpretation in the sense of the specific state intention or objective to protect the individual responsible from (criminal) justice.[381] This intention constitutes, at the same time, an expression of bad faith of the state concerned with regard to the intention to bring the responsible to justice. Indeed, *mala fide* lies at the core of the unwillingness test.[382] While an amnesty may demonstrate such bad faith, this is not always and necessarily the case.[383] Imagine a situation where a state pursues the higher objective of peace and it grants, in good faith, an amnesty as a necessary means to achieve this higher end; then such a "bad faith purpose" cannot be assumed.[384] Similarly, if one recognizes the right to a peaceful transition it would be contradictory to argue that the unwillingness to jeopardize this transition demonstrates unwillingness in the sense of Art. 17.[385] In sum, the fact that impunity will be a certain side effect of an exemption measure is not *per se* sufficient to qualify this measure as pursuing the overall negative purpose.[386] In any case, while subpara. (a) of Art. 17 (2) clearly

inability criteria with regard to the DRC see Burke-White (n 80) at 576 et seq. who suggests (at 576) four criteria "to judge the effectiveness of judicial systems in states recovering from a total or substantial judicial collapse", namely availability of experienced and unbiased judicial personnel, a viable legal infrastructure, adequate operative law and a sufficient police capability. For Arsanjani/Reisman (n 108) at 329, inability exists if "the judical system (…) is unable to obtain the accused or the necessary evidence and testimony or (is) otherwise unable to carry out its proceedings".

[379] Cf. Gropengießer/Meißner (n 60) at 282 et seq.; Werle (n 16) mn 193; Kreicker (n 21) at 305. For a different view Pichon (n 342) at 195 arguing that "amnesties have to be subsumed in general under the notion of unavailability, since it would contradict the whole purpose of an amnesty if it could easily be lifted in a concrete case".

[380] If, on the other hand, inability is interpreted to include also unavailability in the human rights sense, i.e., a lack of an effective judicial remedy (for this broader interpretation for example Meißner [n 368] at 87 arguing that a functioning judiciary exists but it cannot deal with the particular case for normative or factual reasons; also Benzing [n 103] at 614: "capacity overload") an exemption measure within the framework of transitional justice may be considered as an indicator of unavailability (in this sense O'Shea [n 260] at 126 arguing that a failure to prosecute based on amnesty would amount to an inablility to prosecute owing to the unavailability of the state's national judicial system; for inability due to a blanket amnesty also Burke-White [n 80] at 582). Against this broad interpretation, however, runs the Spanish version of the Statute referring, regarding inability, to the lack of a national judiciary ("carece de ella").

[381] Cárdenas (n 46) at 115–6. For Schabas (n 21) at 18 et seq. the Ugandan self-referral has been an unwillingness issue from the outset "self-referral will only work" (for states) "if it can be followed by self-deferral" (at 22).

[382] Cárdenas (n 46) at 113.

[383] For this strict view however Cárdenas (n 46) at 117, 164, 183, 184; id. (n 156) 130.

[384] Seibert-Fohr (n 21) at 570.

[385] But see Gavron (n 64) at 111–2.

[386] Stricter Cárdenas (n 156) at 131 arguing that impunity as certain "collateral damage" must be considered part of the purpose.

calls for a subjective interpretation, subparas. (b) and (c) must be interpreted more objectively.[387] Although the notion of "intent", present in both subparas., normally carries a subjective meaning it must be read in context and this context, referring to such objective criteria like "unjustified delay",[388] independence and impartiality[389] and the "circumstances", implies an overall objective interpretation. Also, the term "*genuinely*" (para. [1] [a], [b]) – "the least objectionable word" – was inserted to give the unwillingness/inability test a more concrete and objective meaning[390] and implies good faith and seriousness on the part of the state concerned with regard to investigation and prosecution.[391] It would be difficult to argue, for example, that a state, which opts for an effective TRC with the ultimate goal of peace in mind, is "genuinely" unwilling.[392] If the TRC, being an "effective" one, is independent and impartial the assumption of unwillingness would even contradict para. (2) (c) since unwillingness presupposes a lack of independence and impartiality. Also, if one defends a broad concept of justice, as does this author (para. 2), a quasi-judicial procedure with a possibility of a criminal sanction would suffice to "bring the person concerned to justice" within the meaning of para. (2) (b) and (c).[393]

Possible Scenarios

44. The preceding analysis shows that a national exemption measure (esp. an amnesty) as such does not make a case inadmissible;[394] rather, the admissibility depends on the specific content and conditions of the measure. Five *scenarios* may be distinguished:

- A blanket self-amnesty
- A conditional amnesty with a TRC

[387] Benzing (n 103) at 610.

[388] For an objective interpretation insofar El Zeidy (n 72) at 901. An "unjustified" delay requires more than an "undue" delay and for this very reason the former term was preferred (Benzing [n 103] at 610–1). The general standard may be taken from the due process rules of human rights instruments (ibid.), a delay may be "unjustified" in particular if it could have been avoided if the respective state organs had employed the adequate care (cf. Cárdenas [n 46] at 119–20). Pichon (n 342) at 195 determines a delay with a view to similiar national proceedings.

[389] Here, again (supra n 377), it must be observed that subpara. (c) only refers to cases where the lack of independence and impartiality plays in favour of the accused and thus would lead to impunity (cf. Benzing [n 103] at 612–3 and Pichon [n 342] at 193–4, 196).

[390] Cf. Holmes (n 367) at 50; id (n 376) at 674; see also El Zeidy (n 72) at 900; Cárdenas (n 46) at 110.

[391] Holmes (n 376) at 674; Benzing (n 103) 605; Cárdenas (n 46) at 110.

[392] Seibert-Fohr (n 21) at 570.

[393] Stahn (n 64) at 716, 719; see also Expert paper complementarity, para. 73: "some form of punishment".

[394] French Conseil Constitutionnel, supra note 265; conc. Gropengießer/Meißner (n 60) at 282; for the same result also Seibert-Fohr (n 21) at 571, 573, 586; Stahn (n 64) at 709–10. See also Schlunck (n 30) at 260 arguing that complementarity is to be interpreted to allow national conflict settlement structures. For a stricter view Cárdenas (n 156) at 129 et seq.

- A conditional amnesty without a TRC
- Measures not amounting to full exemptions
- Ex post exemptions, in particular pardons

45. A *blanket self-amnesty* ("Chilean model") would be *a limine* against the spirit and *raison d'être* of the ICC Statute.[395] It would not fulfil any of the requirements of Art. 17 (1) (a) or (b):[396] There would be neither an investigation[397] nor a decision to prosecute, since the amnesty would bar any investigation and, consequently, the possibility of a prosecution. In addition, as such a measure would constitute "prima facie evidence of unwillingness or inability",[398] it may be interpreted as a "decision (…) for the purpose of shielding" the beneficiaries of the amnesty within the meaning of Art. 17 (2) (a).[399]

46. A *conditional amnesty with a TRC* ("South African model") is a more difficult case.[400] If one follows the broad interpretation of *investigation* suggested here (para. 40) a quasi-judicial investigation by an effective TRC, which fulfils the criteria set out above (para. 16), can be considered an investigation in the sense of the first requirement of Art. 17 (1) (b).[401] If, in addition, the TRC has the option to decide in favour or against *prosecution*, i.e., if it possesses the power to deny an amnesty (para. 40), be it that the crimes committed by the person concerned are too serious, be it that his/her performance before the Commission and in front of the victims is not considered satisfactory or that for any other reasonable and independent assessment he/she does not deserve the exemption measure, the second requirement is also fulfilled.[402] As to the third requirement, the matter is more complicated and the ultimate decision depends on the circumstances of each case[403]

[395] Robinson (n 31) at 505; Seibert-Fohr (n 21) at 557–8.

[396] Robinson (n 31) at 501; Seibert-Fohr (n 21) at 563 et seq., 588; Stahn (n 46) at 461; Cárdenas (n 46) at 73, 159; id. (n 156) at 129; Werle (n 17) mn 215; Wierda/Unger (n 80) at 278 et seq.; Cárdenas (n 356) at 148.

[397] El Zeidy (n 72) at 940, 942; Robinson (n 31) at 503; Seibert-Fohr (n 21) at 565; Gropengießer/Meißner (n 60) at 283. See also supra note 371 and text.

[398] Dugard (n 64) 1014; Dugard (n 60) at 702; Nsereko (n 322) at 119; Expert paper complementarity, para. 73 and annex 4; for the same result regarding Chile Gavron (n 64) at 113.

[399] Gavron (n 64) at 111; Robinson (n 31) at 501; Cárdenas (n 46) at 159 et seq.; Gropengießer/Meißner (n 60) at 285.

[400] Unclear Scharf (n 54) at 525 and Van der Voort/Zwanenburg (n 60) at 330 arguing, on the one hand, that a truth commission constitutes "a genuine investigation" and, on the other, that the obligation to bring a person to justice may require "criminal proceedings". Against an ICC intervention the former UN Secretary General Kofi Annan, stating that "No one should imagine that it [the ICC Statute] would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power (speech at the University of Witwatersrand, as quoted in Villa-Vicencio [n 21] at 222). Murphy (n 193) at 49 calls for a "well-tailored truth commission with similar characteristics to a criminal trial". For Cárdenas (n 356) at 155 the case may still be admissible before the ICC.

[401] Robinson (n 31) at 501; Cárdenas (n 156) at 135; Wouters et al. (n 261) at 293 (refering to the original electronic version of this study).

[402] Robinson (n 31) at 501.

[403] Similarly Werle (n 16) at 66 (mn 192); Cárdenas (n 46) at 179; id. (n 156) at 135–6; conc. Robinson (n 348) at 146.

with due consideration to the proportionality test (para. 19 et seq.) and the criteria regarding conditional amnesties (para. 28) and an effective TRC (para. 16).[404] If, for example, a TRC is independent and impartial this can be considered – based on Art. 17 (2) (c) *a contrario* – as an indicium of willingness and, therefore, an argument against admissibility.[405] Further, one may differentiate according to the nature of the amnesty decision:[406] If it is decided on an individual basis, like in the South African case, each individual decision must be examined in the light of Art. 17 (2) and (3); if it is decided generally with regard to a number of persons and crimes the decision is comparable to a (general) amnesty and as such indicates unwillingness, although the final assessment depends, as always, on the circumstances of the concrete case. In sum, one may conclude that a conditional amnesty with a TRC results in inadmissibility only in exceptional cases, namely only if an effective TRC grants an amnesty on an individual basis under certain strict conditions.

47. From the preceding conclusion follows, *a fortiori*, with regard to a *conditional amnesty without a TRC* that it will hardly ever meet the requirements of Art. 17 (1) (b). First, it is difficult to imagine an effective enforcement of conditions attached to an amnesty without an effective TRC. To be sure, it is perfectly possible to attach conditions to an amnesty independent of the existence of a TRC, for example, a full confession of the crimes committed. However, it is more difficult to enforce these conditions for individual state organs, for example, a prosecutor or an investigating judge, without the public support, resources and legitimacy of an effective TRC. While the investigation and decision to prosecute requirements may be complied with even by the said individual organs if they are able to carry out an investigation in order to, for example, verify a confession, and to take a decision to prosecute in case of non-compliance with the condition(s) (for example, only partial or/and false confession), the absence of an effective TRC deprives the process of the most important alternative justice element and cannot be compensated by other alternative mechanisms (para. 17), at least as far as these are only consequentialist as, e.g., non-criminal sanctions. In fact, only alternative forms of traditional (non-western) justice may be compared to an effective TRC if they enjoy broad legitimacy and guarantee adequate participation and publicity.

48. Other (collective) *measures not amounting to full exemptions*, e.g., a considerable (conditional) mitigation of punishment in the course of a peace deal, do, in principle, meet the requirements of Art. 17 (1) (b). If we take the "Colombian model" (supra para. 22) as an example both the investigation and the prosecution requirements are certainly met since the mitigation of punishment does neither preclude an investigation nor a prosecution. On the contrary, sticking to the letter of the law, the benefits contained therein are dependent on the cooperation (*versión libre*) of the members of the armed groups; if they do not meet their cooperation obligations they may be subjected, at least theoretically, to a normal criminal process. As to the unwillingness or inability test, the outcome depends on the

[404] See also Robinson (n 31) at 501–2.

[405] See also Cárdenas (n 46) at 179.

[406] See Cárdenas (n 46) at 179.

seriousness of the government's commitment to, on the one hand, peace as the ultimate goal of the process and, on the other, justice for the victims as far as is possible without seriously endangering the former. The government's commitment may be measured, inter alia, by the comprehensiveness of the measure, i.e., whether it is designed to reach out to all groups involved in the conflict or whether it privileges one group in particular and, therefore, implies unwillingness with regard to this group.[407] As to the proportionality test, the Colombian Constitutional Court has considered the law as proportional and therefore compatible with the constitution provided that certain improvements with regard to victims rights are made (supra para. 22). From a purely normative perspective this verdict can hardly be criticized, yet it does not relieve the government from taking recourse with more determination to alternative mechanisms of justice, in particular an effective TRC and non-punitive sanctions.[408] Without such mechanisms it is difficult to reconcile such a demobilization process with the justice interest. In addition, it is difficult to imagine that, especially without an effective TRC, the practice of such a process can live up to the normative pretensions following from international and/or national law.

49. It is also conceivable that an investigation and prosecution takes place, i.e., the two first requirements of Art. 17 (1) (a) and (b) are met, but the *case* will subsequently be closed; or the person will be accused but then acquitted or he/she will even be convicted and sentenced but then (immediately) pardoned or the execution of the sentence will be suspended. In all these cases of *ex post exemptions*, the admissibility would depend on the third requirement, i.e., either the trial was not "genuine" in the sense of Art. 17 (1) (a), (b) and/or the proceedings have been undertaken to shield the person from criminal responsibility (Art. 17 [2] [a]), and/or the proceedings were not conducted with the intent / in a manner to bring the person to justice (Art. 17 [2] [b], [c]). In the case of a full court trial, in addition, Art. 17 (1) (c) in connection with Art. 20 (3) would be applicable but that would only lead – by way of Art. 20 (3) – to the same unwillingness criteria contained in Art. 17 (2) (a), (c),[409] albeit from a different ("after trial") perspective.[410] In any event, in all these cases it is difficult to assume the admissibility of the proceedings before the ICC since this would presuppose a quite harsh value judgement about the respective national system, namely that it is acting in bad faith to save the perpetrators from real punishment.[411] The more advanced the proceedings are the more difficult will it be to make such a bad faith argument. In any event, it can only convincingly be made if a clear "impunity intention" on the part of the responsible state organs can be demonstrated; this would, for example, not be possible if there was a regime change and the regime granting the exemption is completely different from the one in power during trial.[412]

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[407] See also Stahn (n 64) at 714–5.

[408] See supra para. 20 with n 214 and 215.

[409] Gropengießer/Meißner (n 60) at 285–86.

[410] See on Art. 20 (3) (a) and (b) in particular Cárdenas (n 46) at 138 et seq.

[411] See Holmes (n 390) at 50, 77; El Zeidy (n 72) at 901.

[412] See also Schabas (2008) at 184; El Zeidy (n 72) at 944–5.

3.3 Intervention by the Security Council (Art. 16)

50. Art. 16 allows the Security Council to hold an investigation or prosecution on the basis of a resolution under Chapter VII of the UN Charter, i.e., in order to prevent a situation identified as a threat to or breach of the peace (Art. 39, 40 UN Charta). Thus, the Council may, by such a decision, lend international validity to a national peace process with an amnesty or other exemption measure for a limited period of time;[413] it could also stay proceedings which under Art. 17 would be considered admissible.[414] It must not be overlooked, however, that the decision remains a decision to *suspend* the proceedings and as such cannot be interpreted as a deference to the national exemption measure.[415] In addition, the ICC would not necessarily be bound by such a decision for it is not part of the UN system[416] and decides autonomously about its jurisdiction, i.e., it possesses *Kompetenz-Kompetenz*[417] (para. 34). More importantly, the Court cannot be forced to accept a measure which would eventually go against its duty to prosecute the international crimes which are part of its subject-matter jurisdiction.[418] For all these reasons, it can be said that the Court has the power to *indirectly* review the Council's decision.[419]

3.4 Interests of Justice, Art. 53 (1) (C), (2) (C)

51. There is a strong strand in the doctrine which argues that the interests of justice clause in Art. 53 (1) (c) and (2) (c) is the most explicit gateway of the ICC Statute

[413] See Scharf (n 54) at 523–24; Seibert-Fohr (n 21) at 583; Van der Voort/Zwanenburg (n 60) at 329; Robinson (n 31) at 503; Ssenyonjo (n 174) at 378 seq.; Gropengießer/Meissner (n 60) at 288–89 even admitting direct Security Council amnesties under chapter VII of the Charter which would be binding for the Court (289 et seq.). Crit. Dugard (n 64) at 1014 arguing that "it is difficult to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace". HRW, 2005, at 7 et seq. wants to reserve the right to let "concerns about a peace process (…) trump prosecutorial efforts" exclusively to the SC. HRW Memorandum 2007 at 10 "believes" that "an article 16 deferral of the ICC's investigation or prosecution of LRA suspects would be inappropriate".

[414] Seibert-Fohr (n 21) at 589; see also Bergsmo/Pejić in Triffterer (ed.) 2008, Art. 16 mn 11 et seq.

[415] But see Scharf (n 54) at 522; convincingly against this view Gavron (n 64) 109; Stahn (n 64) at 698–9, 717. See also Seils/Wierda (n 21) at 8–9: only stay of proceedings, no de facto amnesty.

[416] Cf. Art. 4 (1) ICC Statute and Art. 48 (2), 103 UN Charta according to which the obligations arising out of SC resolutions are to UN members addressed only (see also Stahn [n 64] at 701 with note 19).

[417] See also Scharf (n 54) at 523; Stahn (n 64) at 700–01 with further references; against this view Seibert-Fohr (n 21) at 584 conceding the Security Council a "margin of appreciation"; for a more Security Council friendly view also Benzing (n 103) at 626–7 but admitting that it must not ignore the ICC's competence with regard to complementarity.

[418] See also Scharf (n 54) at 523–24; Seils/Wierda (n 21) at 9; Gropengießer/Meissner (n 60) at 291–92 conceding that the Security Council itself is bound by an eventual duty to prosecute international crimes; similarly Stahn (n 64) at 717.

[419] See also Schabas (n 412) at 84; conc. El Zeidy (n 72) at 966.

for the recognition of alternative processes of national reconciliation, including the granting of an amnesty or other exemption measures.[420] Another view doubts that Art. 53 is the appropriate legal basis for this scenario and argues that the interests of justice clause does not provide for additional criteria which would go beyond Art. 17. Consequently, it is affirmed that "it can hardly be argued that the prosecution is not in the interests of justice" if the case is admissible under Art. 17.[421] Another, even more restrictive view argues that the object and purpose of the ICC Statute (the fight against impunity) and the use of "interests of justice" in other provisions of the ICC and other Statutes[422] indicate that the non-investigation/prosecution cannot be based on considerations of TJ.[423] While these latter views deserve much credit in trying to overcome the broad prosecutorial discretion built into the interests of justice clause (below para. 52) and a possible political interference by limiting the legal analysis to the more precise criteria of Art. 17, they are difficult to reconcile with the wording of Art. 53 and the sheer existence of the interests of justice clause. It would appear that the drafters of the ICC Statute wanted to give the Prosecutor – admittedly without having a unanimous definition of "interests of justice"[424] – an additional instrument to exercise his discretion going beyond the rather "technical" Art. 17.[425] Indeed, there could be situations, which would be considered admissible under Art. 17 and therefore could only be taken away from the ICC, if at all, by recourse to the interests of justice clause. Take for example the scenario that a TRC undertakes an investigation which can never lead to a prosecution since this possibility is precluded by an amnesty. Such a TRC investigation would not correspond to the investigation requirement of Art. 17 (1) (b) because there is no true option for the TRC to decide in favour of a prosecution (para. 40–41), i.e., the case would be admissible and the only way to avoid an interference with the TRC's ongoing work would be – apart from an intervention of the Security Council (Art. 16) – a recourse to the interests of justice clause.[426]

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[420] Dugard (n 64) at 1014; Dugard (n 60) at 702; Wouters et al. (n 261) at 292; Goldstone/Fritz (n 21) at 656, 662; Mallinder (n 65) at 218 et seq., Robinson (n 31) at 486; Olásolo (n 31) at 111 referring to a TRC; Brubacher (n 21) at 81–2 referring to post-conflict reconciliation processes; Seils/Wierda (n 21) at 12 ("most direct significance to mediators"); Meyer (n 177) at 579; less emphatic Scharf (n 54) at 524.

[421] Seibert-Fohr (n 21) at 578 et seq.

[422] See HRW, 2005, at 6 referring to Art. 55 (2) (c), 61, 65, 67 ICC Statute and (in n 17) to Statutes of earlier International Criminal Tribunals where the notion was always understood in the sense of a fair administration of justice.

[423] See HRW, 2005, at 4 et seq. stating at 4–5 that "the prosecutor may not fail to initiate an investigation or decide not to proceed with the investigation because of national efforts, such as truth commissions, national amnesties, or traditional reconciliation methods, or because of concerns regarding an ongoing peace process (…)". Similarly Kourabas (n 243) 69–79 (at 79) argues that "prosecution is required without an exception for amnestys".

[424] Cf. HRW, 2005, at 3–4 with further references.

[425] Olásolo (n 31) at 135 et seq. even argues that the drafters of the ICC Statute have with the interests of justice clause granted unlimited political discretion to the Prosecutor "through the back-door", unmaking the core policy choices against impunity of the Preamble (at 149).

[426] See also Robinson (n 348) at 145.

52. Clearly, whether one likes it or not, there is no other clause in the ICC Statute allowing so explicitly for policy considerations.[427] In particular Art. 15 only provides for an evidentiary test ("reasonable basis to proceed") but does not imply a value judgement as to the appropriateness of an amnesty.[428] In any case, it would go too far to construe the interests of justice clause as granting an "unlimited political discretion"[429] as to a possible amnesty exception.[430] While Art. 53 para. 1 (c) may be distinguished from para. 2 (c) in that the former construes "interests of justice" as an autonomous criterion separate to the other criteria (e.g., gravity of the offence), i.e., as an element which may "nonetheless" (para. 1 [c]) lead to a non-investigation decision, and para. 2 (c) construes "interests of justice" as an element of the "circumstances of the case",[431] this distinction does not convert "interests of justice" in a fully free-standing element but it still refers – extrinsically or intrinsically – to the legal criteria mentioned, i.e., the gravity of the crime, the interests of victims, the age or infirmity of the alleged offender and the role of the perpetrator in the alleged crime (cf. para. [1] [c] and [2] [c]).[432] These criteria, in turn, make clear that the Prosecutor has to take a legally substantiated decision in each individual case and cannot just invoke general policy considerations in their own right; otherwise, he could indeed "risk being mired in making political judgements that would ultimately undermine his work" (or more exactly: his authority) and be subjected "to enormous political pressures and attempted manipulations by governments and rebel groups".[433] Also, the Prosecutor has to take into account the legal situation and debate on the admissibility of amnesties or other exempting measures in the course

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[427] Cf. Arsanjani (n 21) at 67: "broad range of possibilities". See also Goldstone/Fritz (n 21) at 662–3; Brubacher (n 21) at 80 et seq. (at 81: "broader interests of the international community"); Meyer (n 177) at 580; Murphy (n 193) 43. Gallavin (2003) 14 KCLJ 179, at 195, 197 draws a comparison to the "public interest" criterion in English and Welsh law and arguing that while the Prosecutor must be independent she must at the same time be aware of the political realities (on this parallel see also Brubacher [n 21] at 80 arguing at 95 that prosecutorial "discretion must exclude partisan politics, but not the more statesmanlike politics of persuading state compliance"; Seils/Wierda [n 21] at 12).

[428] Cf. Seibert-Fohr (n 21) at 581–2 convincingly against Dugard (n 64) at 1,014 who argues that the Prosecutor can decline to proceed under Art. 15 because of the existence of a national amnesty. Only the reconsideration of a case by the Prosecutor according to Art. 15 (5) (see also Art. 53 [4]) implicitly confers upon him political discretion (cf. Olásolo [n 31] 128 et seq.).

[429] See Olásolo (n 31) at 110–11, 135 et seq., esp. 141 distinguishing (at 110–11) between a limited discretion regarding the goals to be achieved with the prosecutorial decision and an unlimited discretion regarding the convenience of a prosecution with a view to these goals; Olásolo critically concludes that the combination gives "the broadest possible scope of political discretion".

[430] In the same vein Stahn (n 64) at 717–8.

[431] Cf. Gallavin (n 427) at 185 et seq. distinguishing between an external/extrinsic and internal/intrinsic interpretation with regard to para. 1 (c) and para. 2 (c) of Art. 53 and giving para. 1 (c) precedence over para. 2 (c) (at 187). For HRW, 2005, at 19 para. 2 (c) gives a broader discretion than para. 1 (c).

[432] For a very helpful elaboration of these criteria on the basis of the case law of the ICTY and ICTR see HRW, 2005, at 16 et seq., 23–4; OTP, Policy paper interests of justice, September 2007, at 4 et seq.; Bergsmo/Kruger in Triffterer (ed.) 2008, Art. 53 mn 29–30 with 19–23.

[433] HRW, 2005, at 14. See also Bergsmo/Kruger in Triffterer (ed.) 2008, Art. 53 mn 22–23.

of peace processes (para. 7 et seq., 23 et seq.) for he is bound by the international *lex lata* by way of Art. 21 ICC Statute.[434] Last but not least, the possibility[435] of a *proprio motu* judicial review by the PTC of a non-prosecution decision based on a lack of interests of justice (Art. 53 [3] [b])[436] clearly shows that the Prosecutor has no *unfettered* discretion; indeed, while the PTC must not replace the prosecutorial discretion by its own, it is entrusted to review the legality of the Prosecutor's decision.[437]

53. The notion of *justice* in the interests of justice clause is the same broad one defended throughout this paper (para. 2). Thus, "justice" does not focus only on the case itself[438] or is limited to criminal justice but encompasses alternative forms of justice (para. 12 et seq.) and entails an overall assessment of the situation taking into account peace and reconciliation as the ultimate goals of every process of transition.[439] Most scholars, therefore, stress the Prosecutor's discretion in striking the right balance, he shall decide on a case by case basis whether the formal initiation of an investigation (Art. 53 [1]) or prosecution (Art. 53 [2]), independent of the admissibility of the case, would jeopardize higher justice interests in the broad sense.[440] Yet, it must not be overlooked that taking into account the possible (negative) consequences of criminal prosecution implies speculating about hypothetical, future events and therefore is fraught with insecurity. In addition, as in the similar worse abuses argument, the state is vulnerable to blackmail (para. 3). Apart from that, the notion of justice, even in its broad sense, is difficult to reconcile with the total absence of justice, e.g., by deference to a national exemption measure without mechanisms of compensation. In other words, the interests of justice clause can only be invoked if the reason(s) which cause the Prosecutor to abstain from investigation

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[434] See also Gropengießer/Meißner (n 60) at 297; OTP (n 432) at 8 et seq.

[435] The PTC is not obliged but "may" review the prosecutorial decision (Art. 53 [3] [b], see also Rule 109 RPE granting the PTC a period of 180 days to decide on the review).

[436] See also Robinson (n 31) at 487–8; Brubacher (n 21) 86–7; Seils/Wierda (n 21) at 5; HRW, 2005, at 4; Gropengießer/Meißner (n 60) at 297–8; Schabas (n 21) at 31; very critical on the judicial review mechanisms Olásolo (n 31) at 142–3.

[437] Cf. Gropengießer/Meißner (n 60) at 299; Wouters et al. (n 261) at 292; OTP (n 432) at 3; Bergsmo/Kruger in Triffterer (ed.) 2008, Art. 53 mn 38.

[438] Gavron (n 64) at 110.

[439] See also Goldstone/Fritz (n 21) at 662; Robinson (n 31) at 488; Meyer (n 177) at 579.

[440] See for example Stahn (n 64) at 698 arguing that abstinence from (immediate) prosecution may be allowed if otherwise reconciliation would be seriously put a risk; or Gropengießer/Meißner (n 60) at 296, arguing that it is "possible to suspend the punishment even of serious offences in favour of higher-priority-interests" (similarly Van der Voort/Zwanenburg [n 60] at 329–30) or, at 297 that the Prosecutor makes "his *own* decision on prognosis and balance" (emphasis in the original). See also OTP (n 432) stating, on the one hand, that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions" (at 9) and, on the other, "fully" endorsing "the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice" and ensuring "that all efforts are as complementary as possible in developing a comprehensive approach" (at 8). For considerations governing the timing of indictments see Wierda/Unger (n 80) at 266 et seq.

and prosecution can really be traced back or are linked to justice interests, i.e., if the abstention really serves these (broad) justice interests.[441]

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[441] Contrary to HRW, 2005, at 19–20 the victims' justice interests cannot be limited to the interests of a criminal prosecution excluding *a limine* their possible interests in peace, traditional reconciliation, etc. It is equally unconvincing to adduce as an additional factor in favour of criminal prosecution the victims' interest in the memory since this can normally be better preserved by a TRC.

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Abbreviations

ACHR	American Convention of Human Rights
ALC	Annotated Leading Cases of International Criminal Tribunals (André Klip Göran Sluiter, eds.)
AN	*Audiencia Nacional* (Spanish National Court)

ANC	African National Congress
AP	Additional Protocol to the Geneva Conventions
AVR	Archiv des Völkerrechts
Buff. Crim. L. Rev	Buffallo Criminal Law Review
BWV	Berliner Wissenschaftsverlag
CC	*Corte Constitucional* (Constitutional Court)
CLF	Criminal Law Forum
Cornell Int'l L. J.	Cornell International Law Journal
CRP	Community Reconciliation Procedures
DL	*Decreto Legislativo* (Executive Decree)
Davis J. Int'l L. & Pol'y U.C.	Davis Journal of International Law & Policy
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
Eur. J. Cr., Cr. L. & Cr. J.	European Journal of Crime, Criminal Law and Criminal Justice
EuGRZ	Europäische Grundrechte Zeitschrift
GAOR	General Assembly Official Records
GC	Geneva Conventions
Harv.L.Rev.	Harvard Law Review
HRQ	Human Rights Quarterly
IACHR	Inter-American Court of Human Rights
IAComHR	Inter-American Commission of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICRC	International Committee of the Red Cross
ICRC Int. Rev.	International Review of the Red Cross
ICTJ	International Center for Transitional Justice
ICTY	International Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IJTJ	International Journal of Transitional Justice
JICJ	Journal of International Criminal Justice
JuS	Juristische Schulung
KCLJ	The King's College Law Journal
LJIL	Leiden Journal of International Law
OHCHR	Office of the United Nations High Commissioner for Human Rights
OTP	Office of the Prosecutor
PrepCom	Preparatory Committee ICC
Res.	Resolution

SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crimes (East Timor)
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
U.C. Davis L. Rev.	University of California Davis Law Review
WCRO	War Crimes Research Office
WW II	World War II
YLJ	Yale Law Journal
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft